NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 295

6 AUGUST 2024

17 SEPTEMBER 2024

RALEIGH
2025

CITE THIS VOLUME

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CASES

ARGUED AND DETERMINED IN THE

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OF

NORTH CAROLINA

AT

RALEIGH

ANHUI OMI VINYL CO., LTD., PLAINTIFF
v.
USA OPEL FLOORING, INC. F/K/A USA FLOORING IMPORTERS, INC.
F/K/A USA OPEL FLOORING IMPORTERS, LLC, DEFENDANT

No. COA23-993

Filed 6 August 2024

Real Property—good faith purchaser for value—badges of fraud present—good faith exception inapplicable

Where a creditor (plaintiff) alleged that defendant was liable to plaintiff for the amount of a judgment plaintiff had obtained against another entity (debtor) following debtor's sale of real property—its only asset—to defendant, the trial court properly determined that the transfer was voidable pursuant to N.C.G.S. § 39-23.4 (the Uniform Voidable Transactions Act). The court's unchallenged findings of fact (1) invoked multiple "badges of fraud" in the sale—including that the transfer was concealed from plaintiff, was made to an insider while a lawsuit was pending, and left debtor without assets sufficient to pay its existing liabilities—and (2) supported the court's conclusion of law that the good faith exception to the Act (N.C.G.S. § 39-23.8(a)) was inapplicable because neither debtor nor defendant undertook the sale in good faith.

Appeal by defendant from order entered 6 March 2023 by Judge George C. Bell in Davidson County Superior Court. Heard in the Court of Appeals 16 April 2024.

Wyatt Early Harris Wheeler, by Donavan J. Hylarides, James R. Hundley, and Molly R. Ciaccio, for plaintiff-appellee.

Williams Mullen, by Camden R. Webb and Killian K. Wyatt, for defendant-appellant.

ZACHARY, Judge.

This case concerns the transfer of real property from Surface Source USA NC, Inc. ("Surface Source"), to Defendant USA Opel Flooring, Inc. ("Opel"). The trial court determined, *inter alia*, that this transfer was voidable as to Opel's creditor, Plaintiff Anhui Omi Vinyl Co. Ltd. ("Omi"), because the transfer "was done with the intent to hinder, delay, or defraud" Omi in contravention of the Uniform Voidable Transactions Act. *See* N.C. Gen. Stat. § 39-23.4(a) (2023). Opel appeals from the trial court's order entering judgment in favor of Omi in the amount of $1,139,971.21 plus interest. After careful review, we affirm.

I. Background

Omi is a Chinese corporation that manufactures and exports luxury vinyl tile flooring to companies in the United States. One of Omi's customers was Surface Source, a North Carolina corporation that sold and distributed vinyl flooring from a building that it owned in Lexington, North Carolina (the "Surface Source Building"). Surface Source's President, CEO, Director, and Registered Agent Miao "Richard" Yu owned 10% of the stock of Surface Source. At all times relevant to this appeal, the Surface Source Building has been encumbered by a lien in favor of Davidson County, securing an economic-development loan from the county.

In 2017, Surface Source experienced financial difficulty and failed to pay more than $1,000,000.00 owed to Omi for goods sold and delivered to Surface Source. In March 2017, Yu directed Surface Source employees to form a new North Carolina corporation—Opel[1]—via LegalZoom.[2] Opel was formed to engage in the same business as Surface Source. Yu initially owned 60% of Opel's stock.

On 1 June 2017, Omi filed suit against Surface Source, alleging that Surface Source owed Omi more than $1,000,000.00 for goods sold and

1. When it was first incorporated, Opel was named "USA Flooring Importers, Inc." It has subsequently been renamed. For ease of reading, we refer to this corporation as "Opel" throughout.

2. "LegalZoom.com provides an online legal portal to give visitors a general understanding of the law and to provide an automated software solution to individuals who choose to prepare their own legal documents." *LegalZoom Terms of Use*, LegalZoom https://www.legalzoom.com/legal/general-terms/terms-of-use (last updated Sept. 19, 2023).

delivered. Surface Source actively defended Omi's suit, including filing an answer and counterclaim on 1 August 2017.

On 21 November 2017, Surface Source sold the Surface Source Building to Opel for $1,030,000.00 "plus additional consideration." At the time of the transfer, Opel was aware that the Surface Source Building was the only asset that Surface Source owned and that a secured creditor of Surface Source had already foreclosed on and sold all of Surface Source's other assets.[3] As the transaction was being finalized, Surface Source's new counsel sent a letter to Davidson County requesting that the county subordinate its deed of trust against the Surface Source Building to a new deed of trust. In the letter, Surface Source's counsel represented that Surface Source was "transitioning to a new entity" that would eventually become Opel and that the "new entity" would fulfill the existing loan obligations owed to the county. The signed subordination agreement was recorded on 29 November 2017 and identified Opel as the original borrower of the loan from Davidson County, rather than Surface Source.

That same day, Surface Source's attorneys filed a motion to withdraw from the Omi litigation, stating that Surface Source had terminated their representation agreement and obtained new counsel. Before Omi's lawsuit against Surface Source came on for trial, Surface Source's new counsel informed the court that no representative of Surface Source intended to appear at trial. Indeed, when the matter came on for trial on 14 February 2018, no representative of Surface Source was present.

On 14 February 2018, the trial court entered judgment in favor of Omi in the amount of $1,139,971.21 plus interest. However, Omi was unable to collect on its judgment against Surface Source; the Davidson County Sheriff's Office returned Omi's writ of execution as unsatisfied because it "did not locate property on which to levy."

On 29 November 2018, Omi filed a complaint against Opel, alleging that Opel was liable to Omi in the amount of the judgment against Surface Source. Omi alleged that Opel was liable (1) as a "mere continuation" of Surface Source under the doctrine of successor liability or, in the alternative, (2) because the transfer of assets from Surface Source to Opel was a fraudulent transfer pursuant to the Uniform Voidable Transactions Act. On 28 January 2019, Opel filed its answer.

Omi filed a motion for summary judgment on 30 March 2021, and on 23 June 2021, Opel filed a motion for summary judgment as well. On

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3. According to one of Opel's managers, Surface Source's secured creditor "even took the mop away."

6 July 2021, the trial court entered an order denying both summary judgment motions.

On 5 December 2022, the matter came on for bench trial in Davidson County Superior Court. On 6 March 2023, the trial court entered an order concluding that the transfer of the Surface Source Building from Surface Source to Opel was voidable as a fraudulent transfer pursuant to N.C. Gen. Stat. § 39-23.4(a). The trial court alternatively concluded that Opel was a mere continuation of Surface Source and, as such, was liable to Omi. Consequently, the trial court entered judgment in favor of Omi in the amount of $1,139,971.21 plus interest.

Opel filed timely notice of appeal.[4]

II. Discussion

Opel argues on appeal that the trial court erred by entering judgment in favor of Omi on both theories of liability: fraudulent transfer and mere continuation.

A. Standard of Review

"[W]hen the trial court sits without a jury, as it did in this case, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 251–52, 871 S.E.2d 706, 717 (cleaned up), *reh'g denied*, 382 N.C. 328, 873 S.E.2d 411 (2022). "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. Otherwise, a trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.* at 246, 871 S.E.2d at 714 (cleaned up). The trial court's supported findings are conclusive on appeal "even though the evidence might sustain findings to the contrary." *Wurlitzer Distrib. Corp. v. Schofield*, 44 N.C. App. 520, 526, 261 S.E.2d 688, 692 (1980) (citation omitted).

B. Analysis

Opel contends that the trial court erred by concluding that "[t]he transfer of the Surface Source Building from Surface Source to [Opel]

4. In its notice of appeal, Opel initially appealed from the trial court's order denying its motion for summary judgment as well as the order entering judgment. During the settling of the record on appeal, Opel withdrew its notice of appeal, in part, as to the summary judgment order. The parties stipulated that Opel only appeals from the trial court's 6 March 2023 order entering judgment.

was done with the intent to hinder, delay, or defraud" Omi and that, therefore, the transfer was "voidable as to [Omi] under N.C. Gen. Stat. [§] 39-23.4(a)." We disagree.

1. Applicable Legal Principles

From "an early period in the judicial history of this State," North Carolina has recognized the voidability of fraudulent transactions. *Helms v. Green*, 105 N.C. 251, 259, 11 S.E. 470, 472–73 (1890); *see also* N.C. Gen. Stat. § 39-23.4 uniform law cmt. 1 (tracing lineage of the doctrine to "the Statute of 13 Elizabeth, c. 5 (1571)"). "The declared object in enacting 13 Eliz. was to avoid and abolish feigned gifts, grants, alienations, &c., which may be contrived and devised of fraud, to the purpose and intent to delay, hinder, and defraud creditors and others of their just and lawful actions and debts." *Helms*, 105 N.C. at 262, 11 S.E. at 474 (cleaned up).

Our Supreme Court has long recognized the general principle that a transaction tainted by the intent to defraud a creditor may be voidable as to that creditor:

> [T]he *whole* purpose of the parties to such conveyance must be the devotion of the property *bona fide* to the satisfaction of the preferred creditors, and no part of that purpose the hindering or delaying of creditors, except so far as such hindrance or delay is the unavoidable consequence of the preference so given. Every contrivance *to the intent* to hinder creditors—*directed to that end*—is "malicious" that is to say, wicked. . . . But if the hindrance of creditors form any part of the actual intent of the act done, so far the act is as against them a wicked or malicious contrivance—and it is not to be questioned that a conveyance or assurance, tainted in part with a malicious or fraudulent intent, is by the statute made void as against creditors *in toto*.

Hafner v. Irwin, 23 N.C. 490, 498 (1841).

Moreover, it is well established that the presence of certain "badges of fraud" may indicate that a transaction that is not void on its face may nevertheless be found to be voidable as fraudulent. *See State ex rel. Brown v. Mitchell*, 102 N.C. 347, 370, 9 S.E. 702, 703–04 (1889) ("[C]ertain combinations of the several badges of fraud . . . will raise a presumption of fraudulent intent, and make it incumbent on the party benefited by the alleged fraud to show the *bona fides* of the transaction.").

As articulated by our Supreme Court, these badges of fraud included:

> failure to register a conveyance required by law to be registered within a reasonable time after its execution; the embarrassment of a grantor and his failure to reserve sufficient property to satisfy his indebtedness; inadequacy of price; unusual credit given by one in failing circumstances; secrecy in the execution of a conveyance; the fact that one involved in debt makes a conveyance to a near relation.

Id. at 369, 9 S.E. at 703.

Consistent with this centuries-old precedent, the modern-day Uniform Voidable Transactions Act sets forth, in pertinent part, the following ground for determining that a transfer is voidable as fraudulent:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With intent to hinder, delay, or defraud any creditor of the debtor . . . .

N.C. Gen. Stat. § 39-23.4(a)(1). This contemporary legislation "was not designed to permit those dealing in the commercial world to obtain rights by an absence of inquiry under circumstances amounting to an intentional closing of the eyes and mind to defects in or defenses to the transaction." *Cherry Cmty. Org.*, 381 N.C. at 247, 871 S.E.2d at 714 (citation omitted). Rather, the Act "renders voidable as to a creditor any transfer made or obligation incurred when that transfer—in this case, the conveyance of the subject property—is consummated by a debtor with the intent to defraud any creditor of the debtor." *Id.* (cleaned up).

When determining whether a transfer was made with the "intent to hinder, delay, or defraud any creditor of the debtor" under the Uniform Voidable Transactions Act, N.C. Gen. Stat. § 39-23.4(a)(1), the trial court may consider any of the following non-exclusive list of factors, which follow the spirit of the traditional badges of fraud:

> (1) The transfer or obligation was to an insider;
>
> (2) The debtor retained possession or control of the property transferred after the transfer;
>
> (3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) The debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor;

(12) The debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due; and

(13) The debtor transferred the assets in the course of legitimate estate or tax planning.

Id. § 39-23.4(b).

2. Badges of Fraud

In this case, the trial court made numerous findings of fact to support its conclusion that "[t]he transfer of the Surface Source Building from Surface Source to [Opel] was done with the intent to hinder, delay, or defraud" Omi and that, consequently, the transfer was "voidable as to [Omi] under N.C. Gen. Stat. [§] 39-23.4(a)." The trial court's findings of fact, which Opel does not challenge on appeal and are thus binding, *Cherry Cmty. Org.*, 381 N.C. at 246, 871 S.E.2d at 714, include:

3. Surface Source's President and CEO was Miao "Richard" Yu (hereinafter "Yu"), who also owned 10% of Surface Source.

4. By 2017, Surface Source ran into financial difficulty and failed to pay more than $1,000,000 to Omi for goods sold and delivered to Surface Source.

5. In March 2017, Mr. Yu directed Surface Source employees to form a new company called USA Flooring Importers, Inc., which was done by employee Jason Reich through LegalZoom. Mr. Reich also assisted Mr. Yu in setting up a bank account for USA Flooring Importers, Inc.

6. USA Flooring Importers, Inc. later changed its name to USA Opel Flooring Importers, LLC, and then to [Opel] . . . .

7. Opel was formed to conduct exactly the same type of business that Surface Source was engaged in – distribution of vinyl flooring. Opel also operates its business out of the Surface Source Building.

8. At the time of . . . Opel's creation, Yu owned 60% of its stock.

9. On June 1, 2017, Omi filed suit against Surface Source in Wake County . . . for its outstanding debt. The Summons and Complaint were served on Mr. Yu as Surface Source's CEO.

10. At first, Surface Source actively defended the suit, even filing a counterclaim against Omi. However, on or about November 28, 2017, Surface Source abruptly ceased its defense when its legal counsel withdrew from the case. Surface Source did not appear at the trial of the case on February 14, 2018. Omi was awarded a judgment against Surface Source in the amount of $1,1[39],971.21 on February 14, 2018 . . . . Omi then attempted to execute on its judgment against Surface Source, but the Writ of Execution was returned by the Davidson County Sheriff's Department unsatisfied.

11. While Omi's lawsuit against Surface Source was pending, Surface Source transferred the Surface Source Building to Opel in a transaction which closed on November 21, 2017. Opel had knowledge that Surface Source's only asset at that time was the Surface Source Building.

12. As a result of Surface Source's transfer of the Surface Source Building to Opel prior to Omi obtaining its judgement, Omi was not able to obtain a judgment lien against the Surface Source Building.

. . . .

14. When Surface Source transferred the Surface Source Building to Opel, Surface Source's attorney, Adam Gottsegen, sent Davidson County a letter requesting Davidson County to subordinate its deed of trust against the Surface Source Building to the new deed of trust in favor of Bank OZK, Opel's lender. The letter represented that Surface Source was "transitioning to a new entity . . . ." The Subordination Agreement, which Davidson County signed in reliance on the representation made in attorney Gottsegen's letter, identifies *Opel* as the "Borrower" which signed the original 2015 Note and Deed of Trust . . . in favor of Davidson County. . . . Opel has admitted it owes the debt under the loan to Davidson County.

Although the trial court did not specifically discuss the factors enumerated in N.C. Gen. Stat. § 39-23.4(b), these unchallenged findings of fact clearly implicate several of those factors. Yu was the President, CEO, and 10% owner of Surface Source, and he directed Surface Source employees to form Opel—of which he also owned a percentage—and establish its bank account. *See* N.C. Gen. Stat. § 39-23.4(b)(1) (whether the transfer "was to an insider"). Surface Source transferred the Surface Source Building while the Omi suit was pending. *See id.* § 39-23.4(b)(4) (whether "the debtor had been sued or threatened with suit" prior to the transfer). And the transfer was made without Omi's knowledge. *See id.* § 39-23.4(b)(3) (whether "[t]he transfer or obligation was disclosed or concealed"); *see also Cherry Cmty. Org.*, 381 N.C. at 252–53, 871 S.E.2d at 718 (invoking N.C. Gen. Stat. § 39-23.4(b)(3) where the grantor "concealed its sale of the subject property" and where the grantor's "eventual disclosure to [its creditor] of the transfer was performed in order for [the grantor] to gain an advantage in the reactivated litigation").

In addition to those statutory badges of fraud, the trial court's findings of fact also invoke the badges of fraud present when a "debtor does not retain property sufficient to pay [its] then-existing debts." *Edwards v. Nw. Bank*, 39 N.C. App. 261, 272, 250 S.E.2d 651, 659 (1979). The trial court found as fact that the Surface Source Building was "Surface

Source's only asset" at the time of the transaction, *see* N.C. Gen. Stat. § 39-23.4(b)(5) (whether "[t]he transfer was of substantially all the debtor's assets"), and Surface Source became insolvent upon the transfer of its only asset, *see id.* § 39-23.4(b)(9) (whether "[t]he debtor . . . became insolvent shortly after the transfer was made").

Opel does not challenge any of these findings of fact, which renders them binding on appeal. *Cherry Cmty. Org.*, 381 N.C. at 246, 871 S.E.2d at 714. Consequently, the existence of these "several badges of fraud" found by the trial court "raise[s] a presumption of fraudulent intent, and make[s] it incumbent on the party benefited by the alleged fraud to show the *bona fides* of the transaction." *Brown*, 102 N.C. at 370, 9 S.E. at 703–04. This brings us to Opel's main argument regarding this issue: the Uniform Voidable Transactions Act's good-faith exception.

3. The Good-Faith Exception

Under the Uniform Voidable Transactions Act, even though a transfer is voidable as to a creditor against the transferor, the same transfer may not be voidable against the transferee under the good-faith exception. "A transfer or obligation is not voidable under [N.C. Gen. Stat. §] 39-23.4(a)(1) against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee." N.C. Gen. Stat. § 39-23.8(a). The party seeking to invoke the defense of § 39-23.8(a) bears the burden of proving the applicability of the good-faith exception. *Id.* § 39-23.8(g)(1).

Because the two elements of this exception—"a person that took in good faith *and* for a reasonably equivalent value"—are joined by the conjunctive "and," they must both be satisfied for the defense provided in § 39-23.8 to be applicable. *Id.* § 39-23.8(a) (emphasis added); *see also Lithium Corp. of Am., Inc. v. Town of Bessemer City*, 261 N.C. 532, 535, 135 S.E.2d 574, 577 (1964) ("Ordinarily, when the conjunctive 'and' connects words, phrases or clauses of a statutory sentence, they are to be considered jointly."). This, too, is in accord with our longstanding precedents, as it is well settled that a transfer for reasonable consideration may nonetheless be voidable when the transfer is not made in good faith. *See, e.g.*, *Aman v. Walker*, 165 N.C. 224, 227, 81 S.E. 162, 164 (1914) ("If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee*, or of which he has notice, it is void.").

Opel contends that the trial court erred by failing to apply the N.C. Gen. Stat. § 39-23.8(a) defense, because the transfer of the Surface Source Building was made in good faith and for reasonably equivalent

value. In its appellate brief, Opel discusses many of the factors enumerated in § 39-23.4(b) that it claims "would have weighed heavily in favor" of a finding that the transfer to Opel was made in good faith. In so doing, however, Opel merely suggests that the trial court failed to make findings of fact that *could* have supported its position; Opel does not specifically challenge any of the findings of fact that the trial court *did* make in its analysis.

"Whether a party has acted in good faith is a question of fact for the trier of fact . . . ." *Cherry Cmty. Org.*, 381 N.C. at 247, 871 S.E.2d at 714 (citation omitted). By raising and discussing several of the other factors enumerated in N.C. Gen. Stat. § 39-23.4(b), about which the trial court made no findings of fact, Opel essentially asks this Court to impermissibly reweigh the evidence in the record so as to "sustain findings to the contrary" of the trial court's findings. *Wurlitzer*, 44 N.C. App. at 526, 261 S.E.2d at 692. This we cannot—and will not—do. Ours is merely to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Cherry Cmty. Org.*, 381 N.C. at 251–52, 871 S.E.2d at 717 (citation omitted). Opel does not challenge the substance of the trial court's findings of fact, which are thus binding on appeal, *id.* at 246, 871 S.E.2d at 714, and which in turn support the trial court's conclusion that the transfer of the Surface Source Building was voidable as to Omi, notwithstanding Opel's assertion of good faith. Therefore, the trial court's judgment "will not be disturbed" on this basis. *Wurlitzer*, 44 N.C. App. at 526, 261 S.E.2d at 692.

As discussed above, Opel bore the burden of establishing both elements of N.C. Gen. Stat. § 39-23.8(a) in order to avail itself of that statutory defense. *See* N.C. Gen. Stat. § 39-23.8(g)(1). Because the trial court's binding findings of fact support the conclusion that neither Surface Source nor Opel acted in good faith in transferring the Surface Source Building, we need not address whether the transfer was made for "reasonably equivalent value[.]" *Id.* § 39-23.8(a). "The facts, as found by the trial court, compel the imputation of knowledge to [Opel] of [Surface Source]'s fraudulent activities as [Opel] knew these activities to be fraudulent at the time of their commission," which consequently renders the transfer of the Surface Source Building to Opel "voidable as to [Omi] and thus denying [Opel's] ability, under these facts and circumstances, to be a good faith purchaser for value of the subject property." *Cherry Cmty. Org.*, 381 N.C. at 255, 871 S.E.2d at 719.

In light of our holding regarding the fraudulent transfer, we do not reach Opel's challenge to the trial court's alternative conclusion that

Opel was a mere continuation of Surface Source. *See Law Offices of Peter H. Priest, PLLC v. Coch*, 244 N.C. App. 53, 63 n.5, 780 S.E.2d 163, 169 n.5 (2015) (declining to reach arguments concerning the trial court's "alternative holdings" where one issue was dispositive), *disc. review and cert. denied*, 368 N.C. 689, 781 S.E.2d 479 (2016).

C. Remedy

Finally, Opel alleges that the trial court's order "suffers from a fatal logical flaw." Opel asserts that "[v]oiding the transaction cannot permit Omi to recover because the [Surface Source Building] was fully encumbered to secured creditors who had priority over Omi." Not only is this assertion irrelevant, Opel misapprehends the nature of the relief that the trial court ordered.

The trial court did not, in fact, void the transfer of the Surface Source Building. The trial court merely entered "a judgment against [Opel] in an amount equal to [Omi]'s judgment against Surface Source." This is a remedy that the trial court is indisputably authorized to enter by statute. *See* N.C. Gen. Stat. § 39-23.8(b)(1).

Further, the fact that the Surface Source Building was encumbered by liens held by secured creditors does not create "a fatal logical flaw" in the trial court's order sufficient to mandate reversal. Rather, as Omi notes, the trial court's entry of judgment against Opel—in the same amount as Omi's judgment against Surface Source—merely restores Omi to its status quo position: as a judgment creditor, no more and no less.

III. Conclusion

For the foregoing reasons, the trial court's order is affirmed.

AFFIRMED.

Judges COLLINS and FLOOD concur.

CHAPPELL v. WEBB

[295 N.C. App. 13 (2024)]

SANDRA CHAPPELL, ADMINISTRATOR OF THE ESTATE OF SUSAN RENEE CHAPPELL (DECEASED), PLAINTIFF
v.
SHEMARO DEANN WEBB AND LADOROTHY BREANNA FOREMAN, DEFENDANTS

No. COA24-23

Filed 6 August 2024

1. Civil Procedure—motion for judgment notwithstanding the verdict—negligent entrustment

In a wrongful death action arising from a head-on, two-car collision allegedly caused by an impaired driver who had been allowed to operate a vehicle by its owner, the trial court did not err in denying the owner's motion for judgment notwithstanding the verdict of guilty returned by the jury on a charge of negligent entrustment because that tort required evidence only that the owner consented (expressly or impliedly) to the use of her vehicle and knew or reasonably should have known that the driver was likely to cause injury to others by her driving. Taken in the light most favorable to the nonmoving party (plaintiff), the evidence—including the owner's admission in her answer to the complaint that the driver had operated her vehicle with her express knowledge, consent, and authorization; and documentation of the vehicle's ownership which, by statute (N.C.G.S. § 20-71.1(a)), is prima facie evidence of a vehicle owner's consent in a wrongful death case—supported the challenged element of consent.

2. Damages and Remedies—compensatory and punitive damages—amount not excessive—motion for new trial properly denied

In a wrongful death action arising from a head-on, two-car collision allegedly caused by an impaired driver who had been allowed to operate a vehicle by its owner (together, defendants), the trial court did not abuse its discretion in denying defendants' motion for a new trial pursuant to Civil Procedure Rule 59 based upon allegedly excessive damages "given under the influence of passion or prejudice" where, although the total verdict appeared to be the largest impaired driving award in the state and despite the absence of evidence regarding economic damages, the jury was presented with evidence regarding: the victim's pain and suffering prior to her death, the non-income-related losses experienced by her family, and the wanton behavior of both defendants, including that the

driver had five years previously been cited for operating the owner's vehicle while impaired (and pled guilty to that offense). Moreover, the punitive damages awarded did not exceed the statutory limit of three times the compensatory damages.

Appeal by defendants from judgment entered 28 April 2023 by Judge Cynthia K. Sturges in Franklin County Superior Court. Heard in the Court of Appeals 15 May 2024.

Bennett Guthrie PLLC, by Mitchell H. Blankenship, Rodney A. Guthrie, and Joshua H. Bennett, for defendants-appellants.

White & Stradley, PLLC, by J. David Stradley and Ann C. Ochsner, and Henson Fuerst, P.A., by Thomas Henson, Jr., for plaintiff-appellee.

DILLON, Chief Judge.

This case arises from a tragic two-vehicle accident resulting in the fatality of the driver of one of the vehicles. At the conclusion of the trial, the estate of the deceased victim was awarded $40 million in compensatory and punitive damages from two defendants: the intoxicated driver of the other vehicle and the owner of that other vehicle. After careful review, we conclude the trial was free from reversible error and affirm the trial court's rulings on Defendants' post-trial motions.

I. Background

On the evening of 18 September 2020, Defendant Shemaro Deann Webb was driving a Nissan Altima southbound on US Highway 401 toward Raleigh while under the influence of alcohol. Defendant LaDorothy Breanna Foreman was a passenger and owned the Nissan Altima.

On the same highway, Susan Renee Chappell was driving northbound.

At some point, Defendant Webb crossed the center line of the highway while attempting to pass another southbound vehicle in a no-passing zone. Her vehicle collided head-on with Ms. Chappell's vehicle in the northbound lane. Ms. Chappell died later that night due to injuries sustained in the accident.

Plaintiff Sandra Chappell, as the administrator of Ms. Chappell's estate, brought a wrongful death suit against Defendants, seeking to recover damages pursuant to North Carolina's wrongful death statutes. Plaintiff alleged that Defendant Webb was negligent in driving

the vehicle and that Defendant Foreman was negligent by entrusting Defendant Webb with her vehicle.

At the conclusion of the trial, the jury returned verdicts against Defendants. The jury found Defendants jointly and severally liable for $15 million in compensatory damages. The jury found the driver Defendant Webb liable for $5 million in punitive damages and the vehicle owner Defendant Foreman liable for $20 million in punitive damages. The trial court entered a judgment consistent with the verdicts. Defendants moved for post-trial relief from the judgment. Defendant Foreman separately moved for a judgment notwithstanding the verdict ("JNOV"). The trial court denied both motions. Defendants appeal.

II. Analysis

On appeal, Defendant Foreman argues that the trial court erred in denying her motion for JNOV. And both Defendants argue that the trial court erred in denying their other post-trial motions for relief from the large jury verdicts. We address each argument in turn.

A. Negligent Entrustment Claim & Motion for JNOV

[1] We first address the vehicle owner Defendant Foreman's argument that she was entitled to JNOV. She contends Plaintiff did not present sufficient evidence to prove negligent entrustment. Alternatively, she contends that, even if there was sufficient evidence to show she was liable for negligent entrustment, there was insufficient evidence warranting an award of punitive damages against her.

Whether a party is entitled to a motion for JNOV is a question of law, which we review *de novo*. *Est. of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 293, 847 S.E.2d 677, 681 (2020). As our Supreme Court has instructed:

> In making its determination of whether to grant the motion, the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence. If, after undertaking such an analysis of the evidence, the trial judge finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for [JNOV] should be denied.

Abels v. Renfro Corp., 335 N.C. 209, 214–15, 436 S.E.2d 822, 825 (1993) (internal marks omitted).

Here, Defendant Foreman contends Plaintiff failed to prove her negligent entrustment claim. Our Supreme Court has explained that to prove negligent entrustment, the plaintiff must show two things, namely that (1) the defendant car owner entrusted her car to another *and* (2) the car owner knew or reasonably should have known the other person was in a condition where she was likely to cause injury to others in her driving:

> Negligent entrustment is established when the owner of an automobile entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, who is likely to cause injury to others in its use. Based on his own negligence, the owner is liable for any resulting injury or damage proximately caused by the borrower's negligence.

Tart v. Martin, 353 N.C. 252, 254, 540 S.E.2d 332, 334 (2000) (internal citations and marks omitted). The entrustment element "requires *consent from the defendant*, either express or implied, for the third party to use the instrumentality in question." *Bridges v. Parrish*, 222 N.C. App. 320, 327, 731 S.E.2d 262, 267 (2012) (emphasis added), *aff'd*, 366 N.C. 539, 540, 742 S.E.2d 794, 796 (2013).

Regarding the entrustment element, Defendant Foreman suggests that Plaintiff must show more than that Defendant Foreman simply *consented* to allowing Defendant Webb to drive her car: Plaintiff must show that Defendant Foreman *voluntarily delivered possession* of her vehicle to Defendant Webb. Defendant Foreman cites to North Carolina Pattern Jury Instruction 102.68, which the trial court gave to the jury and which includes a requirement that the jury find that a negligent entruster "voluntarily gave possession" of her motor vehicle to the driver.[1] Our Supreme Court's jurisprudence, however, does not suggest that there is a heightened burden beyond that the owner consented, either expressed or implied, to allowing one she knew or should have known to be incompetent/reckless to drive her car. *See Bridges*, 222 N.C. App. at 327, 731 S.E.2d at 267 (holding that a plaintiff show the defendant-owner gave express or implied consent); *Swicegood v. Cooper*, 341 N.C. 178, 179, 459 S.E.2d 206, 206 (1995) (holding that the entrustment element is met where it is shown the owner "had given [the driver] permission to drive the automobile"). *See also State v. Warren*, 348 N.C. 80, 119, 499

1. N.C.P.I. Civil 102.68 is titled "Negligence of Owner Entrusting Motor Vehicle to Incompetent, Careless or Reckless Person."

S.E.2d 431, 453 (1998) (recognizing that a "pattern jury instruction . . . has neither the force nor the effect of law[.]").

We conclude that the issue of Defendant Foreman's negligent entrustment was properly given to the jury. In so holding, we note that in answering Plaintiff's complaint, Defendant Foreman admitted that Defendant Webb drove her vehicle "with [her] express knowledge, express consent, and express authorization[.]" *See Champion v. Waller*, 268 N.C. 426, 428, 150 S.E.2d 783, 785 (1966) ("Facts alleged in the complaint and admitted in the answer are conclusively established by the admission, it not being necessary to introduce such allegations in evidence."). In other words, there is no requirement that a plaintiff provide proof that the entruster handed the keys to the driver but rather merely that the entruster at least impliedly consented to the driver driving her car.

We further note that our General Assembly has provided that evidence of vehicle ownership (here, Defendant Foreman's ownership of the vehicle) is "prima facie evidence" that the driver (here, Defendant Webb) was driving the vehicle with the owner's consent and knowledge:

> In all actions to recover damages for . . . the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.

N.C. Gen. Stat. § 20-71.1(a) (2023).

Finally, we note there was sufficient evidence offered from which the jury could infer that Defendant Foreman entrusted her vehicle to Defendant Webb. Indeed, the evidence showed that Defendant Webb was in the backseat of the vehicle sometime prior to the accident but that at some point prior to the accident she became the driver while Defendant Foreman came to be in the backseat.

Accordingly, the trial court did not err in denying Defendant Foreman's motion for JNOV.

B. Amount of Damages/Motion for New Trial

Defendants jointly make arguments concerning the *amount* of compensatory and punitive damages awarded by the jury.

[2] First, Defendants contend that the trial court abused its discretion in denying Defendants' request for a new trial. Rule 59 of our Rules of Civil Procedure allows the trial court to grant a new trial on the grounds that "excessive or inadequate damages appear[ ] to have been given under the influence of passion or prejudice" or "insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(6)–(7) (2023).

We review a trial court's refusal to grant a new trial based on an argument that the damages awarded were excessive for an abuse of discretion:

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

Worthington v. Bynum, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[A]n 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." *Id.* at 487, 290 S.E.2d at 605.

Defendants argue that the awards must have been the result of passion or prejudice because "[c]ases with similar evidence have produced verdicts several orders of magnitude lower." Indeed, the $40,000,000 *total* verdict appears to be the largest drunk driving verdict in North Carolina history.

In analyzing the verdict, we consider the compensatory and punitive awards separately.

The jury awarded $15 million in compensatory damages.

Defendants direct us to a federal defamation case arising out of North Carolina that was heard in the Fourth Circuit: *Eshelman v. Puma Biotechnology, Inc.* 2 F.4th 276 (2021). In *Eshelman*, the Fourth Circuit concluded that the trial court abused its discretion in denying the defendant's motion for a new trial. *Id.* at 285. The court held that "the jury awarded excessive damages that the evidence could not justify." *Id.* at 283. In determining that the damages were excessive, the court compared the case's damages award to the damages awarded in similar defamation cases, noting that "[o]ne would expect ample evidence of the

harm suffered by [the plaintiff] to support a jury award ten times the size of the largest defamation awards in North Carolina history." *Id.*

Defendants ask us to employ *Eshelman*'s "damages norm" test to determine if the verdict here was excessive when compared to the evidence presented and the typical damages awarded in these cases. Defendants point to other wrongful death cases in which the plaintiffs presented more evidence than presented here, but where the verdict total was much lower than the verdict total here. *See*, *e.g.*, *Haarhuis v. Cheek*, 255 N.C. App. 471, 805 S.E.2d 720 (2017) ($4.25 million compensatory damages award for drunk driving incident); *Boyd v. L.G. DeWitt Trucking Co., Inc.*, 103 N.C. App. 396, 405 S.E.2d 914 (1991) ($869,200 compensatory damages award for drunk driving incident). Defendants argue that a comparison of this case to other similar cases demonstrates that the compensatory damages award here was the influence of passion and prejudice.

Our Supreme Court, however, has previously disapproved of the implementation of a test similar to Defendants' proposed "damages norm" test:

> It would serve no purpose to engage in a great debate over the various policies which might or might not favor the adoption of a specific standard to evaluate and limit a trial judge's discretionary power to grant a new trial if he believes the jury has awarded inadequate or excessive damages. It suffices to say that the overwhelming precedent of this court discloses no compelling reason or need for the implementation of such a rule in North Carolina. Moreover, we are not persuaded that the appellate use of a vague test to measure the "reasonable range" of a given verdict's amount would provide a more effective, consistent or precise method of determining whether a trial judge has exceeded the bounds of discretion in the grant or denial of a new trial.

Worthington, 305 N.C. at 485, 290 S.E.2d at 604 (cleaned up). Accordingly, we cannot adopt such a test.

Further, we note the federal case applying North Carolina law cited by Plaintiff, where a $32.7 million compensatory damages award in a wrongful death action was sustained though there was a lack of evidence concerning the economic damages suffered. *See Finch v. Covil Corp.*, 972 F.3d 507, 516–18 (4th Cir. 2020) (applying North Carolina law and upholding the jury verdict).

And though Plaintiff did not present evidence of Ms. Chappell's anticipated future income nor of her medical and funeral expenses, Plaintiff did present other evidence to justify a compensatory award.

For instance, there was evidence concerning the pain and suffering Ms. Chappell suffered during the last hour of her life. She suffered numerous bodily injuries, including multiple open fractures (bones protruding through her skin); she was conscious and experiencing pain while trapped in her vehicle (extrication by firefighters took approximately thirty minutes) and for part of the ambulance ride; she suffered from respiratory distress and repeatedly expressed an inability to breathe, which would have been "extremely terrifying," "panic inducing," and caused "an impending sense of doom"; and she suffered a traumatic cardiac arrest in the ambulance en route to the hospital.

Also, Plaintiff presented evidence of Ms. Chappell's family's loss, particularly the loss suffered by her two children. The jury was free to award damages based on this evidence. Our Supreme Court has instructed that the award is not limited to "income-focused measure[s] of damages" as may have been the case in the distant past, but may be based on services, society, and companionship, including victims who may not have produced an income, like "a child, homemaker or handicapped person." *DiDonato v. Wortman*, 320 N.C. 423, 429, 358 S.E.2d 489, 492 (1987).

Our Court has previously stated that the size of the award itself cannot establish that the jury was influenced by passion or prejudice. *See Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 161, 683 S.E.2d 728, 742 (2009). Moreover,

> [t]he present monetary value of the decedent to the persons entitled to receive the damages recovered will usually defy any precise mathematical computation. Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury—subject, of course, to the discretionary power of the judge to set its verdict aside when, in his opinion, equity and justice so require.

Brown v. Moore, 286 N.C. 664, 673, 213 S.E.2d 342, 248–49 (1975) (citations omitted).

The structure of the trial itself in this case cuts against Defendants' argument that the jury was influenced by passion or prejudice (in determining the compensatory damages award). The trial was *not* bifurcated. Rather, this jury was responsible for awarding both compensatory *and*

punitive damages during one stage. Thus, the jury knew it would have the opportunity to punish Defendants with its punitive damages award and, therefore, would not need to (inappropriately) punish Defendants with its compensatory damages award.

To be sure, to some people, and perhaps even to some judges, a compensatory damages award of $15 million based on a death involving less than an hour of suffering and where no "economic damages" evidence was introduced is excessive. However, based on the foregoing, our review of the record, and the relevant case law, we cannot say that the trial court abused its discretion in refusing to set aside the compensatory damages award and grant a new trial on that issue. *See Justus v. Rosner*, 371 N.C. 818, 832, 821 S.E.2d 765, 774 (2018) ("[T]he plain language of [Rule 59] states explicitly that . . . the only relief that the trial court may award to plaintiff [based on an excessive or inadequate compensatory damage award] is a new trial.").

We also disagree with Defendants' arguments concerning Plaintiff's counsel's alleged "repeated inflammatory statements" as evidence that the jury awarded high damages under the influence of passion or prejudice.

Defendants failed to object at trial to any statement made during Plaintiff's opening statement and closing argument that they now contest on appeal. Thus, we review only whether the trial court committed reversible error by failing to intervene *ex mero motu* because the argument "strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord[.]" *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citations omitted). *See also State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986) (extending this standard of review to opening statements where no timely objection was made).

Defendants take issue with the opening statement, in which Plaintiff's counsel stated, "Four hundred and twelve. That is how many North Carolina citizens are slaughtered every year by drunk drivers on our highways." Defendants also contest counsel's statement that "if it wasn't [Ms. Chappell], it could have been anybody."

Here, we conclude these statements did not exceed the "wide latitude" afforded to trial counsel during opening statements. *See Gladden*, 315 N.C. at 417, 340 S.E.2d at 685 ("Trial counsel is generally afforded wide latitude in the scope of the opening statement and is generally allowed to state what he intends to show so long as the matter may be proved by admissible evidence."). Perhaps these statements are some

evidence that the jury's verdict was based, at least in part, on passion and prejudice rather than on the evidence. However, we cannot say that the trial court abused its discretion in not making that determination based on the record before us.

The jury awarded Plaintiff $25 million in punitive damages.

We hold that that trial court did not err in failing to disturb the jury's finding Defendants liable for punitive damages or for the amounts awarded.

First, the evidence presented supports the jury's finding of liability with respect to both Defendants, as explained below.

Our General Assembly has provided that "[p]unitive damages may be awarded . . . *to punish* a defendant for egregiously wrongful acts and *to deter* the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1 (emphasis added). That body has further provided that punitive damages may be awarded where it has been proven that a defendant "is liable for compensatory damages" and that the defendant engaged in "willful or wanton conduct" by "clear and convincing evidence." *Id.* § 1D-15.

Defendant Foreman argues that the issue of punitive damages based on *her negligent entrustment* should not have been presented to the jury. Specifically, Defendant argues that the evidence presented at trial did not prove by *clear and convincing evidence* that Defendant Foreman knew Defendant Webb was drunk when she allowed Webb to drive her vehicle. We disagree. Rather, we conclude there was evidence from which the jury could infer that Defendant Foreman knew Defendant Webb was drunk and that Defendant Foreman acted wantonly or willfully in negligently entrusting the vehicle to Defendant Webb.

For instance, a trooper who investigated the accident testified that she observed open beer cans outside and inside the Nissan Altima and smelled a strong odor of alcohol before even sticking her head inside the vehicle. An expert in blood alcohol physiology, pharmacology, and the effects of alcohol on human performance and behavior testified that, in his opinion, Defendant Webb was "significantly impaired, to the point of being intoxicated" at the time of the wreck and would have shown "very obvious signs of intoxication" at the time of the wreck and in the fifteen to twenty minutes prior to the wreck, such as slurred speech and difficulty in locomoting (*e.g.*, walking, picking up items, standing upright). Defendant Webb herself testified regarding how much she drank and admitted to smoking marijuana as well, much of which was consumed in Defendant Foreman's presence. Also, there was evidence that in

2016, five years prior to the accident, Defendant Webb had been pulled over and cited for drunk driving (to which she pleaded guilty) while driving Defendant Foreman's vehicle and while Defendant Foreman was a passenger.

And there is no question that there was sufficient evidence to show Defendant Webb's liability for punitive damages. She drove the vehicle in an impaired state after consuming a large amount of alcohol.

Second, regarding *the amount* of the punitive damages awarded, we note that our General Assembly has *not* placed a cap on such awards where the conduct involves impaired driving. *See* N.C. Gen. Stat. § 1D-26. In any event, the awards in this case total $25,000,000 and do not exceed the statutory limit of three times the compensatory damages award for cases generally. *See* N.C. Gen. Stat. § 1D-25(b).

In setting the amount, the jury must consider the purposes contained in Section 1D-1 and may consider other matters set forth in Section 1D-35. *See* N.C. Gen. Stat. §§ 1D-1, 1D-35.

The evidence offered here showed that *punishing* these Defendants was appropriate since they had engaged in similar drunk driving/negligent entrustment conduct before, as shown by the 2016 drunk driving incident. This evidence supports a determination that a punitive damages award may be necessary *to deter others as well as these* Defendants from engaging in similar conduct in the future.

As to the factors which may be considered by the jury, evidence showed that Defendants' conduct was "reprehensib[le,]" as the conduct involved drunk driving and allowing one obviously impaired to drive; that there was a "likelihood . . . of serious harm"; that Defendants had an "awareness of the probable consequences of [their] conduct," based on the 2016 drunk driving incident and a common sense understanding that one should not drive while impaired; that Defendants had engaged in "similar past conduct" based on the 2016 incident; that "the duration of [Defendants'] conduct was not momentary, but rather, they had been drinking for several hours prior to driving; that "[t]he actual damages suffered" by Ms. Chappell were high, as she lost her life; and that Defendant Foreman "conceal[ed]" her culpability by never admitting she bore any blame. *See* N.C. Gen. Stat. § 1D-35(2).

Defendants take issue with a statement made by Plaintiff's counsel during closing, urging the jury to "speak loud" with their verdict:

> The size of your verdict is the volume with which you speak. A million dollars? That won't carry out those doors

> back there. A few million dollars might be heard at the town limits, but if you want your voices to be heard in Raleigh, and Durham, and Oxford, and Smithfield, or across the state, or across the nation, you're going to have to speak louder.

Here, counsel's statement was limited to punitive damages. We conclude that this statement did not cross the line. The jury is entitled to "speak loud" with its punitive damages award by sending a message of deterrence to people who consider drunk driving or negligently entrusting a vehicle to a drunk driver. *See* N.C. Gen. Stat. § 1D-1 ("Punitive damages may be awarded . . . to deter the defendant and others from committing similar wrongful acts."). And again, we cannot say that the trial court erred by not disturbing the punitive awards of the jury based on the record before us.

Finally, Defendant Foreman argues that her liability for punitive damages ($20 million) is disproportionately higher than that of the driver Defendant Webb ($5 million). However, there are several possible reasons why Defendant Foreman's punitive damages are four times the amount of Defendant Webb's. For instance, Defendant Webb pleaded guilty to criminal charges arising from this accident and is currently serving a term of imprisonment for thirteen to sixteen years, whereas Defendant Foreman was not criminally punished. Additionally, Defendant Webb expressed some remorse during her testimony, whereas Defendant Foreman did not take any responsibility. We, therefore, cannot say the jury's awards were unlawful.[2]

III. Conclusion

Defendants received a fair trial. There was sufficient evidence presented to submit the issues of liability for compensatory and punitive damages to both Defendants. The jury rendered its verdict. The trial court did not err by denying Defendant Foreman's motion for JNOV and it did not abuse its discretion by denying Defendants' motion for a new trial.

AFFIRMED.

Judges ARROWOOD and STADING concur.

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2. We note that the United States Supreme Court has held that punitive damages awards implicate Due Process concerns. *See*, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003); *Lacey v. Kirk*, 238 N.C. App. 376, 395, 767 S.E.2d 632, 646 (2014). However, Defendants made no express argument as to how the award violated their Due Process rights; and, therefore, we do not consider any such argument.

DUKE UNIVERSITY HEALTH SYSTEM INC., PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED SECTION, RESPONDENT
AND
UNIVERSITY OF NORTH CAROLINA HOSPITALS AT CHAPEL HILL AND UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM, RESPONDENT-INTERVENORS

No. COA23-351

Filed 6 August 2024

1. Hospitals and Other Medical Facilities—certificate of need—competing proposals—geographic accessibility—decision affirmed

In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding geographic accessibility where substantial evidence supported the ALJ's findings that intervenor's proposed site, while located in a zip code without any residents, was immediately adjacent to and accessible from densely populated zip codes in Durham County.

2. Hospitals and Other Medical Facilities—certificate of need—competing proposals—relative impact on competition—decision affirmed

In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding the relative impact on competition of each CON application because the alleged error argued by petitioner on appeal—a categorical preference for a new market competitor—was (1) not evident in the ALJ's decision, and (2) even if it were present, would be unavailing given the undisputed fact that petitioner controlled 98% of acute care beds in the county at the time of its CON application.

3. Hospitals and Other Medical Facilities—certificate of need—competing proposals—population to be served—underserved groups—decision affirmed

In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding intervenor's compliance with a statutory requirement (N.C.G.S. § 131E-183(a)(3)) that it identify the population to be served, particularly "underserved groups," where substantial evidence supported the ALJ's more than 80 findings of fact—including those that addressed alleged unrealistic projections identified by petitioner—because the weighing of evidence was for the ALJ rather than the appellate court.

4. Hospitals and Other Medical Facilities—certificate of need—competing proposals—reasonableness of cost, design, and means of construction—remanded for further findings

In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the reasoning of the administrative law judge (ALJ) was unsound as to respondent's conclusions of law that intervenor complied with a statutory requirement (N.C.G.S. § 131E-183(a)(12)) that it demonstrate the reasonableness of the cost, design, and means of construction of the facility on the proposed site. Specifically, the ALJ treated restrictive covenants and zoning requirements applicable to the site as unproblematic and, moreover, considered an alternative site not included in intervenor's application—which, in any event, was itself impaired by a proposed highway extension as well as power lines, a greenway, and water hazards. Given the possibility that the ALJ might not have awarded the CON to intervenor but for its contemplation of the alternative site, the matter was remanded for consideration of intervenor's application taking into account only the site proposed therein.

Judge GRIFFIN concurring in part and dissenting in part.

Appeal by Petitioner from final decision entered on 9 December 2022 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 15 November 2023.

Baker, Donelson, Bearman, Caldwell & Berkowitz, a Professional Corporation, by Kenneth L. Burgess, Matthew A. Fisher, Iain M. Stauffer, and William F. Maddrey, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for respondent-appellee.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Candace S. Friel, Lorin J. Lapidus, Nathaniel J. Pencook, and D. Martin Warf, for respondent-intervenor.

MURPHY, Judge.

When an appellant challenges the substantive determinations of an administrative law judge ("ALJ") on appeal from a contested case hearing for a certificate of need, we review the decision for substantial evidence on the whole record. However, where our statutes dictate the proper scope of administrative review, the ALJ may not exceed that scope. Here, although we affirm the ALJ in almost all respects, we must remand for further findings insofar as the final decision granting the certificate of need relied upon a site other than that presented in the respondent's application.

BACKGROUND

Petitioner-Appellant Duke University Health System, Inc. ("Duke") challenges on appeal the 9 December 2022 final decision of the ALJ to uphold the conditional approval of a certificate of need ("CON") granted to Respondents-Intervenors-Appellees University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System (collectively "UNC") by the North Carolina Department of Health and Human Services (the "Agency").

Pursuant to N.C.G.S § 131E-183(a)(1) and chapters 5 and 6 of the 2021 State Medical Facilities Plan ("SMFP"), the Agency determined the need to develop 40 acute care beds and four operating rooms for the Durham/Caswell County health service areas. The "new acute care beds [and operating rooms] [could not] be developed without a CON issued by the Agency." On 15 April 2021, in response to the need determinations

of the SMFP, five applications to develop additional acute care beds and operating rooms for the Durham County area were submitted to and reviewed by the Agency. Applications were submitted by Duke and North Carolina Specialty hospital/Southpoint Surgery Center, two Durham County health systems. Additionally, UNC applied as a new provider in Durham County.

On 1 May 2021, the Agency independently reviewed all applications against the statutory review criteria found in N.C.G.S. § 131E-183(a)[1] and the applicable regulatory review criteria found in 10A NCAC 14C. Southpoint Surgery Center submitted an application to add four operation rooms based on the need determination in the 2021 SMFP; UNC Hospitals submitted an application to develop 40 acute care beds and two operating rooms in the Research Triangle Park area. Meanwhile, Duke submitted three applications: the first was to add 40 acute care beds and two operating rooms to its existing Durham facility; the second

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1. In pertinent part, N.C.G.S. § 131E-183(a) provides:

> (a) The Department shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued.
>
> (1) The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.
>
> . . . .
>
> (3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.
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> . . . .
>
> (12) Applications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

N.C.G.S. § 131E-183(a)(1), (3), (12) (2023).

was to develop two operating rooms; and a final application sought to develop two more operating rooms at its Ambulatory Surgery Center. The Agency found that Southpoint Surgery Center failed to demonstrate financial feasibility and failed to show that its application was not unnecessarily duplicative of existing or approved services, among other criteria, while it found both Duke and UNCs applications conforming to all the review criteria. As a result, the Agency denied Southpoint's CON application.

Since the need determination in the SMFP places limits on the number of acute care beds that can be approved by the Agency—40 acute care beds and two other operating rooms—accepting both the Duke and UNC applications would have resulted in more acute care beds and operating rooms than the SMFP need determination for Durham County allowed. The Agency therefore concluded that, because the SMFP allowed for only 40 acute beds in the Durham County area, granting Duke's application would require the denial of UNC's application and *vice versa*. Pursuant to the review criteria under N.C.G.S. § 131E-183, the Agency conducted a comparative analysis review of both Duke and UNC CON applications for 40 acute care beds, as well as another for the two operating rooms.

On 21 September 2021, "[b]y decision and Required State Agency Findings[,] the Agency (1) conditionally approved the UNC Hospitals-RTP Application; (2) conditionally approved [Duke's Ambulatory Surgery Center's] Application [for two additional operating rooms]; (3) denied [Duke's] [two operating rooms] Application; (4) denied [Duke's acute care beds] Application; and (5) denied the Southpoint Application [for two operating rooms]." By letter and Required State Agency Findings dated 21 September 2021, the Agency informed Duke that its application for 40 acute care beds and two operating rooms had been denied. Also on 21 September 2021, the Agency issued the Required State Agency Findings containing the findings and conclusions upon which it based its decisions.

On 21 October 2021, Duke filed a petition for contested case hearing pursuant to N.C.G.S § 150B-23 alleging that the Agency had erroneously approved the CON application of UNC in which UNC sought to develop two operating rooms and 40 acute care beds in Durham County. On 10 November 2021, the OAH issued an order, by consent of all parties, to grant UNC the right to intervene in the contested case hearing. The ALJ issued a final decision in which it affirmed the Agency's decision finding UNC's application to be comparatively superior to Duke's application. Duke appealed.

ANALYSIS

On appeal, Duke challenges the ALJ's final decision on four distinct bases, all of which, in substance, challenge the original determinations of the Agency and only derivatively challenge the ALJ's final decision insofar as it did not reverse the Agency. The bases for its challenges on appeal are (A) that the ALJ incorrectly affirmed the Agency's determination that UNC's application was superior to Duke's with respect to geographic accessibility; (B) that the ALJ incorrectly affirmed the Agency's determination that UNC's application was superior to Duke's on the basis of competition; (C) that the ALJ incorrectly affirmed the Agency's finding that UNC's application conformed with N.C.G.S. § 131E-183(a)(3); and (D) the ALJ incorrectly affirmed the Agency's finding that UNC's application conformed with N.C.G.S. § 131E-183(a)(12).

In reviewing the ALJ's determinations, our standard of review is governed by N.C.G.S. § 150B-51, which permits a party seeking judicial review to challenge an ALJ's final decision

> if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C.G.S. §] 150B-29(a), [N.C.G.S. §] 150B-30, or [N.C.G.S. §] 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2023). "With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of [N.C.G.S. § 150B-51], the court shall conduct its review of the final decision using the whole record standard of review." N.C.G.S. § 150B-51(c) (2023).

"In applying the whole record test, the reviewing court is required to examine all competent evidence in order to determine whether the [final] decision is supported by substantial evidence." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Hum. Servs.*, 235 N.C. App. 620, 622-23 (2014) (marks omitted), *disc. rev. denied*, 368 N.C. 242 (2015). "Substantial evidence is such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion." *Id.* at 623. "This test does not allow the reviewing court to replace the [ALJ's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Mills v. N.C. Dep't of Health & Hum. Servs.*, 251 N.C. App. 182, 189 (2016) (marks omitted).

A. Relative Geographic Accessibility

[1] We first address whether the ALJ properly affirmed the Agency's conclusions as to geographic accessibility. Duke contends that the ALJ's decision was erroneous because the Agency had favorably evaluated the UNC application on the basis of geographic accessibility despite being located in Research Triangle Park, a nonresidential area of Durham, and had analyzed the geographic access factor in a manner that lacked a coherent guiding principle and deviated from the methodology of previous reviews. We disagree.

While analyzing the geographic access factor, the ALJ's final decision acknowledged many of the issues Duke raises before us and nonetheless affirmed the Agency's determination in favor of UNC:

> 420. The Agency utilized the comparative factor of Geographic Accessibility in its comparative analysis of the UNC and Duke Applications. (Jt. Ex. 1, pp. 1609, 1619).
>
> 421. In analyzing this comparative factor, the Agency looked at where each applicant proposes to place the proposed services. (Meyer, Vol. 7, p. 1299). An application placing the services at issue in a location where there are not any such services is deemed the more effective alternative under this factor. (Jt. Ex. 1, p. 253; Carter, Vol. 11, pp. 1874-75).
>
> 422. Ms. Sandlin opined that the Agency erred in its analysis of this comparative factor as having geographic dispersal of these need determined assets is not critical because Durham has less land mass than other counties in North Carolina. (Sandlin, Vol. 6, pp. 1058-67).
>
> 423. Mr. Meyer opined that this factor is important because it is related to access, a foundational principle of the CON Law. The CON Law seeks to avoid geographic maldistribution of services, and North Carolina has a "compelling interest in helping to ensure that all North Carolinians have access to [. . .] healthcare services[.]" (Meyer, Vol. 7, p. 1299).

424. In the acute care beds review, the Agency noted there were 1,388 existing and approved acute care beds in the Durham/Caswell County service area, all of which are located in the central area of Durham County, illustrated by the following table:

Facility	**Total AC Beds**	**Address**	**Location**
Duke University Hospital	1,048	2301 Erwin Rd, Durham 27710	Central Durham County
Duke Regional Hospital	316	3643 N. Roxboro Rd, Durham 27704	Central Durham County
North Carolina Specialty Hospital	24	3916 Ben Franklin Blvd, Durham 27704	Central Durham County

(Jt. Ex. 1, p. 1609; see also Meyer, Vol. 7, p. 1300).

425. Similarly, in the ORs review, the Agency noted that there were 93 existing and approved ORs in Durham County, the vast majority of which were concentrated in the central area of Durham County, illustrated by the following table:

Facility	**Type**	**Durham SA OR System**	**Total ORs**	**Address**	**Location**
NCSH	Existing Hospital	NCSH	4	3916 Ben Franklin Blvd, Durham 27704	Central Durham County
DUH	Existing Hospital	Duke	66	2301 Erwin Rd, Durham 27710	Central Durham County

DRH	Existing Hospital	Duke	13	3643 N. Roxboro Rd, Durham 27704	Central Durham County
DASC	Existing ASF	Duke	4	2400 Pratt St, Durham 27710	Central Durham County
Arringdon	Existing ASF	Duke	4	5601 Arringdon Park Dr, Morrisville 27560	South Durham, near I540 at I40
SSC	Approved ASF	NCSH	2	7810 NC Hwy 751, Durham 27713	South Durham, near Hwy 147
UNC-RTP	Proposed Hospital	UNC	2	Parcels in [RTP] 27709	South Durham, just below I40

(Jt. Ex. 1, p. 1620).

426. For both the acute care beds and ORs comparative analyses, the Agency determined that the UNC Application was the more effective alternative, and Duke's Applications were the less effective alternatives for geographic accessibility. (Jt. Ex. 1, pp. 1609, 1620; Hale, Vol. 1, p. 188).

427. UNC proposed placing the acute care beds in this Review in the southern area of Durham County, where there were no existing acute care beds, while Duke proposed placing additional beds at DUH where there were already over one thousand existing or approved acute care beds. (Jt. Ex. 1, p. 1609; Hale, Vol. 1, p. 188). The Agency also found UNC Hospitals-RTP, Duke Arringdon, and Southpoint Surgery Center to be more effective

because they "propose to develop ORs in South Durham County where there are currently only six of 93 existing/approved Durham County ORs[,]" as opposed to the Duke ORs Application which proposed placing additional ORs at DUH where there were already sixty-six existing and approved ORs. (Jt. Ex. 1, p. 1620).

428. Mr. Meyer agreed with the Agency's analysis of this comparative factor. (Meyer, Vol. 7, pp. 1299-1300, 1330-31). In the beds analysis, the existing facilities in Durham are concentrated in the center of the county. (Jt. Ex. 97, p. 11; Meyer, Vol. 7, p. 1301). Mr. Meyer analyzed the locations of hospitals in certain populous counties in North Carolina, including Wake, Mecklenburg, Guilford, and Forsyth counties, all of which have hospitals in the perimeter of the county and generally have good geographic dispersal of hospitals. (Jt. Ex. 103; Meyer, Vol. 7, pp. 1302-1305). His analysis showed that compared to these highly populated counties, Durham County as another highly populated county, "does not have an acute care hospital that's located anywhere but in the center of the county," (Meyer, Vol. 7, p. 1305).

429. Similarly, both Mr. Meyer and Mr. Carter observed that both the UNC Application and the Duke Arringdon application proposed to place ORs in south Durham County, and both were deemed the more effective alternative as to this comparative factor, which they agree was the correct decision. (Meyer, Vol. 7, pp. 1330-31; Carter, Vol. 11, pp. 1886-87).

430. While Durham County has relatively small land mass compared to other counties, Durham County is the third most densely populated county in the state, and such density leads to traffic congestion that can make geographic dispersion of healthcare facilities more important. (Meyer, Vol. 7, pp. 1306-07, 1309-10).

431. Ms. Sandlin produced two maps showing different amounts of population density in Durham County. In Sandlin's initial expert report, the map showing population density illustrated that UNC Hospitals-RTP would be located in a densely-populated area of the county where there are no existing hospitals. (Jt. Ex. 54, p. 12; Meyer, Vol. 7, p. 1309). However, in Sandlin's rebuttal report,

the map showing population density illustrated there is no population in the zip code where UNC Hospitals-RTP would be located, but still showed that the surrounding zip codes are densely populated. (Jt. Ex. 212; Meyer, Vol. 7, pp. 1307-09).[] [A footnote affixed to this finding in the original text reads as follows: "Similarly, there is no population in the zip code that comprises DUH. (Jt. Ex. 4, p. 242; Sandlin, Vol. 7, p. 1201; Carter, Vol. 11, p. 1903)."]

432. Mr. Meyer opined that despite the lack of population in UNC Hospitals-RTP's zip code, UNC's primary site is easily accessible by "the largest, most significant traffic arteries in that part of the county" such that residents in densely-populated southern Durham County would have easy access. (Meyer, Vol. 7, pp. 1308-09).

433. Mr. Carter likewise explained that the UNC Application illustrated that UNC Hospitals-RTP is located along prominent roadways in addition to being located near the heavily populated southern Durham zip codes. (Carter, Vol. 10, p. 1703; *see also* Jt. Ex. 4, pp. 51-58).

434. Ms. Sandlin also opined that UNC Hospitals-RTP is not near a majority of Durham County zip codes and that this does not improve geographic access for the majority of the service area zip codes. (Sandlin, Vol. 6, p. 1061).

435. In contradiction, Mr. Meyer noted that it is more important for a healthcare facility to be proximate to more people, rather than more zip codes. (Meyer, Vol. 7, p. 1310). The zip codes in southern Durham County which are near UNC Hospitals-RTP "comprise more than half of the population of Durham County." (Jt. Ex. 4, p. 55; Meyer, Vol. 7, p. 1310; Sandlin, Vol. 7, pp. 1205-06).

436. When looking at population rather than zip codes, UNC Hospitals-RTP was proximate to over half of the population of Durham County. (Meyer, Vol. 7, p. 1311-12).

437. Mr. Carter added that UNC Hospitals-RTP's primary site is "on the border of RTP" and is "near where a lot of people live." (Carter, Vol. 11, pp. 1904-05). He further opined that UNC Hospitals-RTP's location being in the southern region of Durham County improves access by providing another option for those residents. While some

of those residents may still choose one of the existing facilities, they have another option that may be closer to where they live. (Carter, Vol. 10, p. 1733). Furthermore, compared to DUH, UNC Hospitals-RTP would be easier to find parking and navigate as a smaller facility. (*Id.* at pp. 1733-34).

438. The fact that DUH may be closer to some residents in Caswell County and northern Durham County does not change the Agency's analysis that UNC Hospitals-RTP enhances geographic accessibility. In Mr. Meyer's opinion:

> [R]esidents of northern Durham County are not going to be disadvantaged by this proposal. They will continue to have the same access to any of those existing acute care hospitals that they do currently. This doesn't take away from their access.

(Meyer, Vol. 7, pp. 1313-14). Instead, UNC's proposal "enhances access for south Durham County residents," which is where the greatest need exists for these services due to the population growth in that area. (*Id.* at p. 1314).

439. As a small hospital, "the intent is not to serve each and every patient within Durham County," because UNC Hospitals-RTP does not "have the capacity to do that." (Carter, Vol. 10, pp. 1703-04).

440. Ms. Sandlin testified that the Agency's analysis of this comparative factor was inconsistent with the way the Agency analyzed it in prior reviews. (Sandlin, Vol. 6, pp. 1045-46).

441. Mr. Meyer disagreed with Ms. Sandlin of the Agency's prior reviews. While he interpreted Ms. Sandlin's testimony as opining that the Agency needs to analyze geographic accessibility based on municipalities, Mr. Meyer noted that there is no rule requiring that. Moreover, analyzing geographic accessibility based on municipalities is impractical in Durham County, where there is only one incorporated municipality, the City of Durham. (Meyer, Vol. 7, pp. 1314-15). More importantly, the geographic accessibility comparative factor should look at where people live compared to the existing and proposed services. (*Id.* at 1315-16).

442. Likewise, Mr. Carter disagreed with Ms. Sandlin. In his opinion, the 2020 Forsyth Acute Care Beds Review mentioned by Ms. Sandlin was an inapt comparison, where the existing hospitals were more dispersed than the existing facilities within Durham that are contained in a five-mile radius. (Carter, Vol. 11, p. 1877)

443. Ms. Sandlin testified that UNC's analysis splitting Durham into different regions based on zip codes "seemed manufactured and illogical." (Sandlin, Vol. 6, p. 1017).

444. However, Ms. Sandlin's testimony ignores the fact that Duke itself, assisted by Keystone Planning while Ms. Sandlin was still with that company, analyzed geographic accessibility in this same "manufactured" manner in its 2018 application to develop the Duke Arringdon facility. In its 2018 application, Duke described the same four zip codes (27703, 27709, 27707 and 27713) as "South Durham" that UNC described as south Durham in its application in this Review. (*Compare* Jt. Ex. 106, p. 30 *with* Jt. Ex. 4, p. 54; *see also* Meyer, Vol. 7, pp. 1317-18; Sandlin, Vol. 6, pp. 1120-22).

445. Mr. Carter explained the process by which UNC determined to split Durham County into regions and concluded that UNC divided Durham County into three regions by zip codes so it could analyze where in the county a new hospital should be located, which the SMFP does not discuss in any detail. (Carter, Vol. 10, pp. 1704-06). Mr. Carter further opined that not all patients within the City of Durham were equally served by the existing hospitals due to the lack of available facilities in southern Durham. In other words, "there aren't enough facilities to serve residents in Durham County notwithstanding the fact that the municipality of Durham may go well into the southern part of the county." (*Id*. at p. 1708).

446. Ultimately, Mr. Meyer agreed with the Agency's analysis of this comparative factor, describing it as "an easy call for the Agency." (Meyer, Vol. 7, p. 1318).

447. Mr. Carter agreed that the Agency was correct in determining the UNC was the more effective alternative, and that it was consistent with other findings he has seen. (Carter, Vol. 11, pp. 1874, 1886). Mr. Carter further opined that he did not believe "the Agency's analysis or

> conclusions would have been any different if UNC had proposed a different site really anywhere else in the county that was not within five miles of another hospital." (*Id.* at p. 1877).

Reviewing the record for substantial evidence, *see Surgical Care Affiliates*, 235 N.C. App. at 622-23, we affirm the ALJ's decision with respect to this factor.

At the threshold, we note that Duke has primarily framed its arguments as though our task on appeal were to review the determinations of the Agency rather than the ALJ. However, this is incorrect. While the statute governing judicial review of administrative decisions, N.C.G.S. § 150B-51, used to contemplate direct judicial review of Agency determinations, revisions by our General Assembly in 2011 have refocused our substantive review on the final decision of the ALJ:

> In 2011, the General Assembly amended the Administrative Procedure Act ("APA"), conferring upon administrative law judges the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves. *See* 2011 N.C. Sess. Laws 1678, 1685-97, ch. 398, §§ 15-55. Prior to the enactment of the 2011 amendments, an ALJ hearing a contested case would issue a recommended decision to the agency, and the agency would then issue a final decision. In its final decision, the agency could adopt the ALJ's recommended decision *in toto*, reject certain portions of the decision if it specifically set forth its reasons for doing so, or reject the ALJ's recommended decision in full if it was clearly contrary to the preponderance of the evidence. *See* [N.C.G.S.] § 150B36, *repealed by* 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20. As a result of the 2011 amendments, however, the ALJ's decision is no longer a recommendation to the agency but is instead the final decision in the contested case. [N.C.G.S.] § 150B–34(a).
>
> Under this new statutory framework, an ALJ must "make a final decision . . . that contains findings of fact and conclusions of law" and "decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." *Id.*

AH N.C. Owner LLC v. N.C. Dep't of Health & Hum. Servs., 240 N.C. App. 92, 98-99 (2015). Thus, our review of substantive issues will be based on the ALJ's final decision.

Having established the proper scope of our review, we are entirely satisfied that substantial evidence exists to support each of the arguments Duke raises on appeal. While Duke argues that the ALJ's decision was reversible insofar as it found UNC's application favorable on the basis of geographic access in a zip code with no residents, the ALJ cited substantial evidence indicating that the immediately adjacent zip codes are densely populated—to say nothing of the potential usage the proposed location may receive from those who work, rather than reside, in the proposed location of the UNC facility. As to Duke's allegation that the Agency deviated from its mode of analysis in previous reviews, rendering its decision arbitrary and capricious, we cannot say a deviation without a more specific argument as to why the analysis employed in *this* case was deficient that such an alleged deviation constitutes reversible error, especially absent any directly binding law on point to support such a proposition. The task before the Agency is multifaceted, and the CON review process does not demand that it apply a fixed lens to every case, especially where some considerations may be more salient in a given case than in others. The ALJ's findings and conclusions with respect to geographic access are affirmed.

B. Relative Impact on Competition

[2] Second, we address whether the ALJ properly affirmed the Agency's conclusions as to the Duke and UNC applications' relative impact on competition. Duke argues that the ALJ erroneously affirmed the Agency's decision with respect to this comparative factor because the Agency believed the comparative factor of promoting market competition would always favor a new market entrant and because the Agency failed to consider "quality, cost, and access" as part of the competition factor. With these arguments, too, we disagree.

While the ALJ's final decision does discuss this factor, we note that Duke's stance on this issue takes the form of a broad methodological critique rather than an allegation that a specific analytical error occurred, making reproduction of this portion of the record unnecessary. To the extent this argument constitutes an allegation of legal error, we apply the de novo, rather than whole record, standard of review. N.C.G.S. § 150B-51(c) (2023) ("With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, [subsection (b)(4) referring to "other error[s] of law[,]"] the court shall conduct its review of the final decision using the de novo standard of review.").

At the threshold, we note once again that Duke's arguments principally concern the determinations of the Agency and not the ALJ. However, as the ALJ's final decision is the proper object of our review, *see AH*, 240 N.C. App. at 98-99, we base our analysis primarily on that decision. Bearing that in mind, very few of the issues raised by Duke on appeal directly apply to the ALJ's final decision. The alleged defect that the Agency believed the competition factor would always favor a new market entrant—a view found neither in the Agency's written decision nor the final decision of the ALJ, but sourced to testimony by Agency employees before the Office of Administrative Hearings—was not present in the reasoning of the ALJ, who indicated a typical preference for a new market competitor rather than a categorical one.

However, even if the ALJ's view had been as categorical as the view Duke imputes to the Agency, this would hardly be a case where such reasoning would merit reversal on appeal. Duke has not disputed the ALJ's finding that, of the 1,388 acute care beds in Durham County, only twenty are outside Duke's control. Nor has Duke otherwise presented us with any reason to believe UNC's facility would present more of a threat to competition for this service in Durham County than its own market dominance.[2] Rather, its arguments largely reduce to a contention that it could not realistically "win" the competition factor. Barring radically extenuating circumstances, we do not think an entity controlling more than 98% of a service within a county should realistically expect to "win" when a neutral third party considers whether a new market entrant would be the healthier choice for competition. *Cf. Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 57 (2006) ("[The petitioner]'s argument appears to be that if it operated all three of the MRI scanners this would somehow foster competition rather than if a competitor operated one of the MRI scanners. [The petitioner], in effect, argues that giving it a monopoly in the service area would increase competition. We decline to adopt this incongruous line of reasoning.").

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2. Duke points out that UNC, despite currently operating no acute care beds in Durham County, is already a major medical provider in the greater triangle region, and it further contests the adequacy of the ALJ's analysis as to competition on this basis. While we recognize Duke's concern insofar as a regional oligopoly may be unhealthy for the state of market competition in the absolute sense, the ALJ's assessment of competition was relative, not absolute. Thus, we cannot say the ALJ erred in its determination that, as between the two regionally dominant providers being considered in the competitive application process, the one not currently operating acute care beds within Durham County creates a *more* favorable impact on competition within the county than the one currently wielding a near-monopoly for that service.

Duke also argues that the failure to consider cost and quality of care within the scope of the competition factor rendered its decision reversibly arbitrary. This argument is meritless. Impact on the health of market competition is one of eleven factors considered in the competitive CON review process, several others of which account for cost and quality of care. We affirm the ALJ's determinations as to relative impact on competition.

C. UNC's Compliance with Criterion 3

[3] We next address whether the ALJ properly affirmed the Agency's conclusions as to UNC's compliance with N.C.G.S. § 131E-183(a)(3). N.C.G.S. § 131E-183(a)(3), or "Criterion 3," provides that a certificate of need applicant

> shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

N.C.G.S. § 131E-183(a)(3) (2023). With respect to Criterion 3, Duke argues that UNC's application was insufficient because it relied on unrealistically low projections for the number of out-of-county patients the proposed facility could be expected to attract and because UNC's application allegedly failed to account for the absence of high-acuity care at the proposed facility.[3] As these arguments are derived from factual disagreements with the Agency findings—which, in the ALJ review, were supported by substantial evidence, *see Surgical Care Affiliates*, 235 N.C. App. at 622-23—we affirm the ALJ.

In its final decision, the ALJ affirmed the Agency's conclusion that UNC's CON application was in compliance with criterion 3, finding, in relevant part, as follows:

> 85. Criterion (3) requires the applicant to "identify the population to be served by the proposed project" and to "demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area,

3. Duke also argues that UNC's alleged nonconformity with criterion 3 brings it out of conformity with criteria 1, 4, 5, 6, and 18(a). However, because we determine below that Duke's arguments with respect to criterion 3 are without merit, we need not independently evaluate this argument.

and, in particular, low-income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed." ([N.C.G.S.] § 131E-183(a)(3); Jt. Ex. 1, p. 1502).

86. To find an applicant conforming with this Criterion, the Agency engages in a four-part analysis: (1) the applicant must identify the population to be served, also referred to as the patient origin; (2) the applicant must demonstrate the need of the identified population for the services proposed; (3) the applicant must project the utilization of these services by the identified population in the first three operating years of the project; and (4) the applicant must project the extent to which the projected population, and particularly those in medically underserved groups, have access to the proposed services. (Jt. Ex. 1, p. 1502; Hale, Vol. 2, p. 224; see also Meyer, Vol. 5, p. 936). To be found conforming, the information provided by the applicant must be reasonable and adequately supported. (Hale, Vol. 2, pp. 223-24).

i. Patient Origin

87. The first element of Criterion (3) discusses patient origin, which is where the applicant projects patients will come from to utilize the proposed services. (Jt. Ex. 1, p. 1509; Hale, Vol. 2, p. 225). To analyze patient origin, the Agency reviews the information provided by the applicant and determines whether that information is reasonable and adequately supported. (Hale, Vol. 2, pp. 225-26).

88. The UNC Application provided that the patient origin for UNC Hospitals-RTP would include 90 percent Durham County residents, with some in-migration from Wake, Chatham, and Caswell Counties. (Jt. Ex. 4, p. 43; Carter, Vol. 10, pp. 1690-92).

89. To determine its projected patient origin, UNC considered the limited size of the facility and the overwhelming need in Durham County. While UNC could have used a higher percentage of in-migration in its projections, doing so would have been more aggressive, especially given that a small hospital would be less likely to attract patients from outside of the county. (Carter, Vol. 10, pp. 1692-93).

90. Ms. Sandlin acknowledged that her opinions regarding UNC's projected patient origin, in-migration, and patient population were not based on any Duke facilities of similar size, since there are none. She also did not perform any analysis of the patient origin of a hospital of similar size developed by UNC in developing her opinions. (Sandlin, Vol. 7, pp. 1165-66).

91. Daniel Carter, one of UNC's expert witnesses, opined that UNC's 10 percent in-migration assumption was well-supported, reasonable, and conservative. (Carter, Vol. 10, pp. 1695-96). The UNC Application analyzed in-migration at all 116 acute care hospitals in North Carolina to reach its 10 percent in-migration assumption, and it also accounted for UNC Hospitals-RTP's smaller size and densely populated location. (Jt. Ex. 4, pp. 146-47; Carter, Vol. 10, pp. 1693, 1695).

92. Mr. Carter analogized UNC Hospitals-RTP to UNC Johnston Health in Clayton, a 50-bed community hospital which is approximately the same distance from Wake County as UNC Hospitals-RTP would be. At UNC Johnston Health, there is approximately 9 percent in-migration from Wake County despite its proximity. (Carter, Vol. 10, pp. 1693-94).

93. Mr. Carter also noted that had UNC proposed higher in-migration, it would also have the effect of increasing UNC Hospitals-RTP's utilization and the financial feasibility of the project, which would strengthen its application for both Criteria (3) and (5). (Id. at p. 1693). Furthermore, he noted that UNC could have supported an assumption of 20 percent or even 30 percent in-migration without going beyond its maximum utilization. (Id. at pp. 1694-95).

94. Based upon the information provided in the UNC Application, the Agency determined that UNC adequately identified the patient origin for the population it proposed to serve. (Jt. Ex. 1, p. 1511; Hale, Vol. 2, pp. 226-27).

ii. Demonstration of Need

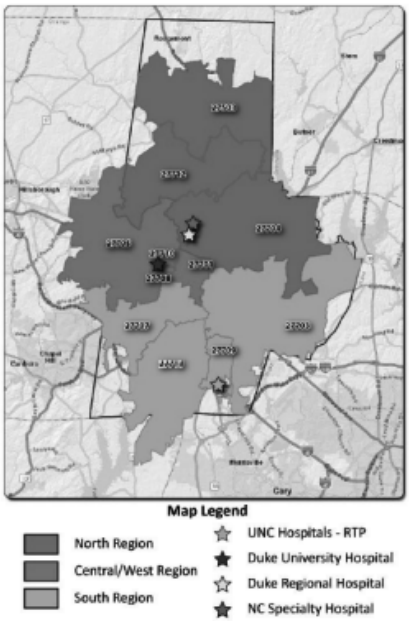
95. The second element of Criterion (3) analyzes whether the applicant demonstrates that the population proposed to be served needs the proposed services. (Jt. Ex. 1, p. 1511;

Hale, Vol. 2, p. 231-32). To conduct its analysis of need, the Agency reviews the information provided by the applicant and assesses whether that information is reasonable and adequately supported. (Hale, Vol. 2, pp. 231-32). This differs from the need determination of Criterion (1), which focuses on the need determination in the SMFP, rather than the needs of patients for the proposed services.

96. UNC provided several reasons why the patients it proposed to serve at UNC Hospitals-RTP needed the proposed services. The Agency determined that UNC's methodology and resulting projections were both reasonable and adequately supported. (Sandlin, Vol. 7, p. 1214).

97. The first reason provided by UNC is the population growth and aging in Durham County. (Jt. Ex. 4, pp. 48-50). UNC noted that Durham County is the sixth most populous county and the third fastest growing county in North Carolina, with the growth rate expected to continue into the next decade. (Id. at 48-49). This growth, combined with the aging of the population, demonstrated that there will be more patients needing acute care services. (Id. at 49-50; Carter, Vol. 10, pp. 1700-01).

98. The second reason provided by UNC is the need for a new hospital in Durham County. As of the date the applications were submitted, there were no acute care beds in the southernmost zip codes in Durham County, where most of the population and growth exists within the county. (Jt. Ex. 4, pp. 51-55). The UNC Application contained the following map illustrating the location of existing hospitals in Durham County and the proposed UNC Hospitals-RTP location:



(Id. at 51; see also id. at 53; Carter, Vol. 10, pp. 1710-11).

99. Additionally, UNC demonstrated that its proposed services were needed because (1) there has not been a new hospital opened in Durham County in over 45 years and (2) Durham County lacks a full-service community hospital. (Jt. Ex. 4, pp. 51-52).

100. The UNC Application included a table which displayed UNC's existing market share of certain zip codes within Durham County. This table showed that UNC already has a strong market presence in southern Durham County (including zip codes 27703, 27713, 27707, 27709) despite not having any facilities there. (Id. at 54; Carter, Vol. 10, pp. 1711-12).

101. The UNC Application also included a table which displayed the historical population growth by region and zip code within Durham County. This table showed that a majority of the Durham County population lives in the southern zip codes. As of 2020, 165,824 out of 326,262 people live in the southern zip codes. In addition, those southern zip codes are the fastest growing zip codes with a

compound annual growth rate ("CAGR") of 2.4% between 2015 and 2020 and expected CAGR of 1.9% between 2020 and 2025. (Jt. Ex. 4, p. 55).

102. In further support of the need for a community hospital in southern Durham County, UNC described the development of roadways and businesses in southern Durham County to emphasize the "sustained growth and development" of southern Durham County that supports the need for UNC Hospitals-RTP. (Id. at pp. 56-58; Carter, Vol. 10, pp. 1713-14).

103. While the SMFP never states that there is a need for any hospital, the fact that there is a need for both beds and ORs in the same area offers the potential for a new hospital. Combined with the need for low acuity services in southern Durham County, there is a need for a community hospital in Durham County. (Carter, Vol. 10, pp. 1696-98).

104. UNC examined the entire Durham/Caswell service area when deciding where to locate its hospital. UNC determined that Caswell County was not an ideal location for a hospital due to its relative lack of population and determined that southern Durham County was ideal based on the need in those densely populated zip codes that lacked a hospital. (Id. at pp. 1699-702; Jt. Ex. 4, pp. 50-55).

105. A third reason provided by UNC is the need for UNC Hospitals hospital-based services in Durham County. A significant number of patients from Durham County use UNC Health facilities and developing a community hospital closer to them would meet their needs for higher frequency, lower acuity services. (Jt. Ex. 4, pp. 58-60; Carter, Vol. 10, pp. 1714-15).

106. UNC already has physicians in Durham County that are part of UNC Health. UNC is focused on meeting the physician needs in the area and would recruit physicians to meet those needs. (Carter, Vol. 10, pp. 1715-16; see also Jt. Ex. 4, pp. 58-59, 382-511). Moreover, UNC Hospitals-RTP would have the same provider number as UNC Hospitals, so the same medical staff that performs surgery in Chapel Hill could do so at UNC Hospitals-RTP. (Carter, Vol. 10, pp. 1716-17; see also Jt. Ex. 4, p. 152; Hadar consistent testimony at Vol. 8, pp. 1464-65).

107. UNC already serves a large number of Durham County residents even without having a hospital in Durham County. Moreover, around one-half of patients in a hospital may not need surgery, and the hospitalists that would provide those services at UNC Hospitals could also provide those services at UNC Hospitals-RTP. (Carter, Vol. 10, pp. 1718-19).

108. The UNC Application further supported the need for UNC Hospitals services in Durham County by describing how UNC Hospitals-RTP "represents an exciting opportunity to develop a new hospital facility with innovation as a central design tenet." (Jt. Ex. 4, p. 59). Mr. Carter explained that UNC felt that this opportunity to build a new hospital in Durham County, which had not presented itself for over 40 years, would allow UNC to provide care in a more modern, unique, and innovative way, as it described doing at its other facilities. (Carter, Vol. 10, p. 1720; Jt. Ex. 4, pp. 58-61).

109. The UNC Application provided examples of its "long history of embracing innovation to deliver the highest quality care with the best patient experience." (Jt. Ex. 4, pp. 60-61). In developing this application, administrators of REX Holly Springs and Johnston Health Clayton provided input of lessons learned from the development of these relatively new hospitals that could be incorporated into the development of UNC Hospitals-RTP. (Carter, Vol. 10, pp. 1721-23; Jt. Ex. 4, pp. 60-61).

110. As a fourth supporting reason, UNC explained that UNC Hospitals-RTP meets the need for acute care beds by providing lower acuity community hospital beds in particular, as it projected that convenient, local access to community hospital services was the primary driver of need for additional acute care beds in the service area. (Jt. Ex. 4, pp. 62-69; Carter, Vol. 10, pp. 1723-30).

111. UNC identified certain lower acuity, high volume services as "selected services," and then analyzed Truven data to illustrate how, "despite the growth at existing tertiary and quaternary facilities in Durham, the basis of this growth was the need for lower acuity, community hospital services." (Jt. Ex. 4, p. 65; Carter, Vol. 10, p. 1726).

112. UNC demonstrated that of the existing hospitals in Durham County, Duke Regional is the fastest growing. (Jt. Ex. 4, p. 64; Carter, Vol. 10, p. 1727). UNC then showed that the selected services were experiencing greater growth than other services in the existing Durham hospitals as a whole, and at DUH and Duke Regional in particular. (Jt. Ex. 4, p. 65; Carter, Vol. 10, pp. 1727-29).

113. UNC further demonstrated that south Durham County residents are seeking lower acuity services more than the central and north regions of Durham County, with over 94 patients daily seeking lower acuity services at existing hospitals. (Jt. Ex. 4, p. 66; Carter, Vol. 10, pp. 1731-33).

114. The UNC Application showed that UNC currently provides the most days of care and experiences the greatest growth for Durham County residents out of all other hospitals except for Duke facilities, and that out of those patients, the highest volume originates from the south region of Durham County. (Jt. Ex. 4, pp. 68-69; Carter, Vol. 10, pp. 1734-36).

115. The UNC Application further showed that UNC Hospitals-RTP meets the need for ORs by providing additional hospital-based ORs, which are well-utilized and provide flexibility and capacity not otherwise available when those ORs are placed in an ambulatory surgical facility. (Jt. Ex. 4, pp. 69-71). Notably, UNC pointed out that while inpatient surgeries have grown at a slower rate than outpatient surgeries statewide, that trend is the opposite in Durham County. (Id. at pp. 69-70; Carter, Vol. 10, pp. 1736-37). UNC also indicated that there has been significant growth in outpatient ORs at ASCs, but that hospital-based ORs would provide the flexibility to meet the need for inpatient surgeries while still allowing for outpatient surgeries to be performed as well. (Jt. Ex. 4, pp. 70-71; Carter, Vol. 10, pp. 1737-38).

116. UNC also supported the need for other services at UNC Hospitals-RTP, including observation beds, procedure rooms, C-Section rooms, imaging, laboratory, and other services, which are needed to support the patients to be seen at UNC Hospitals-RTP. (Jt. Ex. 4, p. 71; Carter, Vol. 10, p. 1738).

117. Based on the information UNC provided, the Agency found UNC's analysis of need to be reasonable and adequately supported. (Jt. Ex. 1, []p. 1512; Hale, Vol. 2, pp. 232-34).

. . . .

iii. Projected Utilization

125. The third element of Criterion (3) evaluates the reasonableness and adequacy of the support for the applicant's projected utilization. (Hale, Vol. 2, p. 235).

126. The Agency does not require applicants to use particular assumptions or methodologies to develop their utilization projections; instead, the assumptions and methodology used by each applicant must be reasonable and adequately supported. (Cummer, Vol. 4, p. 670; Sandlin, Vol. 6, pp. 1115-16).

127. Ms. Sandlin acknowledged that projected utilization at a facility may not necessarily line up with an applicant's actual experience for various reasons. (Sandlin, Vol. 7, pp. 1193-94).

128. The need methodology and projected utilization for the UNC Application were contained in Form C Utilization – Assumptions and Methodology in Section Q of the application. (Jt. Ex. 4, pp. 141-60). UNC projected utilization for the acute care services, surgical services, and ancillary and support services proposed in its application. (Jt. Ex. 1, pp. 1512-20; Hale, Vol. 2, pp. 236-39).

129. UNC used Truven data as the basis for its utilization projections, which both the Agency witness and expert witnesses agreed is frequently utilized by applicants and is a reliable source of data. (Hale, Tr. pp. 237-38; Meyer, Vol. 5, pp. 941-43; Carter, Vol. 11, pp. 1953-55).

130. At the hearing, Mr. Carter explained in detail the assumptions and methodologies used in the UNC Application. The UNC Application began by describing the service area and emphasizing the focus on Durham County, which "sets the stage for" UNC's focus on Durham County in the methodology. (Jt. Ex. 4, pp. 141-42; Carter, Vol. 10, pp. 1739-40).

a. Selected Services

131. The UNC Application next discussed acute care bed utilization, looking first to all days of care for Durham County residents statewide. (Jt. Ex. 4, p. 142; Carter, Vol. 10, p. 1740). Mr. Carter notes that while many methodologies look no further than this, the UNC Application took the extra step of identifying certain high acuity services that it would exclude from the potential days of care to be provided at UNC Hospitals-RTP, as UNC did not propose to provide high acuity, tertiary and quaternary services at UNC Hospitals-RTP. (Jt. Ex. 4, pp. 142-43; Carter, Vol. 10, pp. 1740-41).

132. The remaining services utilized by UNC were called the Selected Services. (See Jt. Ex. 4, p. 143).

133. The decision to exclude certain services was the product of discussions within UNC and the expertise of Mr. Carter. Certain services like cardiac catheterization were excluded because there was no need for a cardiac catheterization unit in the SMFP; other services like neurosurgery could have been included, but given that UNC Hospitals is located nearby, it made sense not to duplicate those services. Moreover, given that UNC Hospitals-RTP is proposed to be a community hospital, UNC prioritized lower-acuity, high-frequency, high-volume cases. (Carter, Vol. 10, pp. 1744-45).

134. UNC decided not to include ICU services at UNC Hospitals-RTP in part based on its recent experience developing community hospitals in Wake and Johnston Counties. Through those facilities, UNC learned that it did not make sense to develop ICU units due to the low volume of patients needing those services compared to the resource-intensive staffing that is required for those beds. (Id. at pp. 1763-65).

135. As explained in the UNC Application, the rooms at UNC Hospitals-RTP were designed to be flexible spaces that would be built to standards such that they could provide ICU-level care as needed. (Jt. Ex. 4, p. 38). If UNC Hospitals-RTP learns as it begins operating that more ICU beds are needed, it could decide to make those beds permanent ICU beds, which would not require any additional

construction or renovation, or any CON approval. (Carter, Vol. 10, pp. 1761-62, 1765).

136. UNC accomplished the exclusion of high acuity services from its analysis by removing diagnosis related groups ("DRGs") associated with the excluded high acuity services from the dataset. (Carter, Vol. 10, pp. 1741-42, Vol. 11, pp. 1897-98). The exclusion of these services resulted in a 31.1 percent reduction in 2019 days of care for Durham County residents. (Jt. Ex. 4, p. 143; Carter, Vol. 10, pp. 1742-44).

137. While the Agency does not require applicants to exclude services in its methodology, UNC chose to do so to underscore the conservativeness of its projections and to reiterate UNC's intention not to develop a quaternary academic medical center in Durham County. (Carter, Vol. 10, pp. 1742-43).

138. Ms. Sandlin did not conduct any analysis utilizing DRG weights to determine the reasonableness of UNC's projections. (Sandlin, Vol. 7, p. 1222; Carter, Vol. 10, pp. 1767-68). She also opined that there is no specific cutoff or threshold for DRG weights that are associated with ICU level of care. (Sandlin, Vol. 7, p. 1223).

139. Mr. Carter likewise opined that there is no bright-line rule for a DRG weight for ICU services. (Carter, Vol. 10, pp. 1756-58).

140. Mr. Carter even analyzed the data UNC relied upon in its analysis and discovered that had UNC applied a bright-line rule excluding DRG weights of over 3.5, only approximately ten percent of the patient days of care for UNC Hospitals-RTP were over that threshold. (Id. at pp. 1759-61).

141. Moreover, those patients without exception had a comorbid condition or major complication that led their condition to progress beyond a 3.5 DRG weight. In those cases, if UNC Hospitals-RTP could not provide the higher level of care needed, they could be transferred to an appropriate facility. (Id. at pp. 1760-61).

142. Ultimately, even if there were ICU patients that were not excluded from UNC Hospitals-RTP's selected services

patients, the projections in the UNC Application would not be impacted. (Id. at p. 1762).

143. Ms. Sandlin created and utilized a Venn diagram as a demonstrative exhibit to show the alleged overlap between UNC's selected services, ICU, post-ICU, and pediatric patients. (Duke Ex. 227). On cross-examination, however, Ms. Sandlin admitted that she did not know what percentage each of the "bubbles" or "circles" on her diagram represented for each service and that her exhibit was not drawn to scale. (Sandlin, Vol. 7, pp. 1218-20). Ms. Sandlin further acknowledged that she did not quantify the numbers or percentage of patients that the diagram was intended to represent. (Sandlin, Vol. 7, p. 1220; Carter, Vol. 10, pp. 1765-67).

144. Regardless of the exclusion of certain high acuity services, UNC Hospitals-RTP will be able to stabilize high acuity patients in an emergency in need of tertiary or quaternary care and transfer them to another hospital that can treat their condition, as it does at its other community hospitals in the greater Triangle area. (Carter, Vol. 10, pp. 1745-46; Hadar, Vol. 8, p. 1454).

b. Methodology

145. Next, UNC projected potential days of care for the selected services in Medicine, Surgery, and Obstetrics through 2029, which is the third project year, using a CAGR based on historical growth rate for those services. (Jt. Ex. 4, pp. 143-44; Carter, Vol. 10, pp. 1746-47). Duke, in its expert testimony, did not criticize UNC's growth rates or methodology included on page 144 of the UNC Application. Mr. Carter opined the growth rates and methodology to be reasonable based on the historical growth rates for Durham County. (Carter, Vol. 10, p. 1747). UNC then showed the potential days of care for Durham County residents for the first three fiscal years of the project. (Jt. Ex. 4, p. 144; Carter, Vol. 10, p. 1747).

146. After that, UNC discussed its market share assumptions for UNC Hospitals-RTP, which is typically analyzed for any new healthcare facility that needs to project a volume of services to be provided. (Carter, Vol. 10, pp. 1747-48). Since UNC already treats many Durham County

patients at its existing facilities outside of Durham County, UNC conservatively projected that UNC Hospitals-RTP would serve three-fourths of UNC's existing market share of Durham County residents. (Jt. Ex. 4, p. 145; Carter, Vol. 10, pp. 1748-50). In the third full project year, this results in a 7.7 percent market share of Durham County patient days for the selected services, leaving 92.3 percent of Durham County patient days to be treated at any other facility in the state. (Carter, Vol. 10, pp. 1750-52).

147. After isolating Durham County and narrowing down days of care based on selected services and UNC's market share of Durham County patient days, UNC was then able to project the patient days by service for Durham County residents, yielding an average daily census ("ADC") of 26.5 patients in the third project year. (Jt. Ex. 4, p. 146; Carter, Vol. 10, pp. 1768-69).

148. The next part of the methodology in the UNC Application demonstrated why the 26.5 ADC was reasonable. UNC noted that its 2019 ADC for Durham County residents for selected services at its existing facilities was 24.4. This highlighted how reasonable and conservative it is to project that UNC Hospitals-RTP would serve only about two more patients per day than UNC currently serves, after UNC Hospitals-RTP is open and operational. (Jt. Ex. 4, p. 146; Carter, Vol. 10, p. 1769). UNC also provided more information about its in-migration assumptions. (Jt. Ex. 4, pp. 146-47; Carter, Vol. 10, pp. 1769-70).

149. UNC further highlighted the conservativeness of its methodology by noting that the amount of patients UNC Hospitals-RTP projects to serve is only part of the projected growth of Durham County residents over the next ten years. (Jt. Ex. 4, p. 148; Carter, Vol. 10, pp. 1770-71). In comparison, the Duke Beds Application proposed to increase patient days by roughly 40,000 in less than ten years. (Jt. Ex. 2, p. 95; Carter, Vol. 10, pp. 1771-72). Based on this observation, Mr. Carter opined that it was not unreasonable for the UNC Application to project to reach 10,700 patient days over a ten-year period of time, especially since UNC already had more patient days for these lower acuity services at hospitals outside of Durham County. (Carter, Vol. 10, pp. 1772-73).

150. In its Comments, Duke claimed that UNC relied on a shift in volume to support its projections. (Jt. Ex. 1, pp. 176-78; Sandlin, Vol. 6, p. 990). UNC responded, however, that this claim was incorrect, because UNC was taking a portion of the new growth in patient days in Durham County. (Jt. Ex. 1, pp. 309-12; Carter, Vol. 10, pp. 1773-75). Regardless, Ms. Sandlin acknowledged that it is reasonable in theory to assume that developing a facility in an area where patients live will cause the existing market share for that provider to increase. (Sandlin, Vol. 6, pp. 1115-16).[4]

151. Ms. Sandlin testified that UNC's projections were unreasonable because the patients that UNC currently treats are going to UNC Hospitals for specialty services. (Id. at pp. 994-96). Mr. Carter refuted Ms. Sandlin's testimony, opining that Ms. Sandlin ignored UNC's exclusion of high acuity patients in its methodology. (Carter, Vol. 10, pp. 1775-76). Moreover, Ms. Sandlin acknowledged that she had not done any analysis of the acuity level of services provided to Durham County patients currently seeking care at UNC. (Sandlin, Vol. 7, pp. 1159-60).

152. UNC also projected emergency department ("ED") utilization in its assumptions and methodologies. (Jt. Ex. 4, pp. 149-51; Carter, Vol. 10, pp. 1776-77). A hospital is required to have an emergency department in North Carolina, though there are no statutes or rules that apply to emergency department projections. (Sandlin, Vol. 7, p. 1215; Carter, Vol. 10, pp. 1778-79).

153. UNC's ED utilization projections were not based solely on ED admissions in Durham County; rather, it analyzed all ED admissions of Durham County residents receiving care throughout the state. (Jt. Ex. 4, p. 150; Carter, Vol. 10, pp. 1777-78). As Mr. Carter opined, even

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4. At several points in its final decision—most notably, findings 150 and 155—the ALJ used language that signaled the existence of conflicts in the evidence without explicitly clarifying which testimony it deemed more credible. While these areas of the final decision were not specifically challenged on the basis of indecisive wording, we note that, in other areas of our caselaw, a gesture to conflicts in the evidence without an explicit resolution by the factfinder may support a challenge on appeal to the finding in question. We therefore note that the better practice for a factfinder is to explicitly, rather than implicitly, signal how it resolves conflicts in evidence.

if the ED utilization projection methodology was wrong, as a hospital, UNC Hospitals-RTP is required to include an ED, and there is no standard the Agency applies to ED utilization that would cause the UNC Application to not be approvable. (Carter, Vol. 10, pp. 1778-79).

154. UNC began projecting OR utilization by assuming that each surgical inpatient is one surgical inpatient case. (Jt. Ex. 4, pp. 155-56; Carter, Vol. 10, p. 1779). UNC then analyzed projected outpatient cases and concluded that there would be 1.5 outpatient surgeries for every inpatient surgery. (Jt. Ex. 4, p. 155; Carter, Vol. 10, pp. 1779-80).

155. Although Duke's expert witness testified that UNC's OR utilization projections were unreasonable because its acute care beds projections were unreasonable, both of UNC's expert witnesses refuted this testimony. Mr. Carter opined that UNC's OR utilization projections were conservative. The projections showed that some of the surgical cases would need to be performed in procedure rooms based on the relatively small capacity of 2 ORs in UNC's proposal. (Carter, Vol. 10, p. 1781). Mr. Meyer opined that UNC's projections were reasonable, and conservative based on his experience in healthcare planning. (Meyer, Vol. 5, pp. 943-44).

156. UNC similarly projected utilization for imaging and ancillary services, observation beds, procedure rooms, and LDR and C-Section rooms. (Jt. Ex. 4, pp. 151-55, 159-60).

157. Based on the information provided by UNC, the Agency found UNC's projected utilization to be reasonable and adequately supported, because UNC:

(1) used publicly available data to determine Durham County residents' potential days of care for UNC Hospitals-RTP's projected services,

(2) used an historical 2-yr compound annual growth rate ("CAGR") to project days of care going forward, and

(3) based its projected surgical, obstetrics, emergency, imaging/ancillary, and observation bed services on historical Truven data for Durham County

> residents, relevant historical UNC Hillsborough experience, or UNC Health services for Durham County residents.
>
> (Jt. Ex. 1, p. 1520; Hale, Vol. 2, pp. 239-40).
>
> 158. The Agency also found UNC's projection that 90 percent of its patient population would come from Durham County to be reasonable because the southern part of Durham County was highly populated, and any nearby Wake County residents have a number of healthcare and hospital choices in Wake County. (Hale, Vol. 2, p. 317).

In light of these findings, the ALJ made the following conclusions of law:

> 45. To conform with Criterion (3), an applicant's projected patient origin, demonstration of need, and projected utilization must be reasonable and adequately supported.
>
> 46. The Agency correctly determined that UNC's projected patient origin for UNC Hospitals-RTP, including 90 percent Durham County residents and its conservative 10 percent in-migration assumption, was reasonable and adequately supported.
>
> 47. The Agency also correctly determined that UNC's demonstration of need for UNC Hospitals-RTP based on the population growth and aging of the population in Durham County, the need for a new hospital in Durham County (particularly the southern area), the need for UNC-Hospitals' hospital-based services in Durham County, and the need for acute care beds (especially community hospital beds) and ORs in Durham County, was reasonable and adequately supported.
>
> 48. The Agency further correctly determined that UNC's projected utilization for all service components at UNC Hospitals-RTP was reasonable and adequately supported.
>
> 49. Substantial evidence in the record of this case supports the Agency's determination that the UNC Application was conforming with Criterion (3).

As reproduced above, these findings and conclusions demonstrate that the ALJ extensively considered UNC's proposal with respect to the service of in-county patients. While we will not belabor the issue by reciting the support for each of the more than eighty findings by the ALJ

pertaining to Criterion 3 generally, we specifically note that the alleged underprediction of patient days provided by UNC's proposed facility in light of the absence of high-acuity services—one of the primary issues raised by Duke in this appeal—was considered and rejected at finding 151, *et seq*. This finding was supported by testimony in the record indicating that, despite Duke's expert having opined that UNC overestimated its patient day projections at the new facility, UNC's projection methodology specifically accounted for the absence of high-acuity services at the new facility—a projected patient reduction of 31 percent. Similarly, Duke's argument on appeal that the UNC application unrealistically projected the number of patients originating from Durham County to be served was also addressed and rejected by the ALJ on the basis that UNC statistically grounded its claims about the relative need for the facilities in Durham County and in-migration rates at comparable UNC facilities, with the ALJ consistently noting that UNC conservatively projected its Durham-resident patient volume to account for such considerations. These findings, too, were supported by testimony on the record.

Despite this evidentiary support in the ALJ's final decision, Duke asks us to overturn the result below on the basis of alleged failures in the reasoning of the Agency. However, our task on appeal is not to evaluate the reasoning of the Agency, but the reasoning of the ALJ. *Compare* N.C.G.S. § 150B-51 (2023) (governing appeals from the Office of Administrative Hearings to the Court of Appeals) *with* N.C.G.S. § 150B-23 (2023) (governing appeals from the Agency to the Office of Administrative Hearings); *see also AH*, 240 N.C. App. at 98. Where the reasoning of the ALJ is supported by substantial evidence, we will not overturn the ALJ's final decision simply because the ALJ weighed the evidence in a manner unfavorable to the appellant, *Mills*, 251 N.C. App. at 189; and, here, the ALJ's decision was amply supported. We will not, therefore, overturn its determination that UNC's application conformed with Criterion 3.

D. UNC's Compliance with Criterion 12

[4] Finally, we address whether the ALJ properly affirmed the Agency's conclusions as to UNC's compliance with N.C.G.S. § 131E-183(a)(12). N.C.G.S. § 131E-183(a)(12), or "Criterion 12," provides that a certificate of need applicant

> shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and

> charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

N.C.G.S. § 131E-183(a)(12) (2023). Duke argues that UNC's proposal was nonconforming with Criterion 12 in that the hospital's primary proposed location in RTP was subject to restrictive covenants not accounted for in the application, while the alternate proposed site occupies a property that straddles proposed expansion of a highway and is otherwise limited by power lines, a public greenway trail, and water hazards.

In its final decision, the ALJ affirmed the Agency's conclusion that UNC's CON application was in compliance with Criterion 12, making the following findings of fact:

> 200. Analysis of this Criterion contains three elements: (1) whether the cost, design, and means of construction proposed represent the most reasonable alternative; (2) whether the construction project will not unduly increase the cost of providing health services by the person proposing the project; and (3) whether energy-saving features have been incorporated into the construction plans. (Id.; Meyer, Vol. 7, pp. 1271-72).
>
> 201. The UNC Application satisfied the first element by (1) providing drawings of its site plan and floor plan in Exhibit C.1 and (2) explaining that the proposed construction and layout for the hospital was based on a "configuration that provides the most efficient circulation and throughput for patients and caregivers," based on "best practice methodologies," as well as "relationships and adjacencies to support functions while also preventing unnecessary costs." (Jt. Ex. 4, pp. 112-13, 233-39; Meyer, Vol. 7, p. 1273).
>
> 202. UNC satisfied the second element of Criterion (12) by explaining that while the UNC Hospitals-RTP project would be capital intensive, UNC set aside excess revenues to fund the project, such that the project could be completed without increasing costs or charges to the public to help fund it. (Jt. Ex. 4, p. 113). UNC provided a letter from the Chief Financial Officer of UNC Hospitals certifying the availability of accumulated cash reserves to fund the project. (Id. at p. 292; Meyer, Vol. 7, pp. 1273-74).
>
> 203. Finally, UNC satisfied the third element of Criterion (12) by showing that its proposed hospital would be energy

efficient and conserve water, and that UNC would develop and implement an Energy Efficiency and Sustainability Plan. (Jt. Ex. 4, p. 113; Meyer, Vol. 7, p. 1274).

i. Zoning of UNC's Primary Site

204. Because a CON is "valid only for the . . . physical location . . . named in the application," applicants also are required to identify a proposed site for a new facility. (N.C. Gen. Stat. § 131E-181(a); Jt. Ex. 4, p. 114; Meyer, Vol. 7, pp. 1272, 1282). The applicant should specify an address, a parcel number, or intersection of roads. (Meyer, Vol. 7, p. 1272).

205. The primary site for UNC Hospitals-RTP identified in the UNC Application is located in southern Durham County in the Research Triangle Park ("RTP") at the convergence of North Carolina Highway 54 and North Carolina Highway 147, also known as the Triangle Expressway. (Jt. Ex. 4, p. 114). At the time of the filing of the UNC Application, the property, also known as the Highwoods Site, was owned by Highwoods Realty Limited Partnership ("Highwoods"). (Id. at 115). UNC provided a Letter of Intent for UNC Health to purchase the property from Highwoods along with its application. (Id.at 517-23).

206. The CON Law does not regulate or even mention zoning. (Meyer, Vol. 7, p. 1281). Nonetheless, Section 4(c) of Criterion (12) in the Agency's application form is entitled "Zoning and Special Use Permits." (Hale, Vol. 2, p. 244). This Section requires an applicant to first describe the current zoning at the proposed site, and then, "[i]f the proposed site will require rezoning, describe how the applicant anticipates having it rezoned[.]" (Jt. Ex. 4, p. 115; Hale, Vol. 2, pp. 266-67).

207. The Agency contemplates that a proposed site for a project may not be properly zoned for the proposed project at the time the application is submitted, by asking applicants the questions posed in Section 4(c). (Hale, Vol. 2, pp. 246, 267).

208. The fact that a site identified in an application may need rezoning does not make an application nonconforming with Criterion (12) or non-approvable. (Id. at p. 267; Meyer, Vol. 7, pp. 1281-82, Vol. 8, p. 1398). The Agency

frequently approves applications that propose projects to be developed on sites that require rezoning before they can be used to develop the proposed services. (Hale, Vol. 2, p. 246; Meyer, Vol. 7, pp. 1277-78). In Mr. Meyer's 25 years of healthcare planning experience, he cannot recall a time when the Agency denied an application due to the fact that a site needed to be rezoned. (Meyer, Vol. 7, p. 1278).

209. Moreover, the Agency is tasked with applying the CON Law and related rules, not with considering an applicant's compliance with other laws like zoning ordinances. Therefore, the Agency does not review applicable zoning laws or restrictive covenants when it reviews an application. (Hale, Vol. 2, p. 266; *see also Craven Reg'l Med. Auth.* [*v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 57-58 (2006)]).

210. Rezoning of sites identified in CON applications typically does not occur until after a CON has been awarded. (Meyer, Vol. 7, p. 1277).

211. According to the UNC Application, UNC's primary proposed site "will require rezoning." UNC noted that it anticipated having the property rezoned:

> The proposed site is located in Research Triangle Park across the street from the Research Triangle Foundations Frontier and HUB RTP developments that have an SRP-C zoning designation. UNC Hospitals currently is working with land use counsel, the property owner, and Research Triangle Foundation management to have the property rezoned to permit hospital use. With the guidance of land use counsel, UNC Hospitals will engage with Durham Planning staff, the Durham Planning Commission, and the Durham Board of County Commissioners to complete the rezoning process. Additionally, UNC Hospitals will, with the cooperation of the Research Triangle Foundation, work with the Research Triangle Park Owners and Tenants Association (O&T) to amend the Research Triangle Park Covenants, Restrictions, and Reservations by resolution to permit hospital use. . . .

(Jt. Ex. 4, p. 115; Hale, Vol. 2, pp. 268-69).

212. Applicants are not required to submit letters of support with their CON application; however, it is common for CON applicants to do so. (Hale, Vol. 2, p. 260; Carter, Vol. 10, pp. 1790-91). The UNC Application included a letter of support from Scott Levitan, CEO of the Research Triangle Foundation ("RTF"). (Jt. Ex. 4, p. 512). Mr. Levitan's letter indicated that the RTF supported the UNC Application; however, it did not make any reference to the property being rezoned or restrictive covenants being amended. (Id.; Hale, Vol. 2, pp. 280-82).

213. UNC was not required to submit the letter of support from Mr. Levitan or anyone else on behalf of RTF to be approvable. (Hale, Vol. 2, pp. 280-81; Carter, Vol. 10, p. 1791).

ii. UNC's Primary Site in the Research Triangle Park

214. The RTP is an approximately 7000-acre university research park located in Durham and Wake Counties, with 5,600 acres, or 80 percent, located in Durham County. (Levitan, Vol. 5, pp. 774, 799-800). There are currently no people living in the RTP. (Id. at 897).

215. Scott Levitan is the President and CEO of the Research Triangle Foundation ("RTF"), a position he has held for approximately five years. (Id. at 769). In this position, Mr. Levitan reports to the RTF Board, which includes representatives of UNC, Duke, NC State University, and North Carolina Central University. (Id. at 773-74).

216. The RTF is a 501(c)(4) entity founded approximately 63 years ago for the purpose of facilitating coordination among UNC, Duke, and NC State University and to enhance the wellbeing of the residents of North Carolina. (Id. at 769-70). The RTF administers the activities of the RTP Owners and Tenants Association ("O&T"). (Id. at 770). The RTF also owns certain property within the RTP. (Id.).

217. There are two types of zoning within the RTP: Science Research Park ("SRP") and Science Research Park – Commercial ("SRP-C"). (Id. at 777-78). SRP-C zoning is more lenient than SRP zoning but only covers 101 acres in RTP known as the RTP Hub, which is a mixed-use development intended to serve as a "town center" for RTP. (Id. at 780-81). The Hub includes Boxyard, a retail center

containing food and retail vendors; Frontier, an innovation campus for startups and emerging companies; residential multi-family apartments; and other businesses not focused on scientific research. (Id. at 781, 829-31).

218. There are also restrictive covenants covering RTP that restrict the property to certain uses. (Jt. Ex. 1, pp. 191-255). According to Mr. Levitan, these restrictive covenants do not currently permit the development of a hospital at UNC's primary site. (Levitan, Vol. 5, p. 785).

219. The primary site for UNC Hospitals-RTP is adjacent to the RTP Hub. (Id. at 783-84). In the recent past, the RTF allowed a parcel of property adjacent to the RTP Hub to be rezoned from SRP to SRP-C to allow the development of a fire station in Durham County. The RTP also allowed a text amendment to the RTP restrictive covenants to allow a school on a particular parcel in Wake County. (Id. at 782-83, 895-96).

220. David Meyer is a 35-year resident of Durham County in addition to his healthcare planning expertise. Mr. Meyer opined that UNC's location adjacent to the RTP Hub made sense from a health planning perspective. He likened UNC Hospitals-RTP to REX Hospital's adjacency to Cameron Village in Raleigh, now known as the Village District, to support the notion that a hospital being adjacent to a multi-use district in the midst of a highly populated area is sensible. (Meyer, Vol. 7, pp. 1274-76, Vol. 8, pp. 1389-91).

221. Initially, UNC explored purchasing a site owned by Keith Corp. within the RTP, but not adjacent to the RTP Hub, and having the site rezoned to allow UNC to build a hospital there. When approached by Keith Corp. about this proposal, Mr. Levitan was not comfortable setting a precedent of SRP-C zoning in areas other than the Hub; however, Mr. Levitan eventually suggested that UNC approach Highwoods about purchasing its property adjacent to the Hub. (Levitan, Vol. 5, pp. 832, 839-42).

222. Mr. Levitan discussed UNC using the Highwoods Site for its proposed hospital at a [11 February] 2021, RTF Development Committee meeting. (Jt. Ex. 119; Levitan, Vol. 5, pp. 843-44). Following that meeting, Mr. Levitan emailed members of the RTF Development Committee

who were not affiliated with either Duke or UNC and obtained their approval to continue cooperating with UNC's proposal. (Jt. Ex. 117; Levitan, Vol. 5, pp. 844-49).

223. In particular, RTF Board member Smedes York stated: "I believe this could be positive as it 'anchors' the location without changing the 'sizzle' of the Hub area. We need the 'personality' of Boxyard and other parts of what we have planned. Rex Hospital's previous location was adjacent to Cameron Village which was a positive." (Jt. Ex. 117).

224. To change the zoning of the primary site, UNC would need to seek approval for rezoning from Durham County and would also need to seek approval from the RTP O&T to amend the restrictive covenants. (Levitan, Vol. 5, p. 785, 798). To Mr. Levitan's knowledge, there has never been a healthcare facility like a hospital permitted in the RTP. (Id.).

225. Although the ultimate decision to allow the development of UNC Hospitals-RTP on the Highwoods Site is up to the RTP's O&T, Mr. Levitan has already begun the process of running the proposal through the relevant committees for a recommendation to the RTP's O&T. UNC's proposal was first brought before the RTF Development Committee. Mr. Levitan believed he "had the imprimatur of the Development Committee to continue conversations in support of the hospital application on the part of the foundation . . . ." (Id. at 796-97). Based on this direction from the Development Committee, Mr. Levitan cooperated with UNC in its efforts to build a hospital within the RTP. (Jt. Exs. 15, 42; Levitan, Vol. 5, pp. 837-38).

226. Mr. Levitan did not discuss his letter of support with the RTF Board or Development Committee before signing it, as he is frequently asked to sign letters of support and does not generally bring those to the RTF Board or other committees for review. (Levitan, Vol. 5, p. 799).

227. Mr. Levitan gave conflicting testimony about whether he was aware Duke might be applying for the same need determined assets in Durham County as UNC. (Compare Levitan, Vol. 5, pp. 786-87 with pp. 822-23). Despite Mr. Levitan's apparent confusion, this Tribunal finds that Mr. Levitan appears to have been aware that Duke may have a conflicting interest with UNC's proposed hospital,

based on his [11 February] 2021 email to certain members of the RTF Development Committee. In this email, Mr. Levitan noted he was "[k]eeping conflicted folks out of the conversation"—i.e., people who were affiliated with either Duke or UNC—and sought their approval to recommend the Highwoods site to UNC. (See Jt. Ex. 119).

228. Mr. Levitan's Letter of Support indicated that the RTF supported UNC's Application; however, it did not make any reference to the property being rezoned or restrictive covenants being amended. (Id.; Hale, Vol. 2, pp. 280-82). At the time the letter was submitted, Mr. Levitan understood the letter would be used "as support for UNC's certificate of need application for a hospital in RTP." (Levitan, Vol. 5, pp. 790-92).

229. UNC reasonably believed its statements regarding the zoning of the primary site were accurate at the time UNC submitted its Application. In an email to Scott Selig and Tallman Trask, Levitan stated, "I think Duke is going to need to pursue its interests in this matter, but based on the direction from the DevComm meeting, we have cooperated with this initiative." (Jt. Ex. 42; Hale, Vol. 2, pp. 283-287). Similarly, in a [20 May] 2021 meeting of the RTF Development Committee, the meeting minutes reflected that at a prior meeting, that "committee suggested to UNC that they could pursue extending the SRP-C zoning across the street if Highwoods was interested in selling their land." (Jt. Ex. 15; Hale, Vol. 2, pp. 287-88).

230. The Agency's Team Leader Ms. Hale did not review any documents prior to the Agency decision that suggested UNC would not be able to have the primary site rezoned or the restrictive covenants amended. (Hale, Vol. 2, p. 291).

231. On or about [13 May] 2021, the Triangle Business Journal published an article discussing UNC's proposed new hospital in the RTP. (Jt. Ex. 130; Levitan, Vol. 5, p. 808). Following the publication of this article, Mr. Levitan was asked by the RTF Executive Committee to clarify his letter of support. (Levitan, Vol. 5, pp. 804, 816). The Executive Committee gave Mr. Levitan the language to include in his second letter verbatim. (Levitan, Vol. 5, pp. 808, 813-14, 827-28).

232. At the hearing and at his deposition, Mr. Levitan used the terms "clarify," "rescind," and "withdraw" interchangeably to mean the same thing. (Levitan, Vol. 5, p. 816). Given the text of the [12 July] 2021 Letter and Mr. Levitan's testimony, the [12 July] 2021 Letter was a clarification of the RTF's position on the UNC Application, rather than a rescission or withdrawal of support.

233. After the RTF Executive Committee decided a clarifying letter should be sent to the Agency, Mr. Levitan sent an email to the Agency stating that his letter of support, which he described as "an outdated correspondence" was included in the UNC Application. In that email, Mr. Levitan asked to speak with either Ms. Inman or Lisa Pittman, the Agency's Assistant Chief of Certificate of Need, regarding "the process and deadlines for submitting comment on UNC Health's application." (Duke Ex. 200; Hale, Vol. 3, pp. 332-33; Levitan, Vol. 5, pp. 810, 812-13).

234. Mr. Levitan subsequently spoke with Ms. Inman, who informed him that the deadline for submitting public comments to the CON Section had passed. Ms. Inman told Mr. Levitan he could still submit a letter and that she would "make every effort" to ensure it was seen by the CON Section. (Levitan, Vol. 5, p. 810).

235. After speaking with Ms. Inman, Mr. Levitan sent his second letter, dated [12 July] 2021 to the Agency. (Jt. Ex. 46). Mr. Levitan submitted his [12 July] 2021 letter to the Agency after the end of the public comment period in this Review. (Hale, Vol. 2, pp. 283, 308-09, 336). Mr. Levitan stated in the [12 July] 2021 Letter, in relevant part, that he was "writing to clarify [his] prior letter dated 13 April 2021," and that "[u]ntil a certificate of need has been awarded and any appeals to the determination of the Healthcare Planning and Certificate of Need Section have been exhausted, RTF will not consider a zoning change for the proposed site in RTP." (Jt. Ex. 46; Levitan, Vol. 5, pp. 818-19).

236. In a [3 September] 2021, letter to Jud Bowman, Chairman of the RTF Board, Vincent Price, President of Duke University, characterized Duke's position on the [12 July] 2021 Letter as follows:

> [Mr. Levitan] then sent a follow up letter on July 12th to the State CON analyst stating that the Foundation would not consider a zoning change until after the CON determination and any appeals. This second letter is also deeply troubling. It did not withdraw the endorsement by RTF of UNC's application. It continued to support placing a hospital within the RTP. It was also provided outside the prescribed public comment period, so cannot by law be considered by the State; thus, its purpose is unclear to me.

(Jt. Ex. 25).

237. Though the Agency received Mr. Levitan's [12 July] 2021 Letter, the Agency did not consider Mr. Levitan's second letter, and did not include the letter as part of the Agency File because the letter was submitted after the end of the public comment period. (Jt. Ex. 91; Hale, Vol. 1, pp. 177-78, 308-09, 336, 339). Mr. Levitan advised the RTF Executive Committee that he had submitted the clarifying letter and that it was submitted outside the public comment period. (Levitan, Vol. 5, pp. 814-15).

238. At the hearing, Mr. Levitan opined that UNC's description on page 115 of the UNC Application regarding the zoning of the primary site was accurate. (Id. at pp. 833-38).

iii. Issues Raised by Duke Regarding UNC's Proposed Sites

239. Duke's Comments raised issues regarding UNC's primary site and pointed to UNC's statement that rezoning was needed. Duke indicated that "the rezoning will require not only Durham County approval but also compliance with the applicable covenants and restrictions affecting Research Triangle Park to which the site is subject," and attached the RTP restrictive covenants to its comments. (Jt. Ex. 1, pp. 185, 191-255).

240. Duke had no knowledge or factual basis to support its comments regarding the UNC Application's primary site or conformity with Criterion (12).

241. Duke provided no expert testimony in support of its contention that the UNC Application was nonconforming with Criterion 12. (Sandlin, Vol. 6, p. 955).

242. Catharine Cummer was the only fact witness Duke called in its case. Ms. Cummer serves dual roles as regulatory counsel and in strategic planning for Duke and has primary responsibility for ensuring the preparation of all CON applications submitted by Duke. (Cummer, Vol. 3, pp. 410-11). Ms. Cummer was not tendered or accepted as an expert witness in this case. Ms. Cummer has never been qualified as an expert witness in any kind of case. She has no expertise in finance, is not a clinician and has never served as a healthcare or certificate of need consultant. Ms. Cummer has never been employed as a project analyst or in any other capacity by the Agency. She has never served on the SHCC or its subcommittees. (Cummer, Vol. 4, pp. 579-82). Ms. Cummer is not on the Real Estate Development Committee or any other committee of the RTF Board. She is not a member of the RTF Board of Directors. (Id. at p. 647).

243. Duke included multiple pages of comments regarding the primary and alternative sites proposed by UNC and its conformity with Criterion 12. Duke also included a copy of the RTP Restrictive Covenants in its Comments against the UNC Application. (Id. at pp. 638-39; Jt. Ex. 1, pp. 191-255). Ms. Cummer was sent a copy of the RTP Restrictive Covenants from Dr. Monte Brown. (Cummer, Vol. 4, p. 645).

244. Duke relied heavily upon its Comments filed against the UNC project as a purported basis for alleging Agency error in this matter and argued that the Agency failed to appropriately consider its Comments, in particular those comments regarding Criterion 12. In its Comments, Duke alleged:

> Notably, the Board [Research Triangle Foundation Board] has historically denied all rezoning applications to allow for health care facilities. In fact, DUHS is informed and believes that UNC has previously asked for permission to put a healthcare facility on the RTP campus itself, which was denied.

(Jt. Ex. 1, p. 185).

245. Ms. Cummer was primarily responsible for the preparation of the Duke Comments regarding Criterion (12). On

cross-examination, contrary to the above Comment, Ms. Cummer admitted she had no personal knowledge regarding any prior applications for rezoning related to healthcare facilities at the RTP and had no personal knowledge regarding what other applications, if any, had been submitted by UNC to the RTP. (Cummer, Vol. 4, pp. 646-49).

246. Instead, Ms. Cummer relied upon a discussion with Scott Selig, Vice President of Real Estate and Capital Assets for Duke University and a designated member of the Real Estate Development Committee of the RTF, for the factual basis of Duke's contentions in its Comments to the Agency. (Cummer, Vol. 4, pp. 646-47).

247. On cross-examination, Ms. Cummer's testimony was impeached by the following deposition testimony of Mr. Selig:

> Question: Okay. Well, regardless of who prepared it, there's a statement in here, right here it says, 'Notably, the board has historically denied all rezoning applications to allow for healthcare facilities.' Is that accurate?
>
> Answer: I have no idea.
>
> Question: Okay. Can you recall a time when the RTF board has denied rezoning for a healthcare facility?
>
> Answer: No.
>
> Question: Okay. The following sentence says, 'In fact, UNC has previously asked for permission to put a facility on the RTP campus itself, which was denied.' Is that accurate?
>
> Answer: I have no idea.
>
> Question: Do you know anything about UNC asking permission to put a facility on the RTP campus itself being denied?
>
> Answer: No.

(Jt. Ex. 157, p. 140; Cummer, Vol. 4, pp. 646-51). After such impeachment, Ms. Cummer agreed that she would defer to Mr. Selig's personal knowledge of such questions regarding

the history of the RTF and any submissions, approvals or denials made for zoning. (Cummer, Vol. 4, p. 652).

248. Ms. Cummer then testified that Dr. Monte Brown, Vice President of Administration for the Duke University Health System, had provided her with the factual basis for those representations made by Duke to the Agency. However, on cross-examination, Ms. Cummer's testimony was impeached with the following deposition testimony of Dr. Brown:

> Question: And with respect to the primary site in the RTP, why do you say that was not a viable site?
>
> Answer: Because we had always been told, the entire time I was here at Duke, that you can't put healthcare in the RTP.
>
> Question: Who had told you that?
>
> Answer: I don't know. It's kind of folklore. Scott [Selig], Tallman [Trask], my predecessor, we had always stayed out of it.

(Jt. Ex. 147, p. 39; Cummer, Vol. 4, p. 654). Ms. Cummer acknowledged that she did not speak with any other persons regarding the content of this section of the Comments. (Cummer, Vol. 4, p. 655).

249. At hearing, Dr. Brown could not recall the factual basis supporting Duke's contention in this regard. (Brown, Vol. 10, pp. 1630, 1634).

250. Despite Duke's comments opposing the proposed site for UNC Hospitals-RTP, Dr. Brown sent an email communication to other Duke representatives calling the UNC primary location a "prime location." (Jt. Ex. 12). Dr. Brown also sent an email stating that "DUHS honored the RTP rules and has purchased land at Page Road and Green Level Road to accomplish its goals outside the RTP. Had the RTP allowed for medical, we likely would have chosen differently." (Jt. Ex. 17).

251. Dr. Brown acknowledged he made no investigation or inquiry whether the zoning for the primary site proposed by UNC could be modified by the Durham County zoning authorities. (Brown, Vol. 10, p. 1633).

252. The unrefuted factual testimony from UNC established that there was no factual basis supporting Duke's contention that UNC had previously sought permission to put a healthcare facility on the RTP campus and was denied. In its Response to Comments, UNC disputed Duke's statements regarding UNC's primary site as UNC was "not aware of the Research Triangle Foundation Board purportedly historically denying all rezoning applications to allow for healthcare facilities[,]" nor was UNC "aware of any situation in which it asked for permission to put a healthcare facility on campus." (Jt. Ex. 1, p. 320). Ms. Hadar testified unequivocally, that UNC has *not* previously sought to put a facility on the RTP campus prior to the UNC Hospitals-RTP Application. (Hadar, Vol. 8, p. 1467).

253. Moreover, Ms. Hale's testimony established that a project analyst may, but is not required to, research information outside of the application to understand what is contained in an application. (Hale, Vol. 1, p. 193). Ms. Hale was aware of the Agency doing such additional research in one other review—the 2016 Wake County MRI Review. (Hale, Vol. 1, pp. 194-97). While zoning ordinances, real estate deeds, and restrictive covenants may be public documents that the Agency could locate and review, the Agency was not required to do so and did not feel the need to do so with respect to UNC's primary site. (Hale, Vol. 1, pp. 197-98, Vol. 2, pp. 300-01). Further, the Agency does not request additional information from applicants who are involved in a competitive review. (Hale, Vol. 2, pp. 277-78).

iv. The Alternate Site Identified in the UNC Application

254. UNC also identified an alternate site for its proposed new hospital. (Jt. Ex. 4, p. 114, n. 30). The alternate site is located along Highway 70 in Durham County and would not require any rezoning. (Id. at 515-16). The alternate site is also close to power, water, and sewer services. (Id. at 516).

255. Duke raised concerns about UNC's alternate site in its Comments alleging the following: "However, that site has even more fundamental obstacles to development than the primary site. . . . The bigger issue, however, is that the alternate site will be rendered unavailable for the

proposed use by a NCDOT highway project in planning stages. . . ." (Jt. Ex. 1, p. 186). For that reason, Duke took the position in its Comments that UNC's alternate site is not a viable possible location for UNC Hospitals-RTP. (Cummer, Vol. 4, p. 661).

256. By letter dated [3 September] 2021, during the Agency's review of the UNC and Duke Applications, Dr. Vincent Price, President of Duke University, sent a four-page letter to the Chair of the Board of Directors for the Research Triangle Foundation, Jud Bowman ("Dr. Price Letter"). (Jt. Ex. 25). In his letter, Dr. Price aired several grievances regarding the UNC Hospitals-RTP project, its proposed primary site in the RTP, and the support letters from Mr. Levitan regarding the same. Dr. Price's Letter represented to the RTF that:

> It seems to me that the only cure for this highly concerning matter is for the Board to recuse itself going forward from any decision that relates to the CON application or eventual award, regardless of who is successful in the CON process. Note that UNC's application does include an alternate site that does not require RTF action that does not require RTF rezoning.

(Id. at 3).

257. Thus, while the Comments filed by Duke represent that the alternate site is "not viable," the Dr. Price letter to the RTF makes no reference to Duke's public position on the alternate site and implies that the alternate site is viable.

258. Duke attempted to distinguish its position in these two documents by claiming that it was merely pointing out that UNC had represented the alternate location to be viable and that the "alternate site has nothing to do with the Research Triangle Park or Research Triangle Foundation, so there would be nothing for the board to do as to the viability or not of an alternate site." (Cummer, Vol. 4, p. 668). Dr. Brown confirmed in his testimony that he did not discuss whether this representation by Dr. Price was inconsistent with the representations in Duke's Comments. (Brown, Vol. 10, p. 1645). Though it could cite

no factual support for the same, Duke continued to stand by its Comments in Opposition. (Id. at 1652). Nonetheless, this answer did not explain why Dr. Price addressed UNC's alternate site at all if its existence was not relevant to the RTF.

259. Ms. Cummer, the author of the Comments, also reviewed and provided comments on a draft of Dr. Price's Letter prior to it being sent to the RTF (Cummer, Vol. 4, p. 666), and was therefore aware of the inconsistent representations made by Duke to the Agency regarding the alternate site and those made to the RTF regarding the same.

260. At hearing, Dr. Brown acknowledged that he provided the information in Duke's Comments about the proposed NCDOT highway project on UNC's alternate site. Yet, he also conceded that he did not investigate whether (1) the proposed alternate site had actually been acquired for the highway project or (2) whether there were any restrictions on what UNC could do with the alternate site property if it had not been acquired by NC DOT or if UNC had acquired the property. (Brown, Vol. 10, pp. 1635-36). Dr. Brown also testified that UNC admitted, in its application, that a highway project was planned for its alternate site. (Id. at p. 1635).

261. However, Mr. Carter clarified that the UNC Application provided information about the alternate site but did not speculate "as to the future of that parcel of land or how it may be used other than for a proposed hospital." (Carter, Vol. 10, p. 1792).

v. UNC Can Make a Material Compliance Request if it Ultimately Cannot Develop a Hospital at its Primary Site

262. A material compliance request is a letter to the Agency stating why the applicant cannot proceed with the project exactly as described in its application. (Hale, Vol. 2, pp. 247, 276-77; Meyer, Vol. 7, p. 1283). The applicant would include in its request the reasons why they could not develop the project at the site and identify an alternate site for the Agency to consider as a location for the assets awarded in the CON. (Hale, Vol. 2, pp. 247-48; Meyer, Vol. 7, p. 1283). Through this process, a modification in plans can

be deemed by the Agency to be in "material compliance" with the representations in the approved application.

263. The Agency routinely approves material compliance requests and has approved material compliance requests to develop projects at alternate sites. (Hale, Vol. 2, p. 248; Cummer, Vol. 4, pp. 680-81; Meyer, Vol. 7, p. 1283). For example, in 2018, Mr. Meyer assisted an ASC in making a material compliance request to the Agency seeking to develop its ASC in a location within Brunswick County at a different site. The Agency approved this request. (Jt. Ex. 100; Meyer, Vol. 7, pp. 1284-85).

264. Regardless of whether UNC develops UNC Hospitals-RTP at the primary site, UNC would be able to submit a material compliance request to the Agency to approve a new location for the facility. UNC could make a similar request if it ultimately was unable to have the primary site rezoned appropriately. (Meyer, Vol. 7, pp. 1285-86).

265. Notably, Duke itself experienced issues with a site identified in a 2018 CON application for ORs in Orange County. (Id. at p. 1286). The 2018 Orange County OR Review was a competitive review in which Duke and UNC both applied for 2 ORs in Orange County. (Cummer, Vol. 4, p. 681). The Agency ultimately awarded the CON to Duke, and UNC challenged this award in a contested case. (Id. at p. 681-82). Duke engaged Keystone Planning, Mr. Meyer's company, to develop Duke's application, and later serve as an expert witness, in that review. (Meyer, Vol. 7, pp. 1286-87).

266. In that review, Duke had leased a location on Sage Road, which location was approved by the Agency. However, during the course of the Agency's review of the application, Duke identified certain remediation and code issues that it believed made it financially more favorable for the project to be developed at a different location. In response, Duke determined that it could make a successful request for a material compliance determination to change the location. (Cummer, Vol. 4, pp. 685-88; Meyer, Vol. 7, pp. 1286-87).

267. Duke did not inform the Agency during the course of the review that it had identified potential issues with

its proposed site. (Cummer, Vol. 4, p. 691). Because the original site was still available to Duke during the course of the review, the "information in the application that the site was available was correct." (Id. at p. 693). According to Ms. Cummer, "[s]o unless an[d] until we were interested in seeking a different site or doing anything else, there was nothing to inform the agency of." (Id.)

268. In both his expert report and deposition testimony in the 2018 Orange County OR Review, Mr. Meyer emphasized that the issues with Duke's ASC site in its CON application were immaterial, as Duke could submit a material compliance request, which the Agency routinely approves. (Jt. Exs. 101, 102; Meyer, Vol. 7, pp. 1287-89).

269. Ms. Cummer also cited to an occasion when Duke previously withdrew a CON application after learning it had relied upon incorrect and overstated data. She explained that the data error was so significant that it made the application infeasible as presented. (Id. at pp. 697-98).

270. Mr. Meyer's opinion concerning UNC's conformity with Criterion (12) and the ability of an approved applicant to submit a material compliance request in the event of site issues is consistent between this Review on behalf of UNC and the 2018 Orange County OR Review on behalf of Duke. (Id.).

271. Mr. Carter agreed with the Agency's conclusion that the UNC Application was conforming with Criterion (12), as UNC provided all information requested by the Agency for this Criterion. (Carter, Vol. 10, p. 1790). Mr. Carter opined that the Agency's analysis of this Criterion was consistent with the way the Agency has analyzed Criterion (12) in previous reviews. (Id. at 1792). Mr. Carter also opined that the specific location of UNC Hospitals-RTP was not material to UNC's demonstration of need for this project, but rather the location of the facility within the southern region of Durham. (Carter, Vol. 11, pp. 1982-83).

272. Ms. Sandlin offered no opinions with respect to UNC's conformity with Criterion (12). (Sandlin, Vol. 6, p. 955; see also Jt. Exs. 54, 146).

273. The Agency considered Duke's Comments in its analysis of UNC's conformity with Criterion (12). In its analysis

> of Criterion (12), the Agency noted "there is some question as to whether or not the first site can be rezoned for a hospital" and indicated it had reviewed Duke's Comments. (Jt. Ex. 1, pp. 1575-76; Meyer, Vol. 7, pp. 1280-81, Vol. 8, pp. 1393-94). The Agency was aware that the site has not yet been rezoned and that Duke questioned the possibility of rezoning the site. (Id.).
>
> 274. Ultimately, the Agency found that UNC had adequately explained its proposed project and its plans for accomplishing the required rezoning, such that it was conforming with Criterion (12). (Jt. Ex. 1, pp. 1575-76; Hale, Vol. 2, pp. 274-75).

In light of these findings, the ALJ made the following conclusions of law:

> 73. The Agency correctly determined that the UNC Application identified a proposed site and adequately demonstrated that the cost, design, and means of construction of UNC Hospitals-RTP represent the most reasonable alternative, will not unduly increase the cost of service to the public, and incorporates energy saving features.
>
> 74. UNC provided adequate information requested by the Agency in the application related to Criterion (12), including describing how it anticipated having the property rezoned.
>
> 75. The Agency reasonably assessed potential zoning and restrictive covenant issues with the primary site for UNC Hospitals-RTP and correctly determined that the UNC Application was conforming with Criterion (12) nonetheless. Moreover, the Agency did not err in not seeking additional information regarding the zoning and restrictive covenants at the primary site. "There is no provision in [N.C.G.S.] § 131E-183, nor Chapter 131E, which permits the Agency to independently assess whether the applicant is conforming to other statutes." (Hale, Vol. 2, p. 266; see also *Craven Reg'l Med. Auth.*, 176 N.C. App. at 58[] . . .). Therefore, the Agency did not err in not engaging in further analysis of the zoning or restrictive covenants beyond what was contained in the Agency findings.
>
> 76. The letter of support from Mr. Levitan was not necessary to the approval of the UNC Application; nonetheless, Mr. Levitan's support letter was consistent with UNC's

> representations in the UNC Application and its Responses to Comments.
>
> 77. The Agency was correct to exclude Mr. Levitan's clarifying letter of [12 July] 2021 from the Agency File because it was submitted after the end of the public comment period. Had the Agency considered that letter and used it as a basis to deny the UNC Application, it would have been reversible error.
>
> 78. Mr. Levitan's clarifying [12 July] 2021 Letter did not state that the RTF would deny any efforts to rezone the primary site; instead, it simply noted that the RTF would not take action until a CON has been awarded and any appeals exhausted. (Jt. Ex. 46; see also Jt. Ex. 25). Thus, had the Agency considered the [12 July] 2021 Letter, the Agency would have been incorrect to use it as a basis for UNC's nonconformity with Criterion (12).
>
> 79. While Duke raised questions about UNC's alternate site, Duke presented no competent evidence as to the unavailability of that site. Neither Ms. Cummer nor Dr. Brown are qualified as an expert in real estate, condemnation, or highway construction. Their testimony suggesting UNC could not develop a hospital at the alternate site is unreliable, and the undersigned gives it no weight.
>
> 80. If UNC is ultimately unable to develop a hospital at the UNC Hospitals-RTP primary site due to zoning or restrictive covenant issues, UNC may submit a material compliance request for another suitable site, consistent with prior Agency decisions approving alternate sites following issuance of a CON. (See [N.C.G.S.] § 131E-181; Hale, Vol. 2, p. 248; Meyer, Vol. 7, pp. 1283-89; Jt. Exs. 100-102). The Agency has the discretion to evaluate any request to develop the proposed hospital at a different location and determine whether such project would be in material compliance with UNC's representations in the UNC Application. [N.C.G.S.] § 131E-189(b).
>
> 81. Substantial evidence in the record supports the Agency's determination that the UNC Application was conforming with Criterion (12).

Here, while the ALJ's decision critiques at length Duke's failure to ground its contentions concerning medical providers' historical inability

to create facilities in RTP in fact, it does admit that the primary location is currently subject to zoning requirements and restrictive covenants that would, as they stand currently, prevent the construction of the proposed facility. Moreover, under N.C.G.S. § 131E-181(a), "[a] certificate of need shall be valid only for the defined scope, physical location, and person named in the application." N.C.G.S. § 131E-181(a) (2023). The application in this case concerned only the RTP location and not the proposed alternative location discussed by the ALJ, so the scope of the consideration should have been limited to the primary proposed location.[5] Thus, much of the ALJ's reasoning was unsound insofar as it treated the presence of the zoning requirements and covenants as unproblematic and considered the alternative site in the determination of whether the CON should issue.[6]

As we review the determination as to Criterion 12 only for substantial evidence on the record and do not interfere with the credibility and weighting determinations of the ALJ, *Surgical Care Affiliates*, 235 N.C. App. at 622-23, we note that the reasoning of the ALJ concerning UNC's compliance with Criterion 12 may have been independently supported, but not definitively so. Namely, even setting aside the ALJ's reasoning concerning the alternate location and its qualms with the support proffered by Duke for its challenge to UNC's CON application, the ALJ's invocation of prior cases where certificates of need have been awarded prior to zoning amendments and finding that RTP has recently altered

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5. In so holding, we express no opinion on whether the ALJ could have permissibly considered an alternate site for the proposed facility if that alternate site had been included in UNC's application.

6. Moreover, to the extent the ALJ used the subsequent possibility of UNC filing a material compliance request to justify its reliance on the availability of the alternate site, we have treated the material compliance request process arising under N.C.G.S. § 131E-181(b) as analytically independent of, and distinct from, the grant or denial of a CON *ab initio*. *See Craven*, 176 N.C. App. at 59 ("The CON Section granted [the] request for a material compliance determination after the CON was issued. [The petitioner] is asking this Court to review events which occurred after the issuance of the final agency decision."); *see also* N.C.G.S. § 131E-181(b) (2023). We understand the possibility of rectifying issues with a proposed facility as a remedial mechanism, not an invitation to lower the threshold at which an initial proposal is deemed satisfactory under our statutory criteria, and the absence of any caselaw in the course of our research in which the future possibility of a material compliance request has constituted substantial evidence to grant a CON appears to confirm this view. While the ordinary rule is that the ALJ is "authorized to establish its own standards in assessing whether an applicant" conforms with the criteria in N.C.G.S. § 131E-183(a), this rule only applies where review requirements have not been specified by our General Assembly. *AH*, 240 N.C. App. at 100; *see also* N.C.G.S. § 131E-177(1) (2023). In this case, our General Assembly clarified in N.C.G.S. § 131E-181(a) that an application's consideration is limited to the physical location described. N.C.G.S. § 131E-181(a) (2023).

its zoning restrictions to accommodate a fire station and its covenants to accommodate a school suggests it found the proposal at the location listed in UNC's application satisfactory under Criterion 12. However, given the possibility that the ALJ would not have awarded UNC the CON without the additional consideration of the proposed alternative site and a future material compliance request, we have no way of knowing whether the ALJ's conclusion would have followed from only the allowable considerations.

Under N.C.G.S. § 150B-51(b), "[t]he court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are[,]" *inter alia*, "[u]nsupported by substantial evidence . . . ." N.C.G.S. § 150B-51(b) (2023). For the reasons explained above, the ALJ's decisions as to Criterion 12 were, for purposes of our review, supported by substantial evidence. However, the use of considerations outside the scope of the ALJ's review casts doubt on whether the ALJ herself would have reached the same conclusions as to Criterion 12 when taking only the proposed location in the application into account. Accordingly, we remand to the ALJ for consideration of whether UNC's application, taking into account only the site proposed in its application and setting aside the possibility of a future material compliance request, satisfied Criterion 12.

In particular, the ALJ should give due consideration to the possibility that a potential inability to change RTP's applicable covenants could result in substantial cost being passed to patients. While the ALJ appears to have been satisfied with the likelihood that both the zoning restrictions and applicable covenants could be amended as necessary to accommodate the proposed UNC facility given a recent history of amendments to permit the construction of a fire station and a school, the final decision makes no meaningful reference to the financial ramifications of a failure to amend either. This is especially troubling with respect to the restrictive covenants, the termination of which requires the consent of the owners of 90% of the subject property and the amendment of which is subject to judicial scrutiny to ensure any changes are "reasonable in light of the contracting parties' original intent" in the event one of the affected property owners is dissatisfied with the amendment. *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 559 (2006); *but see Kerik v. Davidson Cnty.*, 145 N.C. App. 222, 228 (2001) ("[A]doption, amendment, or repeal of a *zoning ordinance* is a legislative decision that must be made by the elected governing board[.]" (emphasis added)). When considering the potential for property owners with an interest in

maintaining these covenants to disallow the construction of the new facility[7] in isolation of UNC's ability to pivot to a location not listed in its application, the ALJ may make a new determination in accordance with whether it is satisfied that UNC has demonstrated that the project "will not unduly increase the costs of providing health services" at the site proposed in the application. N.C.G.S. § 131E-183(a)(12) (2023).

CONCLUSION

We affirm the ALJ with respect to geographic access, competition, and Criterion 3; however, because we cannot determine whether the ALJ would have found UNC's application in conformity with Criterion 12 without considering matters outside the scope of its CON application, we remand to the Office of Administrative Hearings for further findings.

AFFIRMED IN PART; REMANDED IN PART.

Judge STADING concurs.

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

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

I concur with Parts A, B, and C of the majority opinion. However, I dissent from Part D because there was substantial evidence that UNC's application conformed with Criterion 12 and I would therefore affirm the ALJ's decision.

Criterion 12 provides that

> [a]pplications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

7. Or, perhaps more concerningly, consent only for an exorbitant price.

N.C. Gen. Stat. § 131E-183(a)(12) (2023); *see* N.C. Gen. Stat. § 131E-183(a)(1), (3). The majority holds the ALJ erred by considering evidence regarding a secondary location that was not included on UNC's CON application when determining whether the application for the RTP location conformed to Criterion 12.

The standard of review is set forth by section 150B-51 of the North Carolina General Statutes. "With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of [N.C.G.S. § 150B-51], the court shall conduct its review of the final decision using the whole record standard of review." N.C. Gen. Stat. § 150B-51(c) (2023). The whole-record test requires this Court to determine whether the Agency's decision is supported by substantial evidence. *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App 46, 52, 625 S.E.2d 837, 841 (2006) (internal citations omitted). Substantial evidence is relevant evidence that a reasonable mind could conclude supports a decision. *Parkway Urology, P.A. v. N.C. Dep't. of Health & Hum. Servs.*, 205 N.C. App. 529, 535, 696 S.E.2d 187, 192 (2010) (internal marks and citations omitted).

This Court may not "replace the agency's judgment as between two reasonably conflicting views" even if it may be possible to reach a different result if the matter were reviewed de novo. *Id.* "Rather, a court must examine all the record evidence – that which detracts from the agency's findings and conclusions as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency's decision." *N.C. Dep't. of Env't. & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (internal marks and citations omitted). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Dialysis Care of N.C., LLC v N.C. Dep't of Health & Hum. Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000) (internal marks and citations omitted).

The majority correctly points out that a CON is specific to what is listed on the application. N.C. Gen. Stat. § 131E-181(a) (2023) ("A certificate of need shall be valid only for the defined scope, physical location, and person named in the application."). While an ALJ may generally "establish standards and criteria or plans required to carry out the provisions and purposes of [a CON]", N.C. Gen. Stat. § 131E-177(1) (2023), the ALJ may not utilize requirements that conflict with what has been specified by our General Assembly, *AH N.C. Owner LLC v. N.C. Dept. of Health & Hum. Servs.*, 240 N.C. App. 92, 100, 771 S.E.2d 537, 542 (2015) (internal citations omitted).

Here, the ALJ considered a secondary location not included on the application. These considerations were error. However, as the majority states, the ALJ's decisions concerning Criterion 12 were supported by other allowable substantial evidence.

UNC provided drawings of its site plan and floor plan and explained how the construction was designed to be efficient for the provision of services based on "best practice methodologies" while preventing unnecessary costs. UNC also explained that even though the project would be capital intensive, there was funding set aside to ensure the project could be completed without increasing costs. A letter from the Chief Financial Officer of UNC Hospitals was included to certify the availability of funds to be used on this project. Additionally, UNC showed that it would design and implement an Energy Efficiency and Sustainability Plan to demonstrate that the proposed hospital would be energy efficient and conserve water. Although UNC's proposed site required rezoning, UNC anticipated having the property rezoned and indicated that it would work with Durham County and the Research Triangle Foundation to achieve the rezoning required. UNC also supplied a letter of support from the CEO of the Research Triangle Foundation. There was also testimony at the hearing indicating CON applications are almost never denied due to the fact that a site needs to be rezoned.

All of this evidence is permissible as it relates only to the primary site that is included on the application. *See Living Centers-Southeast, Inc. v. N.C. Dep't. of Health & Hum. Servs.*, 138 N.C. App. 572, 580, 532 S.E.2d 192, 197 (2000) ("Our review of the individual statutes within the CON Statute . . . indicates that this article grants applicants a full contested case hearing at which they are allowed to present testimony and *evidence contained in their applications*." (emphasis added)). I would hold that this is substantial evidence as a reasonable mind may accept this evidence as adequate in support of the conclusion that UNC's application conforms with Criterion 12.

Our standard of review demands we stop here. N.C. Gen. Stat. § 150B-51(b) (2023) ("The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are . . . *[u]nsupported by substantial evidence*." (emphasis added)). As UNC's application provided substantial evidence supporting the ALJ's decisions regarding Criterion 12, I would affirm that part of the ALJ's decision, as well.

FLETCHER HOSP., INC. v. N.C. DEP'T OF HEALTH & HUM. SERVS.

[295 N.C. App. 82 (2024)]

FLETCHER HOSPITAL, INC., D/B/A ADVENTHEALTH HENDERSONVILLE,
PETITIONER-APPELLANT AND CROSS-APPELLEE
AND
HENDERSON COUNTY HOSPITAL CORPORATION D/B/A PARDEE HOSPITAL,
PETITIONER-INTERVENOR-APPELLANT AND CROSS-APPELLEE
V.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLANT AND CROSS-APPELLEE
AND
MH MISSION HOSPITAL LLLP, RESPONDENT-INTERVENOR-APPELLANT AND CROSS-APPELLEE

No. COA23-1037

Filed 6 August 2024

1. Hospitals and Other Medical Facilities—certification of need application—failure to hold hearing—substantial prejudice not shown

An administrative law judge (ALJ) correctly determined that, in providing a written comment period in lieu of holding a public hearing on a certificate of need (CON) application (due to public health concerns during a pandemic), the N.C. Department of Health and Human Services failed to follow proper procedure because the public hearing requirement in N.C.G.S. § 131E-185(a1)(2) was mandatory. The ALJ erred, however, when it reversed the agency's decision (conditionally approving the CON application) on the sole basis that the failure constituted substantial prejudice as a matter of law rather than evaluating specific evidence of concrete harm—other than generalized market competition—to the two other healthcare providers who filed petitions for a contested case hearing. This portion of the ALJ's decision was reversed and the matter was remanded for additional consideration.

2. Hospitals and Other Medical Facilities—certificate of need application—determination of competitive review—agency's discretion

In a contested case hearing in which a certificate of need (CON) application for a freestanding emergency department was conditionally approved, the CON Section of the N.C. Department of Health and Human Services (the Agency) did not err by determining that CON applications submitted by other healthcare providers in the same timeframe were not subject to competitive review, as defined by 10A N.C.A.C. 14C.0202, where the Agency was given a broad delegation of authority to decide whether multiple applications were in

competition (such that the approval of one application may require denial of another). Where there was no showing that the Agency abused its discretion during its review process, there was no error in the Agency's decisions regarding the denial of discovery and the exclusion of evidence regarding unrelated third-party applications.

3. Hospitals and Other Medical Facilities—certificate of need application—conditional approval—conformance with statutory criteria—no error

In a contested case hearing in which a certificate of need (CON) application for a freestanding emergency department was conditionally approved, the administrative law judge (ALJ) did not err by affirming the decision of the CON Section of the N.C. Department of Health and Human Services (the Agency) on all substantive grounds, including that the CON application complied with the statutory criteria in N.C.G.S. § 131E-183(a)(3), (6), and (18a). The Agency was not required to conduct a comparative review between the instant CON application and one that was submitted—and rejected—a year earlier, nor was it required to perform an adverse impact assessment by the proposed project on competitors other than evaluating whether that the project would result in unnecessary duplication of existing services.

Judge GRIFFIN concurring in the result without separate opinion.

Appeal by Petitioner, Respondent, and Intervenors from final decision entered on 22 June 2023 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 14 May 2024.

Wyrick Robbins Yates & Ponton LLP, by Charles George, Frank S. Kirschbaum, and Trevor Presler, for petitioner-appellant.

Fox Rothschild LLP, by Maureen Demarest Murray, Terrill Johnson Harris, Kip D. Nelson, and Sean Thomas Placey, for petitioner-intervenor-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for respondent-appellant.

Baker, Donelson, Bearman, Caldwell & Berkowitz, a Professional Corporation, by Kenneth L. Burgess, Matthew A. Fisher, Iain M. Stauffer, and William F. Maddrey, for respondent-intervenor-appellant.

MURPHY, Judge.

Under N.C.G.S. § 131E-185, the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning and Certificate of Need Section ("the Agency") must hold a public hearing when the proponent proposes to spend five million dollars or more on a proposed facility. However, a challenge to the procedure before the Agency under N.C.G.S. § 150B-23 requires more than a showing of error; a petitioner must also show that substantial prejudice occurred as a result of that error. Here, where an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings reversed the conditional approval of a certificate of need ("CON") by the Agency solely based on the reasoning that the failure to hold a public hearing constituted substantial prejudice *per se* and the final decision is otherwise free of error on review, we reverse and remand the final decision.

BACKGROUND

This appeal arises from a CON application filed with the Agency on 15 February 2022 by Respondent-Intervenor-Appellant MH Mission Hospital, LLLP ("Mission") for the development of a freestanding emergency department in Arden, Buncombe County, conditionally approved by the Agency on 24 May 2022. Purporting to act out of concern arising from the pandemic, the Agency did not hold a public hearing pursuant to N.C.G.S. § 131E-185(a1)(2), instead attempting to substitute the required public hearing with an expanded opportunity for written comments. Petitioner-Appellees Fletcher Hospital Inc. d/b/a AdventHealth Hendersonville ("Advent" or "AdventHealth") and Henderson County Hospital Corp. d/b/a Pardee Hospital ("Pardee"), two other healthcare providers in the same region as the proposed facility, filed petitions for a contested case hearing in the Office of Administrative Hearings on 23 June 2022.

The ALJ, in an 85-page final decision, affirmed the Agency on all substantive grounds but nonetheless reversed the conditional approval on the basis that the Agency failed to conduct a public hearing. Advent, Pardee, Mission, and the Agency all appeal.

ANALYSIS

On appeal, the parties' arguments reduce to three broad categories. First, (A) all parties contest the ALJ's determinations as to the Agency's

failure to hold a public hearing during the pandemic. Mission and the Agency argue the procedures during the pandemic were, contrary to the ALJ's holding, legally adequate, while Advent and Pardee argue the ALJ erred in its determination that they did not suffer substantial prejudice. Second, (B) Pardee argues the ALJ erred both in conducting discovery and in its determinations as to the adequacy of discovery before the Agency, impermissibly disallowing evidence pertaining to two applications Pardee alleged should have been subject to a competitive review process alongside Mission's. Finally, (C) Advent and Pardee both argue the ALJ erred in finding Mission's application was compliant with three statutory CON criteria arising under N.C.G.S. § 131E-183(a); namely, Criteria 3, 6, and 18(a).

Our standard of review when reviewing an ALJ's final decision is governed by N.C.G.S. § 150B-51, which dictates that we apply either de novo review or the whole record test depending on the scope of the challenge:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C.G.S. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C.G.S. § 150B-51(b)-(c) (2023). Moreover, especially when applying the whole record standard of review, we are cognizant of the fact that, while an ALJ's final decision is the sole object of our review, the ALJ often sets out its findings and conclusions in relation to those of the Agency pursuant to its own contested case procedures in N.C.G.S. § 150B-23. *See* N.C.G.S. § 150B-23 (2023) (authorizing ALJ review of the Agency in a contested case in the event the Agency "(1) [e]xceeded its authority or jurisdiction[,] (2) [a]cted erroneously[,] (3) [f]ailed to use proper procedure[,] (4) [a]cted arbitrarily or capriciously[,] (5) [f]ailed to act as required by law or rule."). Given the challenge-dependent nature of the standard of review, we will specify before each subsection which standard we employ.

A. Failure to Hold a Hearing

[1] First, we address whether the Agency erred in failing to hold a public hearing concerning the Mission application, whether the absence of such a hearing substantially prejudiced Advent and Pardee, and what remedy, if any, applies. This argument is raised on appeal primarily by Mission and the Agency, but is also contested in part by Advent and Pardee in that the ALJ ruled that they did not suffer substantial prejudice due to the lack of a public hearing. As this issue is an alleged error of law in the ALJ's final decision, committed in its capacity reviewing the Agency for improper procedure, we review the matter de novo. N.C.G.S. § 150B-51(b)(4), (c) (2023).

As to Mission and the Agency's argument that a public hearing was not required during the pandemic, although the Agency concedes that a public hearing was required under the letter of N.C.G.S. § 131E-185(a1)(2), it nonetheless argues that such a hearing should not have been required in this case because of the exigent public health circumstances. While the Agency argues that it provided a period for the public to provide written comments in lieu of a public hearing and outlines the steps it took to communicate the availability of this alternative process to both interested parties and the public, it does not meaningfully contend that this alternative procedure satisfied the statutory requirement. Instead, it argues that providing a public hearing during the pandemic would have rendered it derelict in its statutory duties under N.C.G.S. § 143B-137.1.

N.C.G.S. § 131E-185(a1)(2) provides that, "[n]o more than 20 days from the conclusion of the written comment period, the Department [of Health and Human Services] shall ensure that a public hearing is conducted at a place within the appropriate service area if . . . the proponent proposes to spend five million dollars ($5,000,000) or more . . . ." N.C.G.S. § 131E-185(a1)(2) (2023). Meanwhile, under N.C.G.S. § 143B-137.1,

> [i]t shall be the duty of the Department [of Health and Human Services] to provide the necessary management, development of policy, and establishment and enforcement of standards for the provisions of services in the fields of public and mental health and rehabilitation with the intent to assist all citizens—as individuals, families, and communities—to achieve and maintain an adequate level of health, social and economic well-being, and dignity. Whenever possible, the Department shall emphasize preventive measures to avoid or to reduce the need for costly emergency treatments that often result from lack of forethought. The Department shall establish priorities to eliminate those excessive expenses incurred by the State for lack of adequate funding or careful planning of preventive measures.

N.C.G.S. § 143B-137.1 (2023). Even if the use of mandatory language in this general directive to the department could, under different circumstances, constitute a colorable basis for its failure to provide a public hearing during the pandemic, it is well established that, "when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322 (2012). "And[,] when that specific statute is clear and unambiguous, we are not permitted to engage in statutory construction in any form." *Id.* Regardless of the Agency's invocation of its general statutory duties under N.C.G.S. § 143B-137.1, we cannot ignore the statutory requirement of N.C.G.S. § 131E-185(a1)(2) that it hold a public hearing.[1] We therefore affirm the ALJ's determination that the Agency utilized improper procedure. *Cf. Fletcher Hosp. Inc. v. N.C. Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Health Care Plan. & Certificate of Need Section*, 293 N.C. App. 41, 47 (2024) ("[T]he Agency was required to hold a public hearing under the facts in this case, and its failure to do so was error.").

In the alternative, Mission and the Agency argue that the failure to hold a public hearing during the pandemic did not constitute reversible error per se before the ALJ because the failure to hold a public hearing did not substantially prejudice Pardee and Advent. They base

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1. Nor, as a practical matter, do we see written communications as equivalent to a public hearing. Anyone who lived, worked, and communicated through the pandemic can attest to the qualitative shortcomings of written communication relative to face-to-face contact. Even as a necessary evil during the height of COVID's spread, distanced engagement was never a true replacement.

this argument primarily on N.C.G.S. § 150B-23, which dictates that, in a contested case, a petitioner must "state facts tending to establish that the agency . . . has [] substantially prejudiced the petitioner's rights and that the agency, [*inter alia*,] [f]ailed to use proper procedure." N.C.G.S. § 150B-23 (2023). They also argue the ALJ misinterpreted caselaw in reversing the Agency's determination on this basis.

In its order, the ALJ ruled that the "[d]eprivation of AdventHealth's and Pardee's right to speak at a public hearing in and of itself is substantial prejudice." Mission and the Agency contest this ruling on the basis that, in our CON caselaw, "[t]he harm required to establish substantial prejudice cannot be conjectural or hypothetical. It must be concrete, particularized, and 'actual' or imminent." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Certificate of Need Section*, 235 N.C. App. 620, 631 (2014), *disc. rev. denied*, 368 N.C. 242 (2015). In particular, they argue the ALJ incorrectly relied on *Hospice at Greensboro, Inc. v. N.C. Dep't of Human Resources, Division of Facility Services*, 185 N.C. App. 1, *disc. rev. denied*, 361 N.C. 692 (2007), in making the determination that the deprivation of the right to a public hearing itself constituted substantial prejudice.

In *Hospice*, the matter at issue was whether the Agency's issuance of a "No Review" determination—a path to the approval of a medical facility exempt from the CON process—substantially prejudiced the appellant. *Id.* at 3, 7. In that case, we held that "the issuance of a 'No Review' letter, which results in the establishment of 'a new institutional health service' without a prior determination of need, substantially prejudices a licensed, pre-existing competing health service provider as a matter of law." *Id.* at 16. We explained our reasoning for the holding as follows:

> Because an applicant for a CON must "demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities," this interest (which the General Assembly has also determined to be a public interest) is vetted during the CON application process. Competing hospice providers, like HGI, may participate in the CON application process by filing "written comments and exhibits concerning a proposal [for a new institutional health service] under review with the Department." [N.C.G.S.] § 131E-185(a1) (2005). Such comments may include
>
> > a. Facts relating to the service area proposed in the application;

> b. Facts relating to the representations made by the applicant in its application, and its ability to perform or fulfill the representations made;
>
> c. Discussion and argument regarding whether, in light of the material contained in the application and other relevant factual material, the application complies with relevant review criteria, plans, and standards.

Id.

> Here, HGI was denied any opportunity to comment on the CON application, because there was no CON process. In fact, the CON Section's issuance of a "No Review" letter to Liberty effectively prevented any existing health service provider or other prospective applicant from challenging Liberty's proposal at the agency level, except by filing a petition for a contested case. We hold that the issuance of a "No Review" letter, which resulted in the establishment of a "new institutional health service" in HGIs service area without a prior determination of need was prejudicial as a matter of law.

Id. at 16-17. In other words, while we did not elaborate on whether and to what extent the denial of statutorily-required proceedings short of the total denial of an appellant's participation in the certificate of need process could constitute prejudice as a matter of law, we considered the written portion of the process particularly significant and emphasized the functional exercise of discussion and argument. *Id.* This renders *Hospice*'s application disanalogous to the instant case, as the holding in *Hospice* primarily concerns the availability of a substantive discussion process and the ability to receive comment, not the specific procedure utilized. In light of this limitation on the application of *Hospice*, we hold that the ALJ's reliance on this case was in error. *Hospice*'s analytical emphasis was placed on the availability of a commentary process to gather facts and hear argumentation, which was still present here. *Cf. Fletcher*, 293 N.C. App. at 49 ("Our determination in *Hospice at Greensboro* represents a narrow holding in a fact-specific case, and its guidelines apply to such instances where a petitioner is deprived of *any* opportunity to contest the applicant's proposal at the Agency level.").

Here, Advent and Pardee do not satisfy their burden to show substantial prejudice occurred. Setting aside the procedural harm done to Advent, Pardee, and the public when the Agency failed to hold a public hearing, the ALJ did not evaluate specific evidence on the record which

would indicate whether or not any concrete harm came to Advent and Pardee that was not the result of generalized market competition. As we have repeatedly held, "*mere* competitive advantage [is] an insufficient basis upon which to argue prejudice." *CaroMont Health, Inc. v. N.C. Dep't of Health & Hum. Servs. Div. of Health Serv. Regul., Certificate of Need Section*, 231 N.C. App. 1, 9 (2013) (emphasis added); *see also Parkway Urology, P.A. v. N.C. Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Certificate of Need Section*, 205 N.C. App. 529, 539 (2010) ("Rex's argument, in essence, would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in [N.C.G.S.] § 150B-23(a). . . . Rex was required to provide specific evidence of harm resulting from the award of the CON to CCNC that went beyond any harm that necessarily resulted from additional LINAC competition in Area 20, and NCDHHS concluded that it failed to do so."), *disc. rev. denied*, 365 N.C. 78 (2011).

Given the clarity with which the ALJ signaled that the sole basis for the reversal below was its application of *Hospice* and *ipso facto* substantial prejudice result, we reverse this portion of the final decision. However, just as the absence of a hearing does not automatically constitute substantial prejudice, our caselaw does not categorically preclude increased competition from constituting substantial prejudice; rather, to constitute substantial prejudice, a market competitor appealing to the ALJ must make a *specific* argument as to how that increased competition concretely affects their provision of services. *See Parkway*, 205 N.C. App. at 539 ("Rex reasons[] [that] any additional LINAC capacity at CCNC would necessarily lower the number of LINAC treatments performed at Rex and, as a result, have a substantial impact on Rex's revenues. Rex did not, however, quantify this financial harm in any specific way, other than testimony regarding the amount of revenue Rex receives from its LINAC treatments."). Here, as we are cognizant that our reversal of the ALJ's holding with respect to *Hospice* is likely to have an impact on its overall analysis with respect to substantial prejudice, we remand this case to the ALJ for further consideration of whether substantial prejudice existed on a basis other than per se substantial prejudice due to the hearing's absence.

B. Discovery and Evidentiary Rulings

[2] Next, we address Advent and Pardee's contentions that the ALJ both erred in its own discovery process and in its review of the adequacy

of discovery before the Agency, as well as errors in excluding purportedly relevant evidence. All of these alleged errors stem from the same underlying argument concerning the interpretation of an Agency regulation; namely, that the Agency should have treated two CON applications by third parties in the same timeframe as subject to competitive review alongside the Mission application. As we review issues of law in an administrative appeal de novo, *see* N.C.G.S. § 150B-51(b)-(c) (2023); *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Hum. Servs.*, 242 N.C. App. 666, 672 (2015), we evaluate anew whether the Agency misapplied the applicable regulation and whether, by extension, the ALJ erred in rejecting Advent and Pardee's allegations of error below. To the extent any further aspects of this issue remain after resolution of the interpretive component, "orders regarding discovery matters . . . will not be upset on appeal absent a showing of abuse of [] discretion[,]" *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 27, *disc. rev. denied*, 353 N.C. 371 (2001), nor will rulings concerning the exclusion of evidence. *Williams v. Bell*, 167 N.C. App. 674, 678, *disc. rev. denied*, 359 N.C. 414 (2005).

For their argument that the Agency should have treated two third-party applications as competitive, Advent and Pardee cite 10A NCAC 14C.0202, which defines "competitive review" as review in which "two or more applications [are] submitted to begin review in the same review period proposing the same new institutional health service in the same service area and the CON Section determines that approval of one application may require denial of another application included in the same review period." 10A NCAC 14C.0202 (2023). According to Advent and Pardee, the Agency—and, in reviewing the Agency, the ALJ—incorrectly determined that the applications of Mission and its alleged competitor could be reviewed individually, having cursorily "dismissed the possibility" that either application's approval could be mutually exclusive with the others'.

At the threshold, we note that, despite Advent and Pardee's characterization, the record reflects that the Agency does, in fact, implement an intake process for determining whether any given subset of CON applications are in competition. During a deposition while this case was before the ALJ, Agency staff offered testimony explaining why the Agency determined Mission's application and that of its alleged competitor were not in competition:

> Q. When did you refer to or think about this Rule 10A NCAC 14.0202 with regard to review of the [alleged competitor's] application?

A. Well, first I noticed that they weren't considered competitive reviews. At least I was not told they were competitive reviews when they were assigned to me. And during the course of the review I did not see anything in the two applications that would change that.

Q. How is the determination typically made by the agency for when applications are considered competitive? You mentioned you weren't told that it was competitive when assigned to you. Can you explain that to us, please?

A. Right. Initially, when two applications come in for the same review period for the same service in the same service area, an initial assessment is made by the management team checking the applications in about whether or not they appear like they could be competitive.

Q. Do you know who did that assessment concerning the two freestanding emergency department applications in Buncombe County?

A. No.

Q. Is there any formal documentation of that assessment in the agency file?

A. No.

Q. Looking at Deposition Exhibit 17, at the definition of "competitive review," Mr. McKillip, does the definition include at the end that approval of one application may require denial of another application included in the same review period?

A. Yes.

Q. If two applications could, at least theoretically, be approved, does the agency consider them not to be competitive?

A. As far as the initial review, it would depend—if it was clear they were not competitive, then they would be, as it was in this case, identified as non-competitive applications. If it's not clear at the initial check-in, then they might provisionally be considered competitive, and then the analyst would make the determination later, during the course of the review.

Q. Did you assume at the beginning of the review that these applications had been determined to be non-competitive by CON section management?

A. Yes.

Q. Did you do any analysis when you reviewed the Candler and Arden 2022 applications concerning whether they were competitive?

A. I did not see anything in the applications that would indicate that they had to be considered competitive applications.

Q. Does the agency frequently in reviews look at other information filed by an applicant in other applications?

. . . .

A. No.

Q. Does the agency look at other decisions that relate to the same type of service, like a freestanding emergency department, when reviewing an application for that service?

A. An analyst has discretion to look at prior findings.

Q. Mr. McKillip, the definition of "competitive review" does not state the agency is prohibited from looking at another application for the same service filed in the same review period if it determines the applications are not competitive; does it?

A. No.

Q. So in other words, there's no requirement, for example, that two different analysts be assigned to the review of those applications so that one analyst doesn't see both?

A. Correct.

Q. Would you agree that the definition of "competitive review" does not circumscribe the scope of what the project analyst can consider when reviewing the two applications during the review when they're non-competitive?

A. Yes.

Q. [] [W]hen you were reviewing the [alleged competitor's] application, what was your general approach to the review?

> A. I reviewed the application against the statutory criteria. There were comments after drafting an initial draft of the findings. I read the comments and response to comments and then make final edits to the first draft and I submit that to my cosigner.
>
> Q. If I understood your response, your sequence is to review the application first and to do initial draft of the findings and then look at the comments and response to comments; did I hear you correctly?
>
> A. Yes.

Agency staff then went on to conduct a review of both applications, observed that there was overlap in the proposed service area's zip codes, but nonetheless determined that the overlap did not cause the Agency to deviate from its initial determination that the two applications were not in competition.

Bearing this in mind, nothing in the language of 10A NCAC 14C.0202 mandates that the Agency employ a different procedure in determining whether two applications must be reviewed in tandem per the competitive review process. While Advent and Pardee argue that the language indicating competitive, in-tandem review of two applications occurs if "approval of one application may require denial of another application" required the Agency to employ such review if even the slightest chance of mutual exclusivity between the applications existed, this interpretation ignores the broad delegation of authority to the Agency authorized by the very same section. A full reading of the section reflects that competitive review occurs when "two or more applications [are] submitted to begin review in the same review period proposing the same new institutional health service in the same service area *and the CON Section determines that approval of one application may require denial of another application included in the same review period*." 10A NCAC 14C.0202 (2023) (emphasis added). In other words, the language makes clear that the determination of likelihood is entrusted to the discretion of the Agency, not fixed as a matter of law. While we do not foreclose the possibility that the Agency could abuse this delegation of authority, no such showing has been made here. Consequently, no error occurred under 10A NCAC 14C.0202.

Having so held, we are also satisfied that no further error occurred, as the Agency's adequate procedure for determining whether competitive review is warranted under 10A NCAC 14C.0202 rendered the denial of discovery and the exclusion of evidence concerning unrelated third-party applications appropriate.

C. Substantive Challenges

[3] Finally, we address Advent and Pardee's substantive challenges to the final decision arising under Criteria 3, 6, and 18(a) of N.C.G.S. § 131E-183(a). N.C.G.S. § 131E-183(a) provides, in pertinent part, as follows:

> (a) The Department shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued.
>
> . . . .
>
> (3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.
>
> . . . .
>
> (6) The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.
>
> . . . .
>
> (18a) The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact.

N.C.G.S. § 131E-183(a)(3), (6), (18a) (2023). As evaluating whether the ALJ erred in finding the Mission application compliant with these criteria is a substantive evaluation of the application by the ALJ, we "conduct [our] review of the final decision using the whole record standard of review." N.C.G.S. § 150B-51(c) (2023). "In applying the whole record

test, the reviewing court is required to examine all competent evidence in order to determine whether the [final] decision is supported by substantial evidence." *Surgical Care*, 235 N.C. App. at 622-23 (marks omitted).

Here, while we technically review the determination of the ALJ for substantial evidence on the record, we note that some of Advent and Pardee's arguments are better characterized as methodological critiques of the ALJ—and, indirectly,[2] the Agency—rather than challenges to the sufficiency of the evidence *per se*. Specifically, they contend that the Agency, which had found a CON application by Mission from one year earlier nonconforming with respect to Criteria 3 and 18(a), erred in determining that Mission's 2022 application *did* conform with Criteria 3 and 18(a) without conducting a comparative evaluation between the 2022 application and a similar, rejected application submitted by Mission in 2021. As this argument is unrelated to any specific finding

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2. While the statute governing judicial review of administrative decisions, N.C.G.S. § 150B-51, used to contemplate direct judicial review of this type of Agency determination, revisions by our General Assembly in 2011 have refocused our review on the final decision of the ALJ:

> In 2011, the General Assembly amended the Administrative Procedure Act ("APA"), conferring upon administrative law judges the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves. *See* 2011 N.C. Sess. Laws 1678, 1685-97, ch. 398, §§ 15-55. Prior to the enactment of the 2011 amendments, an ALJ hearing a contested case would issue a recommended decision to the agency, and the agency would then issue a final decision. In its final decision, the agency could adopt the ALJ's recommended decision *in toto*, reject certain portions of the decision if it specifically set forth its reasons for doing so, or reject the ALJ's recommended decision in full if it was clearly contrary to the preponderance of the evidence. *See* [N.C.G.S.] § 150B-36, *repealed by* 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20. As a result of the 2011 amendments, however, the ALJ's decision is no longer a recommendation to the agency but is instead the final decision in the contested case. [N.C.G.S.] § 150B-34(a).
>
> Under this new statutory framework, an ALJ must "make a final decision . . . that contains findings of fact and conclusions of law" and "decide the case based upon the preponderance of the evidence, giving due regard to the respect to facts and inferences within the specialized knowledge of the agency." *Id.*

AH N.C. Owner LLC v. N.C. Dep't of Health & Hum. Servs., 240 N.C. App. 92, 98-99 (2015). Our review of substantive issues will therefore be based on the ALJ's final decision, with occasional references as necessary to the ALJ's determinations as they pertain to its review of the Agency.

the ALJ reached, we cannot meaningfully review it for substantial evidence on the record.

However, as a general attribution that the ALJ erred by failing to conduct a comparative evaluation between the adjacent years' applications, this argument still fails. Aside from a general citation indicating that an abuse of discretion occurs when an administrative decision "lack[s] [] fair and careful consideration," *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 420 (1980), *abrogated by Matter of Redmond by & through Nichols*, 369 N.C. 490 (2017), Advent and Pardee point us to no binding authority justifying the position that the absence of such a comparative analysis constitutes reversible error. Moreover, we think the determination that applications may be best reviewed in isolation of similar applications from current years, while discretionary, is eminently reasonable insofar as it frees the decisionmaker from any biases it may have for or against the applicant and allows it to better evaluate the current-year application in light of a community's changing needs.

Advent and Pardee also argue that the ALJ misapplied Criterion 18(a) in that the Agency did not specifically conduct an "evaluation of the effects or impact of the [proposed facility] on AdventHealth or Pardee, or on Mission's monopoly status" and the ALJ did not, in reviewing the Agency, find that the Agency had any obligation to do so. As to this argument, we affirm the ALJ in all respects. Advent and Pardee have not directed us to—and we have not discovered—any binding law indicating that Criterion 18(a) requires an administrative decision maker to examine the effects of a new facility on specific competitors as part of a broader inquiry concerning impact on competition, and the plain language of the criterion refers to competition in the abstract, not competitor-specific, sense.[3] *See* N.C.G.S. § 131E-183(a)(18a) (2023) ("The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed[.]"). Furthermore,

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3. To the extent Advent and Pardee's argument rests on our reading "competition" as a collective noun referring to a group of competitors for purposes of N.C.G.S. § 131E-183(a)(18a), we reject this interpretation. At time of writing, "competition" is typically used as a collective noun in that sense relatively informally and outside of legal settings. *See Competition*, *Black's Law Dictionary* 355 (11th Ed. 2019) (defining "competition" as "[t]he struggle for commercial advantage" or "the effort or action of two or more commercial interests to obtain the same business from third parties" and omitting any definition referring collectively to competitors); *Competition*, *American Heritage Dictionary* 284 (3rd Ed. 1993) (omitting mention of "competition" as referring collectively to competitors).

while the applicable caselaw does treat particular providers' monopoly or near-monopoly status as salient, *see Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 57 (2006) ("[The petitioner], in effect, argues that giving it a monopoly in the service area would increase competition. We decline to adopt this incongruous line of reasoning."),[4] we will not treat "monopoly" as a "magic word" without which the ALJ's otherwise sound reasoning becomes reversibly erroneous.[5]

As for the arguments that are better conceptualized in terms of whole record review, Advent and Pardee contend that the ALJ misapplied Criterion 6 insofar as it did not reverse the Agency for failing to "do a substantive assessment of the existing or approved service capabilities" in the area. Under Criterion 6, "[t]he applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C.G.S. § 131E-183(a)(18a) (2023). As employees of the Agency who testified before the ALJ indicated that the Agency did not specifically analyze allegedly comparable services offered at Advent and Pardee, Advent and Pardee seek to overturn the ALJ's final decision. However, in its review of the Agency, the ALJ reasoned, in a section entitled "Agency Review of Statutory Criterion 6," that the Agency abided by all statutorily-prescribed duties during the review process and that Advent and Pardee had not otherwise presented a basis to overturn the Agency decision:

> 203. Criterion 6 applied to the Mission Application. Statutory Review Criterion 6 requires that an applicant demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities. (Jt. Ex. 2, Agency File AF 511; *see also* N.C. Gen. Stat. § 131E-183(a)(6)) (Tr. Vol. 15, Platt, p. 2414) (Tr. Vol. 10, Sandlin, p. 1616).
>
> 204. Statutory Review Criterion 6 requires the applicant to identify the other providers who provide the same services in the proposed service area. (Tr. Vol. 2, McKillip, p. 225).

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4. We further note that, in *Craven*, the issue before us was a challenge *by* an entity holding a monopoly to a *competitor's* compliance with Criterion 18(a), not a challenge to a monopoly-holder's compliance with Criterion 18(a). *Id.* at 56-57. To the extent Advent and Pardee cite *Craven* for the proposition that monopoly status threatens an applicant's compliance with Criterion 18(a) by default or alters the required analytical framework, this is an acontextual reading of our precedent.

5. This is to say nothing of the substantial evidence on the record to support the ALJ's position that Mission did not, in fact, have a monopoly in the proposed service area.

205. After identifying the other providers in the service area, the applicant must then explain why the proposed project will not be an unnecessary duplication of services. (Tr. Vol. 2, McKillip, p. 225) (Tr. Vol. 15, Platt, p. 2415).

206. The Agency, when reviewing an application, decides if the information provided by the applicant demonstrates that the proposed project will result in an unnecessary duplication of existing or approved services. (Tr. Vol. 2, McKillip, pp. 225-26).

207. Regarding Statutory Review Criterion 6, Ms. Pittman testified, "You just have to demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." (Tr. Vol. 5, Pittman, p. 895).

208. Statutory Review Criterion 6 does not require that the Agency look at how other providers currently providing the same services will be impacted by the proposed service. (Tr. Vol. 5, Pittman, p. 867).

209. In evaluating Mission's CON application under Statutory Review Criterion 6, it was not necessary for the Agency to conduct a capacity evaluation of either Pardee or AdventHealth because it is not relevant to the Agency's evaluation of Criterion 6. (Tr. Vol. 1, McKillip, p. 138).

210. When reviewing the Mission Application under Statutory Review Criterion 6, the Agency reviewed both the written comments of Petitioners in opposition to the Mission Application and Mission's response to those comments regarding drive times and access to emergency departments. (Tr. Vol. 1., McKillip, p. 140).

211. Section G of the Mission Application relates to its conformity with Statutory Review Criterion 6. (Tr. Vol. 15, Platt, p. 2414) (Jt. Ex. 1, Mission Application MH-97-98).

212. Section G of the Mission Application states, "The proposed FSER will provide more timely access to critical care services in the South Buncombe County market and to patients in North Henderson County." (Jt. Ex. 1, Mission Application MH-97).

213. Section G of the Mission Application identifies the existing providers in the proposed service area that

provide the same service components proposed in the Mission Application as: Pardee, AdventHealth, and Mission Main Hospital. (Jt. Ex. 1, Mission Application MH-97) (Tr. Vol. 15, Platt, pp. 2414-15).

214. The Agency reviewed and applied Statutory Review Criterion 6 to the Mission Application. Following its review, the Agency found Mission's Application to be conforming to Statutory Review Criterion 6. (Jt. Ex. 2, Agency File AF 512) (Tr. Vol. 15, Platt, pp. 2427-28) (Tr. Vol. 1, McKillip, pp. 130-31).

215. The Agency determined that Mission's Application was conforming to Statutory Review Criterion 6 because it adequately demonstrated that the proposal would not result in an unnecessary duplication of existing or approved services in the service area based on:

a. The fact there are no other FSEDs in the proposed service area; and

b. Mission adequately demonstrated that the proposed FSED is needed in addition to the existing or approved providers of emergency services in the service area.

(Jt. Ex. 2, Agency File AF 512).

216. AdventHealth argued that the Agency erred in determining that the Mission Application was conforming to Statutory Review Criterion 6 because the proposed service would unnecessarily duplicate existing services. Ms. Sandlin opined that Mission's Application was nonconforming to Statutory Review Criterion 6 because the proposed project is an unnecessary duplication of already existing services. (Tr. Vol. 10, Sandlin, p. 1636) (Jt. Ex. 144).

217. Ms. Sandlin was questioned several times regarding her assertion that either Mission or the Agency were required to perform an analysis of the impact of Mission's proposed FSED on other providers in terms of lost patients, market share or revenues. (Tr. Vol. 10, Sandlin, pp. 1761-62). Ms. Sandlin did not affirmatively state that the statute required that analysis. *Id.* Ms. Sandlin only stated, "The Agency was responsible for applying Criterion 6 and 18a in this review." *Id.*

218. Pardee argued that the Agency erred in determining that the Mission Application was conforming to Statutory Review Criterion 6 because the project will result in unnecessary duplication of services. (Jt. Ex. 116). Ms. Carter opined regarding Statutory Review Criterion 6: "And in my opinion, the statute is very clear that that is the purpose of Criterion 6 to evaluate unnecessary duplication of the existing facilities and providers." (Tr. Vol. 7, Carter, p. 1258). Ms. Carter further stated the Agency did not conduct an analysis regarding unnecessary duplication under Statutory Review Criterion 6. (*Id*. at p. 1259).

219. The key determination in the analysis of unnecessary duplication under Criterion 6 is whether the proposed service is unnecessary. (Tr. Vol. 15, Platt, p. 2415).

220. Ms. Platt opined that the Agency's application form is specific and that it asks the applicant to identify the existing and approved providers that are either in the service area or near the proposed service area. (Tr. Vol. 15, Platt, p. 2414-15).

221. Mission provided in its application a narrative describing why the proposed Arden FSED was not unnecessarily duplicative of existing and approved providers related to capacity constraints at the Mission Hospital main emergency department in downtown Asheville, population growth in the area that will increase demand for emergency department services, and existing demand for the services. (Tr. Vol. 15, Platt, pp. 2415-16, 2427).

222. Mission, through its expert Ms. Platt, demonstrated that the Agency reviewed the Mission Application in the same manner it has reviewed prior applications when evaluating Criterion 6. (Tr. Vol. 15, Platt, pp. 2418-21) (Jt. Ex. 140, 141). The Atrium Health Ballantyne ED Agency Findings ("Ballantyne Findings") were issued on [22 October] 2021, in which the Agency approved the Ballantyne FSED project. In the Ballantyne Findings, the Agency's analysis of Criterion 6 consisted of the identification of the service area, identification of the existing and approved providers of the same service in the service area, and a summary of the narrative the applicant provided addressing why there is no unnecessary duplication

of services. The analysis by the Agency of the Mission Application was consistent with the Agency's analysis in the Ballantyne Findings. In both the Ballantyne and Concord Agency Findings, the Agency reviewed the providers in or around the service area, summarized the narratives provided by the applicants, and reached a similar conclusion regarding conformity. (Tr. Vol. 15, pp. 2418-19) (Jt. Ex. 140, pp. 22-24) (Jt. Ex. 2, Agency File AF 511-12).

223. Similarly, the Atrium Health Concord ED Agency Findings ("Concord Findings") were issued on [21 April] 2022 and approved a FSED. In analyzing Criterion 6, the Concord Findings show that the Agency identified the service area defined by the applicant, identified the existing and approved providers of the same service in the service area, and quoted the narrative explanation provided by the applicant of why the project was not unnecessarily duplicative. Again, the analysis and approach used for Criterion 6 in the Mission Application was consistent with the approach and analysis by the Agency in the Concord Findings. (Tr. Vol. 15, pp. 2419-21) (Jt. Ex. 141, pp. 15-16) (Jt. Ex. 2, AF 511-12).

224. Further, Statutory Review Criterion 6 does not require that an applicant perform any adverse impact assessment or analysis of a proposed project's impact on other providers. (Tr. Vol. 15, Platt, p. 2415). Ms. Platt, Ms. Pittman, and Mr. McKillip all affirmatively testified that Statutory Review Criterion 6 does not require that an applicant demonstrate the impact the proposed services in its application will have on existing providers. (Tr. Vol. 15, Platt, p. 2415) (Tr. Vol. 1, McKillip, p. 138) (Tr. Vol. 5, Pittman, p. 867).

225. Ms. Platt agreed with the Agency and opined that the Mission Application was conforming to Statutory Review Criterion 6. (Tr. Vol. 15, Platt, p. 2428) (Jt. Ex. 160, p. 6).

226. The Tribunal finds that the testimony of Ms. Pittman, Mr. McKillip and Ms. Platt regarding the Agency's determination that the Mission Application was conforming to Statutory Review Criterion 6 was credible, reliable and persuasive.

227. This Tribunal finds that the Agency's application of Statutory Review Criterion 6 was reasonable and

> adequately supported. Statutory Review Criterion 6 does not require that an applicant perform any adverse impact assessment or analysis of a proposed project's impact on other providers.

On appeal, Advent and Pardee do not specify what substantive analysis they contend the Agency was required to make, what legal authority supports this position, or in what way the Mission application was, in fact, duplicative of their services. Instead, their argument is predicated solely on the absence of this "substantive assessment" and a recitation of several of their other criterion-based arguments. If Advent and Pardee believed the specifics of their existing services were so salient to the Agency's or the ALJ's analysis of Criterion 6, they were perfectly capable of producing positive evidence to support that argument at an earlier stage of these proceedings. For our part, there is neither legal nor factual support for any allegations of administrative error before us, and we will not overturn the ALJ's final decision on such an unmoored basis.

Finally, Advent and Pardee contend that Mission's application should have been deemed nonconforming with Criteria 3, 6, and 18(a) on the basis of Mission's alleged lack of candor to the Agency as to its purpose. The basis for this argument is that the purpose of the new facility as articulated in an internal business memorandum by Mission's parent company was different than the statement of purpose provided to the Agency. Were it not the immediate subject of this sub-issue, we would find it obvious beyond the need for explanation that the operation of a service can be justified on the basis of both public utility and the desire for business growth—in much the same way that litigation can both raise legitimate legal issues and act as a tool to drive potential competitors from a market. Suffice it to say, this argument, even if true, would not merit reversal, as we see no mutual exclusivity between these two types of justifications.[6]

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6. Advent and Pardee also point to a difference in projections regarding anticipated market share and patient traffic between the two memoranda; however, we find it unremarkable that projections might also be more or less conservative depending on the methodologies used and the points they service. Tragically, the gathering and sharing of data is rarely an activity undertaken for the mere love of truth, and it would be impractical for this (or any) tribunal to police the influence of agendas in the presentation of information—only to ensure that they not bleed into or otherwise corrupt the integrity of neutral decisionmakers. Without a more specific allegation that the projections offered to the Agency were fraudulent or deceptive, we do not assume from the mere discrepancy that any reversible error occurred.

CONCLUSION

While the ALJ correctly determined the Agency erred in failing to hold a public hearing, it misapplied *Hospice* in determining that the error substantially prejudiced Advent and Pardee. As the ALJ's reversal of the Agency's conditional approval of a CON to Mission was solely predicated on this legal error, we reverse the ALJ's final decision. N.C.G.S. § 150B-51(b) (2023) (permitting reversal on appeal if, *inter alia*, the final decision on review contains an error of law). However, because we also do not express any opinion on whether the competition-based harm alleged by Advent and Pardee below were sufficiently specific to constitute substantial prejudice, we remand to the ALJ for further proceedings to determine whether Advent and Pardee's allegations of prejudice were based on the mere fact of competition or a specific, concrete harm. *Parkway*, 205 N.C. App. at 539. Advent and Pardee's remaining challenges to the final decision are without merit.

AFFIRMED IN PART; REVERSED, VACATED, AND REMANDED IN PART.

Judge GORE concurs.

Judge GRIFFIN concurs in result.

LIVINGSTONE FLOMEH-MAWUTOR, GEORGINA MICHAEL SHENJERE AND KONSIKRATED MORINGA FARMS D/B/A MORE THAN MANNA, PLAINTIFFS

v.

CITY OF WINSTON-SALEM, DEFENDANT

No. COA23-809

Filed 6 August 2024

1. Appeal and Error—interlocutory order—claims dismissed—counterclaims remained pending—Rule 54(b) certification

In an action for damages arising from the delayed disbursement of a small business loan, the trial court's order of summary judgment dismissing plaintiffs' claims against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention was immediately appealable where, although the order was interlocutory because it left the city's counterclaims pending, the trial court certified that there was "no just reason for delay" of immediate review pursuant to Civil Procedure Rule 54(b).

2. Immunity—governmental—tort claims—operation of small business loan program—governmental function—lack of waiver

In plaintiffs' action against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention (in which plaintiffs alleged damages arising from the delayed disbursement of a small business loan), the trial court properly granted summary judgment in favor of the city on plaintiffs' tort claims based on the city's affirmative defense of governmental immunity. The city's operation of its small business loan program constituted a governmental, rather than a proprietary, function, based in part on the fact that the program was funded by federal block grants and was designed to provide loans to businesses that could not secure loans from traditional lenders. Therefore, the city was immune from suit for the negligence of its employees in the operation of the program, and plaintiff failed to allege any waiver of that immunity.

3. Immunity—governmental—breach of contract—operation of small business loan program—lack of valid contract

In plaintiffs' action against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention (in which plaintiffs alleged damages arising from the delayed disbursement of a small business loan), the trial court properly granted summary judgment in favor of the city on plaintiffs' breach of contract claim based on the city's affirmative defense of governmental immunity. Plaintiffs failed to show that a letter sent to them from a small business development specialist for the city—promising to close the loan within a certain timeframe—constituted a valid contract since the specialist did not have actual authority to bind the city to a contract; therefore, the city had not waived its governmental immunity from suit.

Appeal by plaintiffs from order entered 1 June 2023 by Judge Robert A. Broadie in Forsyth County Superior Court. Heard in the Court of Appeals 5 March 2024.

TLG Law, by Sean A. McLeod and Ty K. McTier, for plaintiffs-appellants.

Womble Bond Dickinson (US) LLP, by James R. Morgan, Jr., and City of Winston-Salem, by City Attorney Angela I. Carmon, for defendant-appellee.

ZACHARY, Judge.

Plaintiffs Livingstone Flomeh-Mawutor, Georgina Michael Shenjere, and Konsikrated Moringa Farms d/b/a More than Manna appeal from the trial court's order granting summary judgment in favor of Defendant, the City of Winston-Salem ("the City"). After careful review, we affirm.

I. Background

In the summer of 2019, Plaintiffs applied for a $100,000 loan via the City's small business loan program. Funded by the federal government, the City's small business loan program is intended "to address the problem of urban decline within the City by focusing on revitalization, development, and/or redevelopment" of Neighborhood Revitalization Strategy Areas, as defined by the United States Department of Housing and Urban Development ("HUD").

In August 2019, Flomeh-Mawutor allegedly received verbal confirmation from Steven Harrison, a small business development specialist for the City, that Plaintiffs' loan request had been approved and that a written letter of approval would be sent the following week. Plaintiffs allege that "Harrison was . . . in routine communication" with Plaintiffs over the ensuing months and repeatedly promised that the loan would close soon.

On 17 February 2020, Harrison sent Plaintiffs a letter ("the Letter") stating that the City had "conditionally approved" Plaintiffs' loan, providing the preliminary terms for the loan, and requiring that the loan be closed within 90 days. The loan eventually closed on 2 July 2020, when Plaintiffs signed, *inter alia*, a loan agreement with the City. On 14 August 2020, the City disbursed the loan proceeds to Plaintiffs. However, Plaintiffs claim to have lost significant business opportunities and goodwill as a result of the delay in their receipt of the funds.

Accordingly, on 9 August 2022, Plaintiffs filed a complaint against the City, advancing claims for: (1) breach of contract, (2) negligent misrepresentation, and (3) negligent hiring and retention. On 17 October 2022, the City filed its answer and counterclaim, in which the City raised the affirmative defense of governmental immunity and advanced counterclaims for breach of contract and unjust enrichment.[1] On 21 December 2022, Plaintiffs filed their reply to the City's counterclaims.

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1. We decline to address the factual basis underlying the City's counterclaims, which remain pending before the trial court.

On 5 May 2023, the City filed a motion for summary judgment on Plaintiffs' claims. The City principally relied upon its assertion that it was "entitled to governmental immunity and/or sovereign immunity as to all claims brought by Plaintiffs[.]" Both sides filed affidavits in support of their competing positions on this issue.

On 15 May 2023, the City's motion came on for hearing in Forsyth County Superior Court. On 1 June 2023, the trial court entered an order granting the City's motion and dismissing Plaintiffs' claims; it also certified the interlocutory order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiffs timely filed notice of appeal.

II. Grounds for Appellate Review

[1] Generally, this Court only reviews appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2) (2023). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Conversely, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381. Because an interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

However, an interlocutory order that disposes of fewer than all claims or parties in an action may be immediately appealed if "the trial court certifies, pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal[.]" *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Rule 54(b) provides, in relevant part:

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b).

A trial court's "[c]ertification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013). Proper certification of an interlocutory order pursuant to Rule 54(b) requires:

> (1) that the case involve multiple parties or multiple claims; (2) that the challenged order finally resolve at least one claim against at least one party; (3) that the trial court certify that there is no just reason for delaying an appeal of the order; and (4) that the challenged order itself contain this certification.

Asher v. Huneycutt, 284 N.C. App. 583, 587, 876 S.E.2d 660, 665 (2022).

Here, the trial court granted summary judgment in favor of the City on Plaintiffs' claims, and dismissed Plaintiffs' claims accordingly. This ruling left the City's counterclaims pending before the court, rendering interlocutory the summary judgment order from which Plaintiffs appealed. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Nevertheless, the trial court's proper Rule 54(b) certification effectively vests jurisdiction in this Court because the case involves multiple parties with multiple claims; the order on appeal finally resolved all claims against the City; and the trial court certified that "there is no just reason for delay" of an immediate appeal, and included this certification on the face of the order from which Plaintiffs appeal. *See Asher*, 284 N.C. App. at 587, 876 S.E.2d at 665. We therefore conclude that this Court has jurisdiction over this matter and proceed to the merits of Plaintiffs' appeal.

III. Discussion

Plaintiffs argue on appeal that the trial court erred by granting the City's motion for summary judgment and dismissing their claims. For the reasons that follow, we disagree.

A. Standard of Review

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). Our appellate courts "review a trial court's order denying a motion for summary judgment de novo." *Meinck v. City of Gastonia*, 371 N.C. 497, 502, 819 S.E.2d 353, 357 (2018).

B. Tort Claims

[2] As discussed below, contract claims raise unique issues regarding the doctrine of governmental immunity. We therefore begin with Plaintiffs' tort claims, each of which involves allegations of the City's negligent operation of its small business loan program.

"Under the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of *governmental functions* absent waiver of immunity." *Id.* (cleaned up). "When, however, a county or municipality is engaged in a *proprietary function*, governmental immunity does not apply." *Id.* at 503, 819 S.E.2d at 358 (cleaned up). "As a result, the determination of whether an entity is entitled to governmental immunity turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Id.* (cleaned up).

Our Supreme Court has repeatedly explained that "a governmental function is an activity that is discretionary, political, legislative, or public in nature and performed for the public good [on] behalf of the State rather than for itself, while a proprietary function is one that is commercial or chiefly for the private advantage of the compact community." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 212, 876 S.E.2d 453, 462 (2022) (cleaned up). In recent years, our Supreme Court has "adopted a three-step method of analysis for use in determining whether a municipality's action was governmental or proprietary in nature." *Id.* at 212–13, 876 S.E.2d at 462.

"The first step, or threshold inquiry, in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue." *Id.* at 213, 876 S.E.2d at 462 (cleaned up). Notably, this inquiry considers "not merely whether the legislature has explicitly provided that a specific activity is governmental but rather, *whether, and to what degree*, the legislature has addressed the issue." *Meinck*, 371 N.C. at 511, 819 S.E.2d at 362 (cleaned up). Nevertheless, "[i]f an action has been designated as governmental or proprietary in nature by the legislature, that is the end of the inquiry[.]" *Providence*, 382 N.C. at 213, 876 S.E.2d at 462 (cleaned up).

If the first step does not yield a definitive answer, the reviewing court proceeds to the second step: "determin[ing] whether the activity is one in which only a governmental agency could engage or provide, in which case it is perforce governmental in nature." *Id.* (cleaned up). However, in light of "our changing world" in which "many services once

thought to be the sole purview of the public sector have been privatized in full or in part[,]" our Supreme Court recognized that a third step may be necessary "when the particular service can be performed both privately and publicly[.]" *Id.* (citation omitted). This third step "involves consideration of a number of additional factors, of which no single factor is dispositive." *Id.* (citation omitted). "Relevant to this inquiry is 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.* (citation omitted).

Applying this three-step method to the case at bar, we begin with the "threshold inquiry"—reviewing "whether, and to what degree, the legislature has addressed the issue." *Id.* (cleaned up). The City asserts that "at the time that the City's small business loan program loaned the $100,000 to Plaintiffs, the North Carolina [General Assembly] had specifically indicated, in N.C. Gen. Stat. § 160A-456, that this expenditure of funds for 'community development' was a governmental activity." Before considering this statutory argument, we must first address recent legislative changes.

Plaintiffs argue that the City is "misleading" this Court with a "wholly incorrect" statutory citation, because our General Assembly has repealed § 160A-456. However, our General Assembly did not repeal this grant of authority; rather, it merely reorganized our local planning and development regulation statutes. "Although Chapter 160A, Article 19 ([N.C. Gen. Stat.] §§ 160A-441 *et seq.*) was repealed and substantively recodified in Chapter 160D, Article 12 ([N.C. Gen. Stat.] § 160D-1201 *et seq.*), the provisions upon which [Plaintiffs] rel[y] are virtually unchanged." *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 645 n.17, 881 S.E.2d 32, 57 n.17 (2022). *Compare* N.C. Gen. Stat. § 160A-456 (2019) (authorizing cities "to engage in, to accept federal and State grants and loans for, and to appropriate and expend funds for community development programs and activities"), *with id.* § 160D-1311 (2023) (authorizing "local government[s]" to do the same).

Accordingly, to the extent that any actions by the City pertinent to this appeal took place after the recodification of § 160A-456 as § 160D-1311, Plaintiffs' argument lacks merit because the applicable statutory authorization has been in effect at all times relevant to this appeal. *See An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State*, S.L. 2019-111, § 2.4, 2019 N.C. Sess. Laws 424, 530–31. As the former § 160A-456 was in effect at the

occurrence of the complained-of actions in this case, and recognizing that the statutory language remains substantially unchanged despite its recodification, we will refer to § 160A-456 in our analysis.

The City compares this case to *Meinck*, in which the defendant-municipality "purchased [a] historic and vacant property and entered into [a] lease as part of its efforts at urban redevelopment and downtown revitalization." 371 N.C. at 504, 819 S.E.2d at 359. Our Supreme Court recognized that "several statutes [we]re relevant to" this effort. *Id.* at 505, 819 S.E.2d at 359; *see also id.* at 505–10, 819 S.E.2d at 359–62 (surveying various statutes). The *Meinck* Court concluded that undertaking "an urban redevelopment project . . . in accordance with these statutes and for the purpose of promoting the health, safety, and welfare of the inhabitants of the State of North Carolina is a governmental function." *Id.* at 513, 819 S.E.2d at 364 (cleaned up).

However, the *Meinck* Court further recognized that "the legislature has not deemed all urban redevelopment and downtown revitalization projects governmental functions that are immune from suit." *Id.* "[E]ven when the legislature has designated a general activity to be a governmental function by statute, the question remains whether the specific activity at issue, in this case and under these circumstances, is a governmental function." *Id.* at 513–14, 819 S.E.2d at 364 (cleaned up). Consequently, the Court concluded that "while the applicable statutory provisions [we]re clearly relevant, . . . the legislature ha[d] not directly resolved whether" the defendant-municipality's purchase and lease of the historic building "as part of its downtown revitalization efforts [wa]s governmental or proprietary in nature[.]" *Id.* at 514, 819 S.E.2d at 364 (cleaned up).

We agree with the City that N.C. Gen. Stat. § 160A-456 is "clearly relevant" to our analysis of the instant case. Mindful that this first step, though not determinative, at least weighs in the City's favor, we follow the careful example of our Supreme Court. "Assuming, without deciding, that the initial step . . . is not determinative of the inquiry that we must undertake in this case, we proceed to the next step, at which we are required to determine whether the activity is one in which only a governmental agency could engage." *Providence*, 382 N.C. at 217, 876 S.E.2d at 465 (cleaned up).

Regarding this second step, the City asserts that "[t]he money to operate the City's small business loan program comes from HUD block grants relating to [Neighborhood Revitalization Strategy Areas]. These kinds of grants only go to governmental entities." The City adds that

"loans from the City's small business loan program are only available to businesses [that] are unable to secure full financing from conventional lending sources, such as private banks." Consequently, the City argues that "programs such as the City's small business loan program, financed by the HUD block grants relating to [Neighborhood Revitalization Strategy Areas], [are] something only a governmental entity could administer." "Since the program or activity in this case can only be provided by a governmental agency," the City concludes that it "is necessarily governmental[.]"

On the other hand, Plaintiffs contend that "the receipt of the [HUD] grant may be governmental in nature, but the loaning of those funds to private citizens is proprietary in nature." While Plaintiffs acknowledge that "it is certainly a public purpose for a city to develop its community[,]" they nonetheless claim that "it is not a governmental purpose for a city to loan money to its citizens." In this respect, whether the loan at issue constituted governmental or proprietary activity depends on how narrowly the activity is defined. Cognizant of our Supreme Court's recognition that "many services once thought to be the sole purview of the public sector have been privatized in full or in part[,]" making it "increasingly difficult to identify services that can only be rendered by a governmental entity[,]" *id.* at 213, 876 S.E.2d at 462 (citation omitted), it is prudent to consider the additional factors of the third step.

As stated above, our Supreme Court has articulated a non-exhaustive list of additional factors to consider, "of which no single factor is dispositive." *Id.* (citation omitted). This list includes "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.* (citation omitted).

Again, the City persuasively notes that "the small business loan program, being a program funded by HUD block grants relating to [Neighborhood Revitalization Strategy Areas], is a program that only a governmental entity could administer." Further, the City suggests that "since [its] small business loan program only loans to businesses that cannot secure loans from traditional lenders such as banks, and is designed to operate at a loss, it is not a program that would be undertaken by a traditional private business such as a bank." Each of these points is supported in the record by the affidavit of Ken Millett, the Director of the City's Office of Business Inclusion and Advancement.

Plaintiffs disagree with the City's claim that its program is "designed to operate at a loss," and instead contend that "the City stands to make a

profit from this contract." This argument—which appears derived from Plaintiffs' unsupported proposition that "the City retain[ed] the initial $100,000.00 in funds"—is unavailing.

After carefully considering the three steps established by our Supreme Court, we conclude that each step favors a determination that the City's activities in this case constitute governmental, rather than proprietary, activity. This leaves one remaining issue with respect to Plaintiffs' tort claims: whether the City waived its claim of governmental immunity. *See Meinck*, 371 N.C. at 502, 819 S.E.2d at 357.

It is well established that "a city can waive its immunity by purchasing liability insurance." *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000); *see also* N.C. Gen. Stat. § 160A-485(a). However, the City's risk manager averred that "the City had neither purchased nor had in effect any liability insurance to cover such claims as are alleged in Plaintiffs' [c]omplaint." Moreover, "[t]his Court has consistently disallowed claims based on tort against governmental entities when the complaint failed to allege a waiver of immunity." *Paquette v. Cty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). As Plaintiffs' complaint failed to allege that the City waived its governmental immunity, their tort claims cannot survive the City's assertion of this affirmative defense. *Id.*

In sum, as to Plaintiffs' tort claims: the City's activity here constituted a governmental function, thus entitling the City to governmental immunity absent a waiver of that immunity. But Plaintiffs did not allege such a waiver by the City, and moreover, nothing in the record indicates that the City in fact waived its immunity. Therefore, the trial court properly granted summary judgment in the City's favor as to Plaintiffs' tort claims.

C. Breach of Contract

[3] We next address Plaintiffs' breach of contract claim. In contrast to claims sounding in tort, a "local government . . . waives [its governmental] immunity when it enters into a valid contract, to the extent of that contract." *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 899 (2017). "Specifically, [our Supreme] Court has held that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Id.* (cleaned up). "Likewise, a city or county waives immunity when it enters into a valid contract." *Id.* (cleaned up).

Generally, "to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Id.* (citation omitted). However, "[b]ecause in contract actions the doctrine of sovereign immunity will not be a defense, a waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim." *Id.* at 48, 802 S.E.2d at 899 (cleaned up). "Thus, an allegation of a valid contract is an allegation of waiver of governmental immunity." *Id.*

Accordingly, we begin by assessing Plaintiffs' allegation of a valid contract. In their complaint, Plaintiffs did not specifically identify or describe the contract that they assert was breached. Plaintiffs initially suggested that Harrison breached several of his "promise[s] to close the loan" in 2019, but then only allege that "Plaintiffs and [the City] entered into a valid contract by . . . signing and accepting the terms of the small business loan from" the City. However, the City observes that "in their discovery responses, and in the deposition of Plaintiff Livingstone Flomeh-Mawutor, Plaintiffs specifically identified the [Letter] as the contract that they allege was breached."

The City persuasively argues that the Letter does not constitute a valid contract for several reasons. For example, the City explains that "Harrison did not have the actual authority to bind the City to a contract[.]" *See L&S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 622, 471 S.E.2d 118, 120 (1996) (affirming summary judgment in favor of city where employee who signed an alleged contract "was not vested with actual authority to bind the city . . . to a contract" under the Winston-Salem Code). This Court recognized that "the law holds those dealing with a [c]ity to a knowledge of the extent of the power and of any restrictions imposed[.] . . . This is because the scope of such authority is a matter of public record." *Id.* (cleaned up).

Therefore, Plaintiffs are "charged with notice of all limitations upon the authority of [Harrison]" to enter into a contract binding the City. *Id.* Beverly Whitt, the City's senior financial analyst, stated in her affidavit that Harrison "does not have – and has never had – the actual authority to enter into a contract on behalf of the City of Winston-Salem." This argument, one among several raised in the City's appellate brief, definitively supports the trial court's grant of summary judgment on Plaintiffs' contract claim.

Given that Plaintiffs failed to prove that the Letter was a valid contract, the City has not waived its governmental immunity from suit, and

Plaintiffs cannot overcome the City's affirmative defense. *See Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247–48 (2001). Accordingly, the trial court properly granted the City's motion for summary judgment with regard to Plaintiffs' contract claim, as well.

IV. Conclusion

For the foregoing reasons, the trial court's order granting summary judgment in the City's favor is affirmed.

AFFIRMED.

Judges WOOD and THOMPSON concur.

IN THE MATTER OF A.K., L.K.

No. COA23-898

Filed 6 August 2024

1. Appeal and Error—appellate jurisdiction—juvenile neglect case—orders appointing guardian ad litem—denial of request to representation by retained counsel

In a neglect matter, where the trial court denied respondent-mother's request to be represented by her privately retained counsel, respondent-mother could not challenge on appeal the court's appointment of a guardian ad litem (GAL) to represent her, since she did not appeal from either of the two interlocutory orders appointing the GAL, and, at any rate, neither of those orders qualified as appealable orders under the Juvenile Code (N.C.G.S. § 7B-1001). Although the appellate court was inclined to review the GAL appointment issue by invoking Appellate Rule 2, it could not do so because the record lacked a transcript of the hearing where the GAL was appointed and, therefore, there was no way to determine if respondent-mother objected to the appointment at that hearing. However, with respect to respondent-mother's argument regarding the denial of her right to representation by her retained counsel, appellate review was proper because the adjudication order clearly addressed the issue, respondent-mother adequately gave notice of appeal of that order, and a transcript of the adjudication hearing was available.

2. Child Abuse, Dependency, and Neglect—right to representation by retained counsel—statutory mandate—qualifications for retained counsel

The adjudication and disposition orders in a neglect matter were vacated—and the matter was remanded—because the trial court violated the statutory mandate in N.C.G.S. § 7B-602(a) by denying respondent-mother's request to release her court-appointed counsel and to be represented by her privately retained counsel, who had made an appearance in the case, after determining that the retained counsel's representation would be detrimental to respondent-mother because he lacked experience representing parents in abuse, neglect, and dependency proceedings. The court did not address the requirements of section 7B-602(a) when making its determination, and although a lack of specific experience with juvenile cases would have disqualified a court-appointed counsel from representing respondent-mother, the rules for qualifying court-appointed attorneys to represent parents in Chapter 7B cases do not apply to privately retained attorneys, who only require a valid license to practice law to appear in such cases.

Appeal by respondent-appellant-mother from orders entered 8 February 2023 and 14 June 2023 by Judge Angela Foster in District Court, Guilford County. Heard in the Court of Appeals 17 June 2024.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Alexandria G. Hill for the guardian ad litem.

Emily Sutton Dezio for respondent-appellant-mother.

J. Thomas Diepenbrock for respondent-appellee-father.

STROUD, Judge.

Respondent-appellant-mother raises several arguments on appeal from an order adjudicating her children neglected juveniles and the resulting disposition order. As the trial court erred by denying Respondent-appellant-mother's request to release her appointed counsel and to be represented by her retained counsel, we must vacate the Adjudication and Disposition Orders.

I. Factual Background & Procedural History

The Guilford County Department of Health and Human Services ("DHHS") became involved with this family on 1 September 2022 when DHHS received a report that Respondent-appellant-mother ("Mother") threw plates and broke furniture in the presence of her minor children, "Link,"[1] then age 7 years, and "Ady," then age 4 years. According to the petition, the report alleged the Greensboro Police had responded to a "family disturbance" at Mother's home "where there were plates and chairs found broken." The report also alleged that Mother suffered from mental health issues, including delusions, and had been keeping both children confined to their rooms without access to education or medical care, such that Link and Ady displayed poor language and social skills. The petition further alleged that a social worker attempted to visit the home on 1 September 2022, and she had been informed that Mother spoke Albanian, so she contacted the language line in case she needed assistance in communication. No one was at the home on that day. A social worker attempted to visit the next day also, but again no one was at home.

On 7 September 2022, the social worker visited the home again and was able to speak to some of the family members at their residence. Mother refused to come out of her bedroom during the social worker's visit, and when the social worker tried to obtain information about the juveniles, Mother refused and yelled for the social worker to leave. When Mother threatened to call law enforcement, the social worker went outside and called law enforcement herself. While awaiting assistance, the social worker observed Mother step outside the home, "shouting [and] saying that she was fearful of her life" and acting "paranoid" and "confused."

Mother was back inside her bedroom when officers arrived. Eventually the officers were able to persuade Mother to allow them to see and speak to the juveniles, who were largely uncommunicative and only gave the officers their names. The social worker was required to stand at the edge of the home's driveway, too far away to assess the appearance of the children or speak to them. The social worker did talk to the juveniles' maternal grandmother, who initially seemed coherent and expressed concern about the children's wellbeing but later appeared to become confused. The maternal uncle, also a resident in

1. Pseudonyms are used to protect the identities of the juveniles and for ease of reading.

the family home, told the social worker that the grandmother suffered from schizophrenia.

Due to the social worker's inability to investigate the report adequately, she did not believe the juveniles could safely remain in the home. The social worker's supervisor contacted the juveniles' father, who wanted to retrieve Ady and Link, but he was living in Michigan and not immediately able take custody of the children. As a result, on 8 September 2022 the social worker filed juvenile petitions alleging neglect and obtained orders placing both children in the nonsecure custody of DHHS. On the Summons issued to Mother, a hearing date for 9 September 2022 was set and a provisional attorney for Mother, Brett Moore, was appointed by the trial court.

On 9 September, the trial court held a hearing on continued nonsecure custody; the order from this hearing was filed on 10 October 2022, continued nonsecure custody of the children with DHHS, and also included several provisions including some addressing the cultural needs of the children. For example, the continued nonsecure custody order provided that "the children are of the Islamic/Muslim faith and do not eat pork," that "the juveniles shall not attend any religious services other than Islamic services," and that "all visits are to be conducted in English." The "pre-adjudication, adjudication, and disposition" hearing was scheduled for 9 November 2022.

Mother retained Mr. Amro Elsayed, an attorney from Forsyth County, to represent her and on 7 November 2022, he filed a notice of appearance to represent Mother and served the notice by fax and email on opposing counsel and the GAL.

On 9 November 2022, Mother, Father, court-appointed counsel for both, and Mr. Elsayed were present[2] for the scheduled hearing on "pre-adjudication, adjudication, and disposition." The trial court entered an order to continue ("Continuance Order") this hearing, noting it was continued with the consent of all parties. The Continuance Order indicates the trial court had *sua sponte* appointed a GAL for Mother. The Continuance Order does not indicate an evidentiary hearing was held on 9 November 2022. The Continuance Order was filed on 9 December 2022 and states it was "so Ordered this the 9th day of November, 2022; Signed this the 7 day of Dec., 2022." According to this Continuance Order:

2. Father lives in Michigan and participated by way of video conference.

> Preadjudication, Adjudication and Disposition hearing scheduled on this date pursuant to G.S § 7B-803 and based upon a review of the court file and the argument of counsel, the Court finds and concludes as follows:
>
> . . . .
>
> [x] The parties consent to continue this matter.
>
> . . . .
>
> [x] For good cause shown, and justice requires, the matter should be continued for hearing.
>
> . . . .
>
> [x] For extraordinary circumstances (N.C.G.S. § 7B-803) necessary for:
>
> (a) [x] the proper administration of justice; and/or
>
> (b) [x] in the best interests of the juvenile(s).
>
> [x] **Other:** The court finds that based on the allegations in the petition and the mother's inability to understand the proceedings and cultural barriers the mother is in need of a Rule 17 GAL to assist the mother in these proceedings. Lisa Grigley is appointed as Rule 17 GAL for mother [ ]."
>
> **IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:**
>
> 1. This matter is hereby continued and placed on the **December 9, 2022,** Session of District Juvenile Court for Guilford County **(Greensboro Division) for Pre-Adjudication & Adjudication** hearing.

Therefore, according to the Continuance Order, the trial court considered only "the court file and the argument of counsel" in the decision to continue the hearing and to appoint a GAL for Mother. We presume the trial court's order reflects the proceedings on 9 November 2022 correctly, and according to the order, no evidentiary hearing was held but the hearing scheduled for 9 November 2022 was *continued*. The trial court heard arguments from counsel and considered documents in the court file, but arguments of counsel are not evidence. *See Blue v. Bhiro*, 381 N.C. 1, 6, 871 S.E.2d 691, 695 (2022) ("Notably, it is axiomatic that the arguments of counsel are not evidence." (citations and quotation marks omitted)).

On 17 November 2022, the trial court entered an "Order to Appoint, Deny, or Release Guardian ad Litem (for respondent)[;]" ("GAL Order") this order was on a form, AOC-J-206, Rev. 10/13. (Capitalization altered.) The typed date on the GAL Order is 9 November 2022, so it appears this order is a more formal order memorializing the appointment of the GAL as stated in the Continuance Order, although the GAL Order does not indicate that it was based upon any specific hearing date. The GAL Order has no added text other than the case caption, name of Mother, date, name of the appointed GAL, and "cc: Lisa Grigley" and marking the boxes on the form; it states:

> Relevant to the inquiry regarding appointment of a Guardian ad Litem for the above-named respondent, the Court finds as follows:
>
> 1. The Court has jurisdiction over the parties and subject matter.
>
> 2. Based on the evidence presented, the Court makes the following findings of fact:
>
> . . . .
>
> b. [Mother] is incompetent in accordance with G.S. 1A-1, Rule 17, based upon the following:

The blank area of the form for findings of fact is entirely empty. The trial court made a conclusion of law by marking box 2, concluding "[Mother] is incompetent in accordance with G.S. 1A-1, Rule 17."

The pre-adjudication and adjudication hearing was held on 9 December 2022. At the start of the hearing, the trial court addressed Mother's request to replace her appointed counsel with Mr. Elsayed. Mr. Elsayed was present at the hearing and participated in this portion of the hearing. Mr. Elsayed had filed his notice of appearance before the 9 November 2022 court date and had appeared on that date. Counsel and the trial court put on the record the discussions they had at the 9 November court date regarding Mother's request to be represented by Mr. Elsayed. The district court denied Mother's request to be represented by Mr. Elsayed. The adjudication hearing on the neglect petitions immediately followed.

In an order entered 8 February 2023, the court adjudicated Ady and Link to be neglected juveniles. The disposition hearing was originally set for 3 February 2023 but was continued several times and was conducted on 26 and 28 April 2023; the court entered an order on 14 June

2023 that kept the juveniles in DHHS custody with a plan for reunification. Mother gave timely notice of appeal from the Adjudication and Disposition Orders.[3]

II. Analysis

Mother makes several arguments on appeal: (1) the district court erred in appointing a GAL for Mother; (2) the district court erred by refusing to permit Mother to be represented by retained counsel instead of her court-appointed counsel; and (3) several findings of fact in the Adjudication Order are unsupported by the evidence, and there are insufficient findings to support a conclusion of neglect. As we must vacate the Adjudication and Disposition Orders based upon the trial court's denial of Mother's right to be represented by her privately retained counsel instead of her court-appointed counsel, we need not address the merits of the Adjudication or Disposition Order but must vacate both and remand for new hearing.

A. Jurisdiction

[1] Mother filed timely notice of appeal from the Pre-adjudication and Adjudication Order and the Disposition Order and we have jurisdiction to review these orders under North Carolina General Statute Section 7B-1001(3). *See* N.C. Gen. Stat. § 7B-1001(3) (2023) ("Right to appeal. (a) In a juvenile matter under this Subchapter, 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."). DHHS and Father contend Mother did not appeal from the orders appointing the GAL, noting both the Continuance Order and the GAL Order are not appealable under North Carolina General Statute Section 7B-1001(3). DHHS also contends that "Mother's efforts to cast those orders as invalid because they lack proper findings and conclusions lack merit."

It is correct that interlocutory orders such as a Continuance Order and the GAL Order are not appealable orders under North Carolina General Statute Section 7B-1001(3). *See generally* N.C. Gen. Stat. § 7B-1001 (listing which orders in a juvenile matter are appealable directly to this Court, which does not include a continuance order or order appointing a GAL). However, Rule 2 of our Rules of Appellate Procedure "allows an appellate court to suspend the Rules of Appellate Procedure and reach the merits of

3. Respondent-father participated in the hearing but did not give notice of appeal. Instead, Father has filed an appellee brief, asking this Court to uphold the adjudication and disposition orders.

an unpreserved issue in a case pending before the court." *State v. Ricks*, 378 N.C. 737, 740, 862 S.E.2d 835, 838 (2021) (citations, quotation marks, and brackets omitted). "An appellate court, however, may only invoke Rule 2 in exceptional circumstances when injustice appears manifest to the court or when the case presents significant issues of importance in the public interest." *Id.* (citations, quotation marks, ellipses, and brackets omitted).

Although we would be inclined to invoke Rule 2 to address Mother's argument as to the appointment of her GAL, given the importance of her rights as a parent and the complete absence of findings of fact or evidence to support appointment of a GAL, we are unable to review this issue without a transcript of the 9 November 2022 hearing as we are unable to determine if Mother objected to the appointment of the GAL. But we note Mother's concern regarding the appointment of the GAL is intertwined with her argument regarding the trial court's refusal to allow her to be represented by retained counsel of her choice.

However, the trial court's ruling regarding counsel is clearly addressed in the Adjudication Order which was properly noticed for appeal, and we have the transcript for this hearing. The issues regarding appointment of the GAL and representation by retained counsel are somewhat related. Mr. Elsayed filed his notice of appearance on 7 November 2022, and he first appeared in court at the 9 November 2022 hearing. The GAL Order was not filed until 17 November 2022, also after Mr. Elsayed filed his notice of appearance and appeared in court on 9 November. Thus, before the trial court entered the GAL Order for Mother on 17 November 2022, Mother had retained an attorney to represent her, but the trial court refused to allow Mr. Elsayed to represent her, based in part upon the opinion of Mother's GAL that Mother should be represented by Mr. Moore, her court-appointed attorney, despite the fact Mother had retained Mr. Elsayed before the issue of appointment of a GAL for her had come up. But in summary, because we do not have a transcript of the 9 November 2022 court date, our review will be limited to the trial court's denial of Mother's right to be represented by retained counsel of her choice.

B. Refusal to Permit Retained Counsel to Represent Mother

[2] Mother contends that "[t]he right for a litigant to select her own attorney is protected by N.C.G.S. 7B-602(a). The trial court's requirement that [Mother's] counsel be approved by the Court was error and violated [her] due process rights." Mother argues the denial to be represented by Mr. Elsayed was also a violation of her constitutional rights.

The GAL for the children contends Mother is not entitled to review of this issue because

> the Pre-adjudication Order reflects a notice of appearance was filed by Amaro Eslayed. (sic) There the court inquired into the substitution of counsel for . . . Mother. . . . Mother, however, has not appealed the Pre-Adjudication Order. And the parties have not been provided a transcript of that portion of the proceedings.

DHHS also contends that "the trial court addressed Mr. Elsayed's qualifications and denied her request to substitute him for her court-appointed counsel . . . in the 9 November 2022 hearing" for which we do not have a transcript. But the record page cited by GAL as the "Pre-adjudication Order" is actually the "Pre-Adjudication *and* Adjudication Order;" there was no separate pre-adjudication order entered. Mother did properly file notice of appeal from the Adjudication Order. In addition, the record shows Mr. Elsayed did appear at the 9 November 2022 hearing, and at the beginning of the 9 December 2022 hearing Mr. Elsayed renewed his request to represent Mother, and the trial court and counsel placed on the record a description of the 9 November discussion regarding Mr. Elsayed's appearance as well as the trial court's rationale for denying his request. We have a transcript for this portion of the proceedings and the trial court made findings of fact on Mother's request for Mr. Elsayed to represent her.

We have been unable to find any prior cases addressing a trial court's refusal to allow a respondent-parent to be represented by retained counsel where the retained counsel has filed a notice of appearance and appeared in court for a hearing. But in *In re K.M.W.*, addressing a parent's right to counsel based on statutory criteria, our Supreme Court has stated the standard of review is *de novo*:

> A trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily prescribed criteria, so we review the question of whether the trial court erroneously determined that a parent waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding using a *de novo* standard of review.

376 N.C. 195, 209-10, 851 S.E.2d 849, 860 (2020).

As noted, Mother also contends the trial court's refusal to allow her to be represented by retained counsel violated her constitutional due

process rights. The standard of review "where constitutional rights are implicated" is also *de novo*:

> The general rule that *de novo* review is appropriate in cases where constitutional rights are implicated, as they are here, reinforces our determination that the de novo standard of review applies here. *See Piedmont Triad Regional Water Authority v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated."). Under the *de novo* standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

Hall v. Wilmington Health, PLLC, 282 N.C. App. 463, 475, 872 S.E.2d 347, 359 (2022) (citations and quotation marks omitted).

The GAL argues we review this issue for abuse of discretion. The GAL cites several unpublished cases to support this claim, without compliance with North Carolina Rule of Appellate Procedure 30(e)(3). *See* N.C. R. App. P. 30(e)(3) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. . . . When citing an unpublished opinion, a party must indicate the opinion[']s unpublished status."). In addition, all of the cases cited, published or unpublished, address a respondent's (or criminal defendant's) request to substitute new appointed counsel for the appointed counsel already representing the respondent. We do review the trial court's ruling on a request for substitution of appointed counsel for abuse of discretion, but that is not the issue in this case. *See State v. Glenn*, 221 N.C. App. 143, 148, 726 S.E.2d 185, 189 (2012) ("Absent a showing of a Sixth Amendment violation, we review the denial of a motion to appoint substitute counsel under an abuse of discretion." (citations, quotation marks, and brackets omitted)). The GAL also relies on cases addressing a defendant's motion to continue a case to have time to retain a private attorney, where the defendant was already represented by appointed counsel. Again, we review that type of ruling for abuse of discretion, *see State v. Holloman*, 231 N.C. App. 426, 429-30, 751 S.E.2d 638, 641 (2013) (reviewing a defendant's motion to substitute counsel from an appointed attorney to a retained one under an abuse of discretion standard), but Mother did not move to continue the hearing. Mr. Elsayed was present for court on 9 November 2022 and again on 9 December 2022 and neither he nor Mother requested continuance of the 9 December 2022 hearing.

Here, Mother's argument is primarily based upon North Carolina General Statute Section 7B-602(a) as she contends the trial court failed to comply with a statutory mandate and thus deprived her of her right to be represented by retained counsel. We therefore review this issue *de novo*. *See* N.C. Gen. Stat. § 7B-602(a)(3) (2023); *see also In re N.L.M.*, 283 N.C. App. 356, 377, 873 S.E.2d 640, 652 (2022) ("This Court reviews de novo whether a trial court correctly adhered to a statutory mandate and, if there was error, whether such error was harmless." (citation omitted)).

It is well-established that a parent in an adjudication or termination of parental rights case is entitled to counsel of their choice. *See* N.C. Gen. Stat. § 7B-602(a)(3). North Carolina General Statute Section 7B-602 sets out the right to counsel, including the right to be represented by retained counsel:

> (a) In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right. When a petition is filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall appoint provisional counsel for each parent named in the petition in accordance with rules adopted by the Office of Indigent Defense Services, shall indicate the appointment on the juvenile summons or attached notice, and shall provide a copy of the petition and summons or notice to the attorney. At the first hearing, the court shall dismiss the provisional counsel if the respondent parent:
>
> (1) Does not appear at the hearing;
>
> (2) Does not qualify for court-appointed counsel;
>
> (3) Has retained counsel; or
>
> (4) Waives the right to counsel.
>
> The court shall confirm the appointment of counsel if subdivisions (1) through (4) of this subsection are not applicable to the respondent parent.

N.C. Gen. Stat. § 7B-602(a). "The use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error." *In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005).

After the filing of the petitions for Link and Ady, Mother was assigned provisional appointed counsel, Mr. Moore. Before the first scheduled hearing after the initial nonsecure custody hearings, on 7 November 2022, Attorney Amro Elsayed filed a notice of appearance for Mother. Mr. Elsayed also appeared at the 9 November 2022 court date. At the 9 December hearing, Mother's court-appointed counsel "put on the record how we got here with three attorneys." Mr. Moore said that "upon filing of the petition" on 8 September, he was "appointed to be provisional counsel for the mother, went through a nonsecure custody hearing, and at the subsequent nonsecure custody hearing, an Attorney Elsayed had made it known to myself that he would intend to enter the case" and then he filed a notice of appearance and appeared in court at the next nonsecure custody hearing.

The trial court made several findings of fact in the Adjudication Order regarding Mother's request to substitute counsel. These findings of fact are not challenged and are binding on appeal. *See In re J.S.*, 374 N.C. 811, 814, 845 S.E.2d 66, 71 (2020) ("Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal." (citation and quotation marks omitted)).

> 7. After inquiry of the Court, the court makes the following findings regarding Attorney Elsayed's appearance in this matter:
>
> a. The Court made an inquiry of counsel's experience representing parents in Abuse Neglect and Dependency (A/N/D) cases.
>
> b. Upon inquiry, the Court found Mr. Elsayed did not have any requisite experience or basic knowledge of Chapter 7B of the North Carolina General Statu[t]es to represent parents in A/N/D cases.
>
> c. The Court has concerns if Attorney Elsayed were to represent [Mother], [Mother] would suffer irreparable harm to her parental rights and would be in danger of having her parental rights terminated which is not the intent of the Department at this time.
>
> d. The Department has indicated that the current plan for the family is reunification.
>
> e. That given Attorney Elsayed's inexperience representing clients in A/N/D cases and the Department's intent

> to reunify the family, Mr. Elsayed's representation of [M]other would most likely not be the desired outcome.
>
> f. That Court finds despite the fact that Attorney Elsayed is retained, that his representation would be detrimental to [M]other in this case due to his inexperience representing parents in A/N/D cases.
>
> g. That Rule 17-GAL attorney, Lisa Grigley requested Attorney Brett Moore remain counsel for [M]other.
>
> h. Therefore, the court finds Attorney Elsayed does not require the requisite experience or competence to represent parents in A/N/D cases.
>
> i. The court finds that it is in the best interest of [M]other that Attorney Brett Moore remains the court appointed attorney for [M]other and Attorney Amaro (sic) Elsayed is released from this case.

Thus the trial court determined Mr. Elsayed was not *qualified* to represent Mother and did not allow Mother to be represented by her retained counsel. The trial court explained that after the 9 November 2022 hearing when Mr. Elsayed first appeared to represent Mother, it had determined he was "not qualified" to represent Mother:

> This Court made an inquiry as to the experience to work in this courtroom because not anyone is allowed to work in here because of its specialized nature. It is extremely different from any courtroom in this building. Upon inquiry, the Court discovered that counsel had not had any experience in working a DSS case, which is what this courtroom is, and the Court became quite concerned that the possibility of moving to TPR within a year, which is the termination of parental rights would get there if we did not have an experienced attorney representing the mother in this case.
>
> Therefore, the Court made a decision that Mr. Moore would continue representing the mother in reference to this case and the attorney would not be appointed to represent the mother in this case, that even though the attorney stated that he is retained, he lacks the experience to work this case. And the Court felt that and continues to feel that that could be extremely, not could be, would be detrimental to the mother in this case, and we could end

> up and most likely would end up terminating her parental rights, which is not the intent of the Department of Health and Services at this time.
>
> The Department has made it known that reunification, the children's reunification with the mother is of utmost importance, and that is what they want to do. The Court found that given that the attorney has no experience in representing DSS clients that that most likely would not be the outcome and, therefore, the Court made the decision that he is unqualified to work in this courtroom without meeting the requirements of the local rules in reference to working in DSS court.

Mr. Elsayed specifically argued to the trial court that "I'm not appointed, I'm retained, and there is no standards to qualify me."

Mr. Elsayed was correct. While the trial court did not state a specific "local rule" it was relying on, the 18th Judicial District has "Local Rules Governing Abuse, Neglect, and Dependency and Termination of Parental Rights Cases." *See generally* Administrative Order Amending Local Rules Governing Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings, Guilford Cnty. (Apr. 1, 2021). Rule 4, "Appointment of Counsel, Guardian ad Litem for Parent, and Conflict Guardian Ad Litem – Attorney Advocate Lists[,]" contains over three pages of rules governing the requirements, experience, and training for an attorney to be on the "list" of court-appointed attorneys for indigent parents in that district. *See id.*, Rule 4. But these requirements apply only to qualification for an attorney to be on the court-appointed list; these rules do not apply to privately retained counsel. *See id.* Rule 4.01 states "[t]he clerk of court shall maintain the list of attorneys *eligible to be appointed* to represent parents[.]" *See id.*, Rule 4.01 (emphasis added). Further, Rule 6 is titled "Court Appointed Attorney – Continuation of Representation" and is again clearly applicable to court-appointed attorneys, not privately retained ones. *See id.*, Rule 6. Mr. Elsayed was not requesting to be appointed by the trial court to represent Mother; he was retained by her. The only required credential or qualification for an attorney to represent a respondent-parent is a valid license to practice law in North Carolina, and there is no dispute that Mr. Elsayed is an attorney licensed to practice in North Carolina.

A large part of DHHS' argument is that the trial court did not err by refusing to allow Mr. Elsayed to represent Mother because trial courts have "the inherent authority or power to regulate the attorneys appearing before them." However, the two cases cited by DHHS, *Rosenthal*

Furs, Inc. v. Fine, 282 N.C. App. 530, 540, 871 S.E.2d 153, 160 (2022), and *Sick v. Transylvania Cnty. Hosp.*, 364 N.C. 172, 182, 695 S.E.2d 429, 426 (2010), involve attorneys where they were "engaged in unethical or potentially unethical conduct[.]" But there is no argument or indication that Mr. Elsayed acted unethically in any manner. Our record indicates Mr. Elsayed acted appropriately in his court appearances in this case and nothing indicates he would be acting unethically by representing Mother, even assuming he lacked the specific experience in juvenile cases as would be required by the Local Rules for an attorney on a court-appointed list.

DHHS also contends it was possible Mr. Elsayed's representation of Mother could violate the North Carolina Rules of Professional Conduct, Rule 1.1, as his lack of experience could render him incompetent to handle such a case. *See* N.C. R. Prof'l Conduct 1.1 ("Competence"). However, merely asserting an attorney is inexperienced, although licensed to practice law in this State, and may not provide competent legal services is not a sufficient basis to deny a motion to substitute counsel. Every attorney has a first case in any specific area of law. If the trial court had unrestrained inherent authority to deny a party's request for representation by a privately *retained* attorney based only on an attorney's lack of a certain amount of experience in a particular field of law, a trial court could essentially require all attorneys appearing in that court to have some specific level of experience to appear as counsel for a client who has privately retained them; inherent authority simply does not go this far. We do not disagree with the trial court's statements regarding the specialized nature of abuse, neglect, and dependency proceedings, but the standards for court-appointed attorneys are simply not applicable to privately retained attorneys. Thus, the cases cited by DHHS involving the trial court's inherent authority are inapposite to this case.

We also note that the trial court found that "the Rule 17-GAL attorney, Lisa Grigley requested Attorney Brett Moore remain counsel for [M]other." We have serious concerns regarding the appointment of a GAL for Mother, without prior notice or an opportunity to be heard, but as noted, due to the lack of a transcript for 9 November 2022 we are unable to review the GAL Order. But as relevant to the issue of Mother's choice of counsel, Mother's Rule 17 GAL also objected to allowing Mr. Elsayed to represent Mother. Even if we assume that the appointment of the GAL was proper, the GAL based her objection to Mr. Elsayed's representation on the same basis as the trial court – Mr. Elsayed's lack of experience in A/N/D cases based upon his lack of qualification under the Local Rules to serve as court-appointed counsel. Further, the trial court found that Mother was unable to choose her counsel because she was

incompetent; the trial court found Mr. Elsayed did not have the requisite training and experience to represent Mother in a juvenile case under the local rules. Since the trial court made no findings at all in the GAL Order, we are unable to ascertain exactly why Mother needed a GAL or if her incapacity would have interfered with her ability to select counsel.[4] In addition, since Mother had not yet had a full evaluation of her mental health and did not testify, we have no information in the record upon which to assess why the trial court determined Mother needed a GAL.

The trial court did not address the requirements of North Carolina General Statute Section 7B-602, which provides that "[a]t the first hearing, the court *shall* dismiss the provisional counsel if the respondent parent . . . [h]as retained counsel." N.C. Gen. Stat. § 7B-602(a)(3) (emphasis added). Whether the trial court took this statute in account or not, the trial court's stated reason for denying Mr. Elsayed's request to represent Mother was his failure to comply with the requirement of the Local Rules applicable to court-appointed attorneys for abuse, neglect, or dependency cases. Whether the trial court's denial of Mother's motion to substitute counsel was based on a misapprehension of law that Mr. Elsayed must have a certain level of experience in A/N/D court before being allowed to represent Mother or whether the trial court simply failed to comply with the statutory mandate of North Carolina General Statute Section 7B-602, the trial court erred by not allowing Mother to be represented by her retained counsel. For this reason, we must vacate the Pre-adjudication and Adjudication Order and Disposition Order.

III. Conclusion

As the trial court erred by failing to comply with North Carolina General Statute Section 7B-602(a) and to allow Mother to be represented by her retained counsel, we vacate the Pre-adjudication and Adjudication Order and the Disposition Order and remand for further proceedings. On remand, upon the request of any party, the trial court shall hold a hearing to consider whether Mother is still in need of a Rule

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4. According to the Continuance Order, the trial court determined Mother needed a GAL based upon her "inability to understand the proceedings and cultural barriers." The record also shows Mother is Albanian and Muslim, and English is not her first language. The trial court did not note any type of incompetency as defined by North Carolina General Statute Section 35A-1101(7). *See generally In re M.S.E.*, 378 N.C. 40, 44, 859 S.E.2d 196, 203 (2021) ("An 'incompetent adult' is defined as one 'who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.' N.C.G.S. § 35A-1101(7) (2019).").

17 GAL and if the trial court determines Mother is still in need of a Rule 17 GAL, the trial court shall enter an order with findings of fact to support its conclusion of law.

VACATED.

Judges FLOOD and STADING concur.

BREAL MADISON, III, PLAINTIFF
v.
ABIGAIL GONZALEZ-MADISON, DEFENDANT

No. COA23-1032

Filed 6 August 2024

1. Child Custody and Support—permanent custody order—best interest determination—no abuse of discretion

In a child custody case between two active-duty members of the military, there was no abuse of discretion in the district court's award of primary physical custody to the mother where, although the findings of fact would have supported either the mother or the father receiving primary physical custody, it was for the court to consider and weigh its findings of fact to determine what award of custody would be in the juvenile's best interest.

2. Child Custody and Support—permanent custody order—self-executing modification provisions—speculative—abuse of discretion

In a child custody case, the district court's alternative visitation schedule, set to self-execute in the event that one or both of the parents—each an active-duty member of the United States Army—received a permanent change of station (PCS), constituted an abuse of discretion where the potential change in circumstances (that is, a physical relocation of one or both parents) was too speculative. Accordingly, that portion of the order was vacated, with the parents maintaining the right to seek a custody modification when either received a PCS (or if any other change of circumstances arose).

Appeal by plaintiff from order entered 16 June 2023 by Judge Stephen C. Stokes in Cumberland County District Court. Heard in the Court of Appeals 12 June 2024.

Tharrington Smith, LLP, by Jaye Meyer and Sarah Izzell-Cutler, for plaintiff-appellant.

The Law Office of Michael A. Simmons, PLLC, by Michael A. Simmons, for defendant-appellee.

DILLON, Chief Judge.

In this appeal, Plaintiff Breal Madison, III, ("Father") appeals the trial court's order granting primary physical care, custody, and control to Defendant Abigail Gonzalez-Madison ("Mother").

I. Background

Father and Mother (collectively, "Parents") are both active-duty members of the United States Army. In 2019, they became the biological parents of minor child Liam while both were stationed at Ft. Bragg.[1] Parents separated following Liam's birth and consented to a temporary custody order, granting Parents joint legal and physical custody.

In 2022, both Parents were re-stationed in Hawaii. Father moved to Hawaii in February. Three months later, in May, Mother and Liam moved to Hawaii.

In February 2023, while in Hawaii, the trial court in Cumberland County held a Webex hearing to determine permanent custody. In June 2023, the trial court entered an order granting Parents joint legal custody of Liam, but awarded Mother primary physical care, custody, and control of Liam. Father appeals.

II. Analysis

"It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998). "This discretion is based upon the trial court's opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (cleaned up). Accordingly, we review a trial court's custody determination for an abuse of discretion, meaning that a trial court's decision must "be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not

1. Pseudonym used for protection of the minor child's identity.

have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Father makes three arguments on appeal, which we address in turn.

A. Best Interest Determination

[1] First, Father contests the trial court's determination that it is in Liam's best interest for Mother to have primary physical custody.

> Before awarding primary physical custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party will be in the best interest of the child. Such a conclusion must be supported by findings of fact. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.

Hall v. Hall, 188 N.C. App. 527, 532, 655 S.E.2d 901, 905 (2008) (internal marks omitted). In child custody cases, the trial court has "broad discretion as to which facts to consider and how much weight to accord them." *In re A.K.*, 360 N.C. 449, 456, 628 S.E.2d 753, 757 (2006).

Father points to several findings of fact which he believes show the "inevitable conclusion" that awarding him primary physical custody "would better promote the minor child's best interest." For instance, the trial court made several findings regarding Parents' "notable communication issues" and appeared to suggest that Mother was at fault for those issues. However, the court also found that "[n]otwithstanding the communications, Father and Mother have assisted each other in the care and custody of the minor child." The trial court also made findings regarding the interactions between Father and Liam. In particular, the trial court found that "Father retains a consistent daily routine of dropping off and picking up the minor child from daycare. Father enjoys date nights and extracurricular activities with the minor child to include reading, swimming, [and] going to the park." The trial court did not make comparable findings regarding Mother's routine and activities with Liam. And we note that Father showed a great involvement in Liam's speech therapy, with Father attending seventeen sessions and Mother attending only three sessions.

Accordingly, some of the trial court's findings of fact may suggest that it would be in the child's best interest for Father to have primary physical custody. Yet, other findings suggest that it would be in the child's best interest for Mother to have primary physical custody, such as the

findings tending to show that Mother has greater financial resources to support Liam, that Mother has previously taken on the responsibility of physically caring for Liam full-time when her move to Hawaii was delayed, and that Mother has a live-in boyfriend who helps take care of Liam.

Here, the trial court had discretion to determine how much weight to give each finding of fact, and its best interest conclusion is supported by those findings of fact. Based on the record before us, therefore, we cannot say that the trial court abused its discretion in awarding primary physical care, custody, and control to Mother.

B. "Self-Executing" Modification Provisions

[2] Father contests provisions within the custody order which will not take effect, if at all, until Parents, or either of them, are relocated by the Army from Hawaii.

At the time of the February 2023 custody hearing, Parents had several years left on their current military orders in Hawaii. The trial court found that each parent was expected to have a permanent change of station ("PCS") once his/her current assignment ended in 2025. Mother plans to remain in the Army but hopes to relocate closer to her family in Texas. Father may or may not have a PCS to the same location as Mother. The trial court ordered an alternative visitation schedule to commence, if at all, following either parent's PCS. This alternative schedule includes provisions that depend on Parents' physical proximity to each other (*e.g.*, whether Parents are living farther than 100 miles apart from each other).

We agree with Father that the trial court abused its discretion by including these "self-executing" modification provisions for the reasoning below.

A "self-executing" modification provision within a custody order is one which modifies the custody arrangement upon the occurrence of an event which may occur in the future. Several states have held that self-executing modification orders are generally illegal, at least one state has held them to be legal, and their legality is unclear in other states. *See generally* Helen R. Davis, *Self-Executing Modifications of Custody Orders: Are They Legal?*, 24 J. Am. Acad. Matrim. Laws. 53, 56 (2021).

Our Supreme Court has held that "the trial court is vested with broad discretion in cases involving child custody," *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902, and that "[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 [its order] was so arbitrary

that it could not have been the result of a reasoned decision," *White*, 312 N.C. at 777, 324 S.E.2d at 833.

That Court has also stated that "[a] judgment awarding custody is based upon the conditions found to exist *at the time it is entered* [and that the] judgment is subject to change as is necessary to make it *conform to changed conditions when they occur*." *Stanback v. Stanback*, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965) (emphasis added).

Our Court has held that "evidence of speculation or conjecture that a detrimental change may take place sometime in the future will not support a change in custody." *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000) (internal citations and quotations omitted).[2]

However, in 2015, our Court held that it was not an abuse of discretion by the trial court to include a provision in a custody order (entered when the child was under two years of age) which changed the father's visitation years in the future when the child entered kindergarten. *See Burger v. Smith*, 243 N.C. App. 233, 246–48, 776 S.E.2d 886, 895–96 (2015). We concluded that, based on the facts in that case, "rather than being arbitrary, the visitation schedule was an appropriate response to the parties' unusual living situation." *Id.* at 248, 776 S.E.2d at 895–96. We noted the father's argument that the future visitation schedule "may prove incompatible with" whatever the future might hold, such as the "extracurricular activities in which the child might participate" in high school. *Id.* at 248, 776 S.E.2d at 896. Addressing the father's concern, we reminded that if the future held something unexpected, the father could seek a modification based on the unexpected changed conditions. *Id.*

In the present case, though, the change of circumstances which may occur based on a PCS are much more speculative than that in *Burger*. Here, the trial court made a call regarding visitation in the future without knowing when either parent may be transferred from Hawaii or where either may be transferred or how far apart Mother and Father would be living from each other. A PCS could create either a slight change or a drastic change which could uproot Liam to *any* United States Army base. We, therefore, conclude the trial court abused its discretion by incorporating the "self-executing" provisions in its order, provisions which do not take effect until after either parent receives a PCS transferring him/her from Hawaii, where the time and place of such transfer is unknown.

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2. We note that both detrimental and beneficial changes in circumstances may warrant a change in custody. *See Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900 (disapproving of a line of Court of Appeals cases that "require[d] a showing of adversity to the child as a result of changed circumstances to justify a change of custody.").

When a PCS order is received by either parent, the trial court may *at that time* consider the nature and particulars of the changed conditions occasioned by the PCS and determine *then* what custody arrangement would be in the best interest of the child. (Of course, either parent may seek a modification based on other changed circumstances as they may arise.)

C. Decretal Paragraphs

Father contests several provisions in the decretal order. Specifically, he argues that the trial court failed to make findings of fact or conclusions of law to support its judgment. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) ("Evidence must support findings; findings must support conclusions; conclusions must support the judgment.").

As we have concluded that the trial court erred in decreeing any change to take effect, if at all, post-PCS, we need not again address the decretal paragraphs addressing post-PCS custody/visitation. As to the other decretal provisions, we conclude the trial court did not abuse its discretion and affirm the order as to those provisions.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges GORE and THOMPSON concur.

MR ENTERTAINMENT, LLC D/B/A OFF THE WAGON DUELING PIANO BAR, JESS T. MILLS, IV AND BENJAMIN O. REESE, PETITIONERS
v.
THE CITY OF ASHEVILLE AND THE CITY OF ASHEVILLE BOARD OF ADJUSTMENT, RESPONDENTS

No. COA23-1109

Filed 6 August 2024

Zoning—violation of sign ordinance—single location at specific time—opportunity to cure—failure to re-inspect

The owners of a business (petitioners) timely cured their violation of a city ordinance prohibiting signs or advertisements on vehicles "parked or located for the primary purpose of displaying said sign" by notifying the code enforcement official that they had promptly moved their vehicle on the same day they received notice of the violation. The plain language of the ordinance, the evidence

of the violation as shown by three photos attached to the notice, and legal principles requiring interpretation of ordinances in favor of the free use of property all supported a determination that the violation occurred at a single location at a specific time, and was not an ongoing violation as the city later contended (based on petitioners continuing to drive their truck with the sign on it around the city for more than two years after the initial notice). The city had the burden of showing the existence of a violation, and its failure to re-inspect the site of the violation after being notified of abatement could not defeat petitioners' timely notice of cure. Therefore, the city's action to enforce the violation was rendered moot, and the matter was remanded to the trial court for dismissal.

Appeal by respondents from judgment entered 3 August 2023 by Judge Jacquline D. Grant in Buncombe County Superior Court. Heard in the Court of Appeals 11 June 2024.

Ferikes Bleynat & Cannon, PLLC, by Edward L. Bleynat, Jr., for the petitioner-appellants.

City Attorney's Office, by Sr. Assistant City Attorney Eric P. Edgerton, for the defendant-appellees.

TYSON, Judge.

MR Entertainment, LLC d/b/a Off the Wagon Dueling Piano Bar, Jess T. Mills, IV, and Benjamin O. Reese ("Petitioners") appeal from an order, which affirmed a decision of the City of Asheville Board of Adjustment ("the Board") and denied their motions. This case was consolidated by order with *City of Asheville v. MR Entertainment*, COA 23-1110. We vacate and remand.

I. Background

Shannon Morgan, a City Code Enforcement Officer, issued a Sign Violation Notice to Petitioners on 17 September 2014. Petitioners were served with the Notice of Violation on both the 23 and 24 of September 2014. The notice asserted Petitioners were in violation of City of Asheville Code of Ordinances Section 7-13-3(3). Section 7-13-3(3) reads, "Sign or advertisements placed on vehicles or trailers that are *parked or located for the primary purpose of displaying said sign* are prohibited." The City of Asheville UDO § 7-13-3(3) (emphasis supplied). Three photos were attached to the notice, taken less than an hour apart of Petitioners'

vehicle, with sign in the bed, parked behind their business. Under the notice, Petitioners had either twenty-four hours to correct and abate the violation *or* thirty days to appeal. Failure to comply results in "a civil penalty of one hundred dollars . . . per day for the number of days the violation[] continues."

Under the notice, the violation may only be considered corrected if Petitioners "notif[y] the Code Enforcement Official . . . and the site is inspected and determined to be in compliance by the Code Enforcement staff." On 25 September 2014, Petitioner Reese engaged in an email exchange with Officer Morgan. Petitioner Reese requested further information about appealing the notice, but additionally indicated any violation concerning Petitioners' vehicle parked behind their business had been corrected and abated the same day as the vehicle had only been parked at the site that afternoon. Petitioners did not appeal the notice within thirty days. No follow-up inspection was performed by Code Enforcement staff. The Board found: "no inspection was ever performed, and no determination was issued by the City that the [Petitioners] had corrected the conditions giving rise to the" notice.

Two and a half years later, on 17 January 2017, Harry Gillis, another City Code Enforcement Officer, issued a citation purportedly based on the original notice, alleging the continuous violation of Section 7-13-3(3) since 17 September 2014. Following the citation, Petitioner Reese sent multiple letters to Officer Gillis informing him the truck had been promptly moved back in 2014, and asserted Petitioners were not in violation of Section 7-13-3(3) for a variety of reasons.

A letter from Robin Curry, then City Attorney, purportedly clarified the situation by alleging the "continuous violation" was due to Petitioners driving the truck containing the sign "throughout Asheville for the purpose of displaying the [s]ign" rather than for the singular parking incident, as documented in the 17 September 2014 notice.

On 22 August 2018, the City of Asheville ("the City") filed a complaint against Petitioners seeking injunctive relief to enjoin further use of the truck with the sign and the collection of civil penalties purportedly amounting to $57,500 from September 2014, with fines continuing to accrue at one-hundred dollars per day ("the Enforcement Action").

On 12 April 2019, Petitioners initiated an appeal, separate from the Enforcement Action, of the 2014 notice to the City of Asheville Board of Adjustment. The Board dismissed Petitioners' appeal on 28 October 2019 for lack of subject matter jurisdiction, citing Petitioners' failure to appeal the 2014 notice within the prescribed thirty-day period from

issuance. Petitioners appealed the Board's dismissal through a Writ of *Certiorari* to the Buncombe County Superior Court, wherein it was joined with the City's Enforcement Action.

Petitioners filed a Motion to Dismiss for lack of subject matter jurisdiction and a Motion for Summary Judgment in the Enforcement Action. The City filed a Rule 12(c) Motion for Judgment on the Pleadings and Motion to Strike the Affidavit of Benjamin Reese. The trial court granted both of the City's motions and denied both of Petitioners' motions. Concerning Petitioners' appeal of the Notice of the Violation, the trial court affirmed the Board's dismissal for lack of subject matter jurisdiction. Petitioner appealed the Enforcement Action and the dismissal separately.

II. Jurisdiction

Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

Petitioners argue the trial court erred in affirming the Board's dismissal for subject matter jurisdiction as: (1) the trial court misapplied the *de novo* standard of review; and, (2) enforcement of the notice as-applied would violate Petitioners' due process rights.

A. Standard of Review

When reviewing a superior court's order regarding a zoning board of adjustment's decision, this Court is tasked with "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Harding v. Bd. of Adjustment of Davie Cnty.*, 170 N.C. App. 392, 395, 612 S.E.2d 431, 434 (2005)) (citations omitted). When reviewing whether a superior court's order regarding "a zoning board of adjustment's decision [was proper], [t]he scope of our review is the same as that of the trial court." *Id.*

The proper standard of review "depends upon the particular issues presented on appeal." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). Where the petitioner has alleged "the [b]oard's decision was based on an error of law, *de novo* review is proper." *Id.* "Under *de novo* review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011).

B. Analysis

The City issued the 2014 Notice of Violation pursuant to the City of Asheville UDO § 7-18-3, which specifies "[t]he notice of violation shall include an opportunity to cure the violation within a prescribed period of time." The 2014 Notice of Violation facially complied with this requirement, providing Petitioners the opportunity to *either* cure the violation "within twenty-four (24) hours *or* file an appeal to the board of adjustment within thirty (30) days." (emphasis supplied). However, the notice continues, stating the violation can only be considered cured when Petitioners had notified the Code Enforcement Official and a subsequent inspection had determined the site to be in compliance.

"[W]ords should be given their natural and ordinary meaning[.]" *Grassy Creek Neighborhood All. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citation omitted). "In its elementary sense the word 'or' . . . is a disjunctive particle indicating that the various members of the sentence are to be taken separately . . . ." *Id.* Concerning the 2014 notice, the applicability of the two clauses "is not limited to cases falling within both clauses, but will apply to cases falling within either of them." *Id.* at 296, 542 S.E.2d at 300.

Petitioners do not allege the notice was appealed within the requisite thirty days prescribed in the notice, as required by N.C. Gen. Stat. § 160D-405(d) (2023). However, the ordinance specifically allows Petitioners "the opportunity" to cure and abate the violation within the twenty-four-hour period specified in the notice and to render the 2014 notice moot. The City of Asheville UDO § 7-18-3.

North Carolina courts decline to answer moot questions as an exercise of judicial restraint." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). Under the traditional analysis, "[a] case is considered moot when 'a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.' Typically, '[c]ourts will not entertain such cases because it is not the responsibility of courts to decide abstract propositions of law.' " *Citizens Addressing Reassignment & Educ., Inc. v. Wake Cnty. Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007) (citations omitted). Due to the disjunctive language within the ordinance and notice and the statutory requirement that Petitioners be afforded an "opportunity to cure the violation," Petitioners had *either* the option to appeal the notice *or* to cure and abate the violation. If Petitioners cured the violation within the twenty-four-hour period prescribed in the notice, any lingering question over the validity of the 2014 Notice of Violation is moot. The City of Asheville UDO § 7-18-3.

1. The Violation

To determine whether Petitioners cured the violation requires consideration of the specifics of the violation alleged within the notice and the ordinance Petitioners allegedly violated, the City of Asheville UDO § 7-13-3(3). The notice states, "[t]he nature of the violation is the use of a vehicle for the primary purpose of displaying off-premise signage . . . ." Further, Section 7-13-3(3) reads, "Signs or advertisements placed on vehicles or trailers that are parked or located for the primary purpose of displaying said sign are prohibited." The City of Asheville UDO § 7-13-3(3).

Petitioners and the City disagree about the nature of the violation cited within the notice. The City argues Petitioners violated section 7-13-3(3) by continuously driving the truck identified in the notice within city limits for over two years after the cited violation. Petitioners argue the violation cited the specific instance of their truck being parked behind their business. We agree with Petitioners.

"The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property." *Innovative 55, LLC v. Robeson Cnty.*, 253 N.C. App. 714, 720, 801 S.E.2d 671, 676 (2017) (citations omitted). Further, "words should be given their natural and ordinary meaning, and need not be interpreted when they speak for themselves." *Grassy Creek*, 142 N.C. App. at 297, 542 S.E.2d at 301 (citations omitted).

The City contends the inherently mobile nature of a vehicle expands the scope of Section 7-13-3(3) to include the vehicle's operation throughout the city, not only in a singular location at a specified time. However, the plain language of Section 7-13-3(3) states it does not apply to every vehicle in "operation throughout the city" but only to those "that are *parked or located* for the primary purpose of displaying [advertisements]." The City of Asheville UDO § 7-13-3(3) (emphasis supplied).

North Carolina courts have long distinguished such language from the general acts of driving. *See, e.g.*, *Morris v. Jenrette Transp. Co.*, 235 N.C. 568, 575, 70 S.E.2d 845, 850 (1952) (" 'park' or 'leave standing' . . . mean[] 'something more than a mere temporary or momentary stop on the road for a necessary purpose.' "). The plain language of UDO Section 7-13-3(3), "narrowly" or "strictly" "construed in favor of the free use of property," precludes an interpretation of the specific violation alleged within the notice as being Petitioners driving the identified truck in "operation throughout the city" in 2014 and for two and a half years thereafter. *Innovative 55, LLC*, 253 N.C. App. at 720, 801 S.E.2d at 676.

In addition to the statutory language of the ordinance, there are several other indications to support an interpretation of the 2014 notice as alleging a violation only in the singular instance and place, as was documented within the notice: (1) attached to the notice were three photos taken less than an hour apart of Petitioners' vehicle, with sign attached, and all three photos were of a singular instance of Petitioners' vehicle being parked behind their business at a specified date and time; (2) no other evidence or documentation of separate instances were included within the notice; and, (3) the notice explicitly requires a site inspection to abate and cure. The notice's requirement of a site inspection further supports an inference the notice specifies a violation at a singular location at a specific time.

Based upon the ordinance's plain language and the evidence contained within the notice, along with the legal principles of construction favoring free property rights, we conclude the violation specified within the notice to be the specific instance of Petitioners' truck being parked behind their business at a specific time and date in 2014. *Id.*

2. The Cure

Under the notice, Petitioners had twenty-four hours to cure the violation. Further, the violation alleged within the notice could only be "considered corrected . . . when [Petitioners] ha[d] notified the Code Enforcement Official . . . and the site [was] inspected and determined to be in compliance[.]"

Petitioners confirmed to the code official the vehicle was moved the same afternoon long before they actually received notice, as the vehicle was only parked behind their business for a limited time. Upon receiving the notice, Petitioner Reese promptly emailed Shannon Morgan, the City Code Enforcement Officer who had issued the Sign Violation Notice to Petitioners. Petitioner Reese requested further information regarding appealing the notice, but additionally and specifically asserted any purported violation concerning Petitioners' vehicle being parked behind their business had been corrected, as the vehicle had only been parked behind their business on that date and was moved. Petitioners' email to Officer Morgan satisfies the requirement for Petitioners to notify the Code Enforcement Official of their abatement of the violation. Petitioners' further requests for information or other documents regarding the alternative right of appealing the notice is immaterial.

Upon receiving notice of the abatement from Petitioners, the 2014 Notice of Violation additionally requires "the site [be] inspected and determined to be in compliance" by a Code Enforcement Officer.

Despite Petitioners notifying Officer Morgan the vehicle was no longer at the site, the record does not show Officer Morgan performed a site inspection or made a determination regarding whether the violation had been abated. The City's own failure to re-inspect the site cannot defeat Petitioner's timely notice of cure. The Board specifically found "no inspection was ever performed" after Reece's email to Morgan.

3. The City's Burden

The City carries the burden of proving the existence of a violation of a local zoning ordinance. *City of Winston-Salem v. Hoots Concrete Co.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980). The uncontested evidence shows Petitioners moved their vehicle the same day the initial photographs contained in the notice were taken, and they had removed their vehicle before they had received the 2014 notice. Petitioners timely notified the City of their removal and abatement. Under these circumstances, the burden of proving Petitioner's continued violation of the local zoning ordinance remains upon the City. *See id.* For the 2014 notice to support any further action, the City was required to show evidence of and prove the continuing specified violation past Petitioners' notice of removal and abatement. *Id.*

Under the City of Asheville UDO § 7-18-3, the City is also required to provide an opportunity for Petitioners to cure their violation: "[t]he notice of violation *shall include an opportunity to cure the violation* within a prescribed period of time." The City of Asheville UDO § 7-18-3 (emphasis supplied). No evidence tends to show Petitioners' vehicle remained in violation after the initial photographs contained in the specified notice were taken. The record shows Petitioners promptly removed the vehicle and notified the City of their abatement. The only remaining step was for the City to re-inspect the site and confirm the abatement. The Board found as fact the City had failed to re-inspect the site. In light of our holding, we need not reach Petitioners' remaining arguments.

IV. Conclusion

The trial court erred in affirming the Asheville Board of Adjustment's order dismissing Petitioners' claim, granting the City's motion for judgment on the pleadings, and denying Petitioners' motions. The City's action was rendered moot by Petitioners' notice and abatement as a means to cure the violation under the ordinance. *Id.* We vacate and remand for dismissal. *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and GRIFFIN concur.

WILLIAM B. SHANNON AND NANCY P. SHANNON, PLAINTIFFS
v.
ROUSE BUILDERS, INC., DEFENDANT

No. COA23-318

Filed 6 August 2024

1. Appeal and Error—interlocutory order—partial summary judgment—substantial right—danger of inconsistent verdicts

In a dispute over whether a former owner of a piece of property (defendant, a construction company) could legally dump debris on the property (now owned by plaintiffs) pursuant to an easement purporting to give defendant that right, the trial court's interlocutory order granting partial summary judgment to defendant on two of plaintiffs' causes of action—plaintiffs having been granted partial summary judgment on their other three causes of action—was immediately reviewable because it affected a substantial right. Given that future proceedings could lead to separate trials on the different causes of action—which all involved the single fundamental question of whether defendant illegally dumped debris on plaintiffs' property—there was a danger of separate juries reaching inconsistent verdicts, particularly on the question of when plaintiffs' various causes of action accrued (in accordance with each relevant statute of limitation) based on competing accrual evidence.

2. Unfair Trade Practices—easement dispute—dumping on property—activity not in or affecting commerce

In a property dispute in which plaintiffs sued defendant (a construction company that previously owned plaintiffs' property) to stop it from dumping timber and natural debris on their land (a right purportedly granted in an easement), the trial court properly granted partial summary judgment to defendant on plaintiffs' claim for unfair and deceptive trade practices (UDTP) because defendant's activity was not "in or affecting commerce." Although defendant's dumping was indirectly part of its day-to-day operations, it did not involve transactions between businesses or between a business and consumers since plaintiffs were not a business or a consumer of defendant's business and, therefore, plaintiffs were precluded from recovering under a UDTP cause of action.

Appeal by Plaintiffs from order entered 15 November 2022 by Judge James W. Morgan in Gaston County Superior Court. Heard in the Court of Appeals 15 November 2023.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for Plaintiffs-Appellants.

McAngus Goudelock & Courie, PLLC, by James D. McAlister, for Defendant-Appellee.

Arthurs & Foltz, by Douglas P. Arthurs, for Defendant-Appellee.

CARPENTER, Judge.

William and Nancy Shannon ("Plaintiffs") appeal from an order (the "Order") granting in part and denying in part a motion for summary judgment filed by Rouse Builders, Inc. ("Defendant"). After careful review, we affirm the Order.

I. Factual & Procedural Background

This case concerns a dispute over an easement used for dumping construction debris. Plaintiffs originally sued Defendant on 3 November 2017, but Plaintiffs voluntarily dismissed their complaint without prejudice on 13 November 2019. On 10 November 2020, Plaintiffs sued Defendant again, asserting the following causes of action: breach of contract, nuisance, trespass, negligence, negligence per se, and unfair and deceptive trade practices ("UDTP"). Plaintiffs sought damages, declaratory judgment, injunctive relief, and attorneys' fees. On 4 October 2022, Defendant filed a motion for summary judgment concerning all of Plaintiffs' causes of action. The trial court heard the motion on 31 October 2022, and hearing evidence tended to show the following.

Defendant is a construction company and a previous owner of real property in Gaston County (the "Property"), which Plaintiffs now own. In 2003, Defendant sold the Property to David and Heather Mercer via a general warranty deed (the "Deed"). The Deed includes an easement for Defendant's continued use of the Property to "dump[ ] timber and natural land debris." On 15 August 2005, Plaintiffs purchased the Property from the Mercers.

Plaintiffs asserted that Defendant illegally used the Property as a construction dump. On 18 August 2005, Plaintiffs blocked Defendant's access to the Property with a chain. In response, Defendant assured Plaintiffs that the Deed allowed it to dump debris on the Property, and that its dumping was proper. After reviewing the Deed, Plaintiffs contacted the Gaston County Planning Department ("Gaston County"). Based on the Deed and discussions with Defendant and Gaston County, Plaintiffs believed that Defendant's dumping was proper.

But on 2 June 2015, Plaintiffs received a notice of violation from Gaston County concerning Defendant's dumping. In the notice, Gaston County alleged that Plaintiffs were responsible for Defendant's dumping, and Gaston County threatened to take civil action if Defendant did not obtain the required permit or stop the dumping. Plaintiffs stated that this notice from Gaston County was their first indication that Defendant's dumping was illegal, or that Defendant's prior representations about the dumping were false.

Defendant, on the other hand, claimed that it properly used the Property for dumping, as prescribed in the Deed. Regardless, Defendant argued that Plaintiffs had actual knowledge of the extent of its dumping in 2005, and that Defendant did not change its dumping practices between 2005 and 2015.

On 15 November 2022, the trial court entered the Order, which partly granted and partly denied Defendant's motion for summary judgment. The Order denied Defendant's motion concerning Plaintiffs' trespass, nuisance, and negligence, theories. The Order granted Defendant's motion concerning Plaintiffs' breach-of-contract and UDTP theories. On 14 December 2022, Plaintiffs filed notice of appeal.

II. Jurisdiction

[1] "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Cap., L.C.*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citing *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Orders granting partial summary judgment are interlocutory. *Country Boys Auction & Realty Co. v. Carolina Warehouse, Inc.*, 180 N.C. App. 141, 144, 636 S.E.2d 309, 312 (2006).

There are, however, exceptions to the general rule prohibiting appeals from interlocutory orders. *See* N.C. Gen. Stat. § 7A-27(b)(3) (2023). One exception is the substantial-right exception, which allows us to review an interlocutory order if the order affects a "substantial right." *See id.* "An interlocutory order affects a substantial right if the order deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Suarez v. Am. Ramp Co.*, 266 N.C. App. 604, 608, 831 S.E.2d 885, 889 (2019) (*purgandum*).

Here, the Order is interlocutory because it grants partial summary judgment. *See Country Boys Auction & Realty Co.*, 180 N.C. App. at 144,

636 S.E.2d at 312. But Plaintiffs argue that we have jurisdiction via the substantial-right exception. Specifically, Plaintiffs argue that the Order affects a substantial right because it creates the possibility of inconsistent verdicts on common questions of fact.

Plaintiffs' argument is as follows: If we do not review the Order now, we can only review it after trial. If we review and reverse the Order after trial, a different jury will then decide the remanded UDTP theory, which according to Plaintiffs, hinges on the same facts as its other causes of action. And the second jury could potentially view the facts differently than the first jury, thus leaving Plaintiffs with inconsistent verdicts on common questions of fact.

We have granted review under this exception before. *See*, *e.g.*, *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989). Under this exception, the appellant "must 'show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.' " *See Clements v. Clements*, 219 N.C. App. 581, 585, 725 S.E.2d 373, 376 (2012) (quoting *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995)).

Plaintiffs' case involves one fundamental claim: that Defendant illegally dumped debris on the Property. Plaintiffs seek relief for this claim through multiple causes of action. The trial court, however, dismissed two theories at summary judgment, while allowing the others to proceed to trial. So potentially, one jury could resolve the theories for which the trial court denied summary judgment, and another jury could resolve the theories for which the trial court granted summary judgment. *See Davidson*, 93 N.C. App. at 25, 376 S.E.2d at 491. Under this scenario, the juries will review the same factual issues, and each jury could resolve the issues differently.

For example, both trespass and UDTP are subject to statutes of limitation. *See* N.C. Gen. Stat. §§ 1-52(3), 75-16.2 (2023). Both of these statutes of limitation begin to run when the cause of action accrues, which is when Plaintiffs knew or should have known, whichever is earlier, about the alleged illegal activity. *See Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302 (1998) (citing N.C. Gen. Stat. § 1-52(16)) (providing that a trespass theory accrues when "it becomes apparent or ought reasonably to have become apparent to claimant"); *Nash v. Motorola*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989) (holding that a UDTP theory based on fraud accrues when the plaintiff discovered or should have discovered the fraud).

When parties dispute facts about accrual, "the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 679 (2001). And "[w]hen the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." *Id.* at 319, 555 S.E.2d at 679 (citing *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)).

Here, Defendant affirmatively pleaded statute-of-limitations defenses to all of Plaintiffs' causes of action. In response, Plaintiffs argued that they did not know, and had no reason to know, about the illegality of Defendant's dumping until 2015. On the other hand, Defendant asserted that Plaintiffs knew about the extent of its dumping in 2005. If Plaintiffs are correct, neither their trespass nor their UDTP theories would be time barred; but if Defendant is correct, both theories would be time barred.[1] *See* N.C. Gen. Stat. §§ 1-52(3), 75-16.2.

When Plaintiffs knew, or should have known, about the alleged illegality of Defendant's dumping is a question of fact. *See Everts*, 147 N.C. App. at 319, 555 S.E.2d at 679. So if Plaintiffs' trespass and UDTP causes of action are resolved at separate trials, separate juries will answer the accrual question, and both juries will analyze the same factual issues. *See Clements*, 219 N.C. App. at 585, 725 S.E.2d at 376. Further, it is possible for the juries to reach inconsistent accrual conclusions because there is competing accrual evidence. *See id.* at 585, 725 S.E.2d at 376. Therefore, the Order affects a substantial right, and we have jurisdiction over this appeal. *See* N.C. Gen. Stat. § 7A-27(b)(3).

III. Issue

[2] The issue on appeal is whether the trial court erred by partially granting Defendant summary judgment.

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1. Plaintiffs filed their initial complaint on 3 November 2017. Therefore, if Plaintiffs' causes accrued on 2 June 2015, as they assert, then they filed their complaint within the applicable statutes of limitation for trespass and UDTP. *See* N.C. Gen. Stat. §§ 1-52(3) (three years), 75-16.2 (four years). Plaintiffs later dismissed their complaint without prejudice on 13 November 2019. Under Rule 41 of our Rules of Civil Procedure, when a plaintiff voluntarily dismisses a complaint without prejudice, the plaintiff may file a "new action based on the same claim . . . within one year after such dismissal." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2023). Voluntary dismissal under Rule 41 also "extend[s] the statute of limitations by one year after a voluntary dismissal." *Staley v. Lingerfelt*, 134 N.C. App. 294, 298, 517 S.E.2d 392, 395 (1999) (citing *Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973)). So if Plaintiffs' accrual assertion is correct, their theories are still within the applicable statutes of limitation because Plaintiffs refiled their complaint within one year of their voluntary dismissal.

IV. Analysis

The Order granted Defendant summary judgment concerning Plaintiffs' breach-of-contract and UDTP causes of action. On appeal, however, Plaintiffs only challenge the Order concerning UDTP. Because Plaintiffs do not challenge the Order concerning breach of contract, we will not analyze that portion of the Order. *See Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) ("It is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." (citing N.C. R. App. P. 28(b)(6))).

A. Standard of Review

We review summary-judgment rulings de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Under a de novo review, this 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)).

Summary judgment is appropriate when "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) (2023). Concerning summary judgment, courts "must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Indeed, "[s]ince this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

B. UDTP

North Carolina's UDTP cause of action is codified in Article 1 of Chapter 75. *See* N.C. Gen. Stat. § 75-1.1 (2023). Under subsection 75-1.1(a), "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* § 75-1.1(a). UDTP "requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 738, 659 S.E.2d 483, 488 (2008) (quoting *Craven v. SEIU COPE*, 188 N.C. App. 814, 818, 656 S.E.2d 729, 733–34 (2008)).

We begin and end with the second element of UDTP: "in or affecting commerce." Commerce "includes all business activities, however

denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). Although the statutory language is expansive, the North Carolina Supreme Court has narrowed its scope. *See*, *e.g.*, *Nobel v. Foxmoor Grp.*, 380 N.C. 116, 121, 868 S.E.2d 30, 34 (2022).

The Court has defined business activities as the "regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms*, *Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). But the Court has since limited business activity to "two types of business transactions: '(1) interactions between businesses, and (2) interactions between businesses and consumers.' " *See Nobel*, 380 N.C. at 121, 868 S.E.2d at 34 (quoting *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010)). In other words, internal business operations are not covered by subsection 75-1.1(b). *See id.* at 121, 868 S.E.2d at 34.

"Consumer" is not unlimited. *See id.* at 121–22, 868 S.E.2d at 34–35. Rather, to be a consumer under the second *White* category, the plaintiff must consume the defendant's product or service. *See id.* at 121–22, 868 S.E.2d at 34–35 (citing *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981)) (declaring that a transaction was not "in or affecting commerce" because although "a personal relationship existed between plaintiff and defendant, there [was] no evidence that plaintiff was a consumer of Foxmoor, nor engaged in any commercial transaction with the company").

Here, Defendant's dumping does not fit squarely into either of the *White* categories. *See White*, 364 N.C. at 52, 691 S.E.2d at 679. The transaction that is alleged to have harmed Plaintiffs was Defendant's dumping, and indeed, the parties disagree about the legality of Defendant's dumping. But as the dumping relates to the second prong of UDTP, the parties do not dispute any material facts. The Defendant is a construction business, and Plaintiffs are not a business. Moreover, Defendant did not build or remodel a home for Plaintiffs. Further, Plaintiffs did not pay Defendant to dump on the Property, and Defendant did not pay Plaintiffs in order to dump on the Property.

As Plaintiffs are not a business, the dumping does not fit into the first *White* category because it was not an interaction between businesses. *See id.* at 52, 691 S.E.2d at 679. The dumping does not fit into the second *White* category either, because Plaintiffs are not "consumers" of Defendant. *See Nobel*, 380 N.C. at 121–22, 868 S.E.2d at 34–35. Plaintiffs

are not Defendant's consumers because Defendant, a construction company, did not build or remodel their home, and Plaintiffs did not buy any other goods or services from Defendant.[2] *See id.* at 121–22, 868 S.E.2d at 34–35. Therefore, the dumping was not an interaction between a business and its consumer. *See id.* at 121–22, 868 S.E.2d at 34–35.

Because Defendant is a construction company, however, dumping construction debris was at least indirectly part of Defendant's day-to-day operations. *See HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493. Nonetheless, Defendant's dumping was more akin to an internal business operation than an external business transaction. *See Nobel*, 380 N.C. at 121, 868 S.E.2d at 34. So although Defendant's dumping may have harmed Plaintiffs, Defendant's dumping was not "in or affecting commerce." *See Nucor Corp.*, 189 N.C. App. at 738, 659 S.E.2d at 488. This does not preclude Plaintiffs from seeking a remedy through other legal theories, but it does preclude Plaintiffs from seeking a UDTP remedy. *See Nobel*, 380 N.C. at 121, 868 S.E.2d at 34.

In sum, because the parties do not dispute any material facts concerning the second element of UDTP, summary judgment is appropriate "as a matter of law." *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). And even viewing the evidence in Plaintiffs' favor, *see Dalton*, 353 N.C. at 651, 548 S.E.2d at 707, they cannot establish that Defendant's dumping was "in or affect[ed] commerce," *see Nucor Corp.*, 189 N.C. App. at 738, 659 S.E.2d at 488. Therefore, the trial court correctly granted Defendant summary judgment concerning UDTP. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

V. Conclusion

We conclude that the trial court correctly granted Defendant summary judgment concerning UDTP. Therefore, we affirm the Order.

AFFIRMED.

Judges GORE and FLOOD concur.

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2. To be sure, if Plaintiffs complained about the sale of the Property, as such, they could potentially satisfy the second UDTP prong. *See Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 584, 473 S.E.2d 680, 688 (1996) (holding "that indirect purchasers have standing under N.C. [Gen. Stat.] § 75-16 to sue for Chapter 75 violations"). Plaintiffs, however, do not complain about the sale of the Property. Rather, they argue that Defendant's dumping on the Property "occurred with such frequency as to indicate a general business practice."

STATE OF NORTH CAROLINA ex rel. GERALD CANNON, in his individual capacity and his official capacity As Sheriff of Anson County, Plaintiff

v.

ANSON COUNTY; ANSON COUNTY BOARD OF COMMISSIONERS; JARVIS T. WOODBURN, in his official capacity; JEFFREY BRICKEN, in his official capacity; ROBERT MIMS, JR., in his official capacity; LAWRENCE GATEWOOD, in his official capacity; JAMES CAUDLE, in his official capacity; PRISCILLA LITTLE, in her official capacity; DAVID HAROLD C. SMITH, in his official capacity; SCOTT HOWELL, Defendants

No. COA23-1069

Filed 6 August 2024

1. Open Meetings—quo warranto action—appointment of sheriff—validity up for judicial review—suit under N.C.G.S. § 143-318.16A—unnecessary

In a quo warranto action brought by plaintiff after defendant county board of commissioners appointed him as sheriff (to fill a vacancy resulting from the prior sheriff's death) but subsequently replaced him with defendant interim sheriff (who had already served the rest of the deceased sheriff's term), plaintiff placed up for judicial review the validity of his appointment by arguing that, since nobody challenged his appointment through a "proper proceeding" under N.C.G.S. § 143-318.16A, the appointment was presumptively valid, and therefore defendants had "usurped" plaintiff's position as sheriff. Consequently, defendants were not required to challenge plaintiff's appointment by filing a separate suit under section 143-318.16A (setting forth the procedure for challenging violations of the Open Meetings Law).

2. Open Meetings—quo warranto action—emergency appointment of sheriff—improper meeting procedure—lack of notice—lack of quorum

In a quo warranto action brought by plaintiff after defendant county board of commissioners convened a meeting to appoint him as sheriff (to fill a vacancy resulting from the prior sheriff's death) but subsequently replaced him with defendant interim sheriff (who had already served the rest of the deceased sheriff's term), the trial court properly granted judgment on the pleadings in favor of defendants because the face of plaintiff's complaint showed that plaintiff's initial appointment was unlawful. First, the board's meeting did not qualify as an emergency meeting under the Open Meetings Laws (N.C.G.S. § 143-318.12(f)) because, at a previous meeting, the board

had already expressed its awareness of the looming sheriff vacancy and determined that no immediate action was necessary; absent a true emergency, the board was statutorily required to give notice to the public of the meeting forty-eight hours in advance, which it did not do. Additionally, although four out of the seven commissioners voted to appoint plaintiff, because there was no "emergency" that would have allowed remote participation pursuant to section 166A-19.24(a), the two votes that were cast via conference call were invalid, and therefore the board did not have the quorum necessary to appoint plaintiff.

Judge THOMPSON dissenting.

Appeal by plaintiff from order entered 10 May 2023 by Judge Stephan R. Futrell in Anson County Superior Court. Heard in the Court of Appeals 28 May 2024.

Leitner, Bragg & Griffin, PLLC, by Ellen A. Bragg and Thomas Leitner, for plaintiff-appellant.

Ellis & Winters LLP, by Jonathan D. Sasser and Jeffrey Steven Warren, for defendant-appellee Scott Howell.

Cranfill Sumner LLP, by Patrick H. Flanagan and Steven A. Bader, for defendant-appellee Anson County, et al.

Scott Forbes, for defendant-appellee Anson County, et al.

FLOOD, Judge.

Gerald Cannon ("Plaintiff") appeals from an order granting Defendants' motions for judgment on the pleadings. After careful review, we conclude the trial court did not err by granting Defendants' motions for judgment on the pleadings because the face of Plaintiff's quo warranto complaint shows the Anson County Board of Commissioners (the "Board") unlawfully appointed Plaintiff as Anson County Sheriff.

I. Factual and Procedural Background

On 21 September 2022, Anson County Sheriff Landric Reid passed away during his term of office. On 4 October 2022, the Board appointed Chief Deputy Scott Howell ("Defendant Howell") to fulfill the remainder

of Sheriff Reid's term, which was set to expire on 5 December 2022.[1] Prior to his death, Sheriff Reid had won the Democratic nomination for Sheriff and was on the 8 November 2022 general election ballot for Sheriff. Due to the short amount of time between Sheriff Reid's death and the general election, Sheriff Reid was unable to be removed from the ballot and won re-election in November 2022, thereby creating a vacancy for his second term.

On 1 December 2022, the Board convened for a "special meeting" to discuss the looming Sheriff vacancy. The commissioners present during the special meeting were Chairman Jarvis T. Woodburn, Vice Chair Robert Mims, Vancine Sturdivant, Harold C. Smith, Dr. Sims, Lawrence Gatewood, and J.D. Bricken. During the special meeting, Commissioner Bricken asked the Anson County Attorney, Scott Forbes, whether the Board had "authority to appoint a sheriff to fulfill an upcoming vacancy." According to the minutes from the special meeting, "Attorney Forbes advised that [a] Closed Session would be the more appropriate venue to answer this question as it is a legal matter from which he assumes litigation is likely to follow." Due to the attorney-client privilege between Attorney Forbes and the Board, Attorney Forbes advised that the Board would need to vote before having him address the question in an open session. The Board subsequently voted to go into a closed session. After the Board came out of the closed session, the Board voted six to one to conclude the special meeting, as they had determined in the closed session that the issue of appointing a sheriff could wait until the Board's regularly scheduled meeting to be held on 6 December 2022. Following the vote, Commissioner Woodburn announced to the open session audience that there "would be no action taken today and 'this matter will be resolved on December 6.' "

On 3 December 2022, the Democratic Party of Anson County (the "Democratic Party") selected Plaintiff to fill the vacancy of the Anson County Sheriff. The Democratic Party was operating under the belief that, pursuant to N.C. Gen. Stat. § 162-5.1 (b) (2021), the Board was required to appoint the person recommended by the Democratic Party, as Sheriff Reid had been elected as the Democratic nominee. This section of the statute, however, applies only to select counties, of which Anson County is not included.

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1. Plaintiff's quo warranto complaint indicated that the term expired at midnight on 4 December 2022, but deposition testimony confirmed the term expired at midnight on 5 December 2022.

Despite the Board concluding at the special meeting on 1 December 2022 that no action needed to be taken until the 6 December 2022 regular meeting, Commissioner Woodburn called for an "emergency meeting" on 5 December 2022 to address the vacancy for Sheriff. Commissioner Woodburn called the 5 December meeting after he was contacted by Commissioner Smith, who represented that a board member of the Democratic Party had "told him that the sheriff's position needed to be dealt with[.]" Commissioner Woodburn thought that "made sense" as there would be a vacancy as of 5 December 2022.[2] On 5 December 2022, at 5:29 p.m. the Clerk to the Board—Denise Cannon—sent an email to all six commissioners, notifying them that Commissioner Woodburn had called the 5 December meeting. Cannon also called all six board members between 4:56 p.m. and 5:42 p.m. on 5 December 2022, and made contact with five commissioners, but was unable to reach Commissioner Gatewood. The 5 December meeting began at 5:45 p.m. at the Anson County Government Center.

Commissioners Sturdivant and Smith were present in person at the 5 December meeting, and Commissioners Woodburn and Sims were present via conference call. Commissioner Bricken is not included on the list of commissioners who were present, but the meeting minutes reflect that he participated in the meeting via conference call; however, he lost contact at some point prior to the vote. Commissioners Smith, Sturdivant, Sims, and Woodburn voted to appoint Plaintiff to fill the vacant Sheriff's position. Commissioner Bricken was called to vote, but was unresponsive. Plaintiff won the nomination with four out of seven votes and was sworn in as Anson County Sheriff at the close of the 5 December meeting.

Later that evening, Attorney Forbes contacted Plaintiff and Defendant Howell. Attorney Forbes notified Plaintiff that he interpreted the 5 December meeting as an illegal meeting because there was no "emergency," and Plaintiff's appointment was therefore invalid. Attorney Forbes told Defendant Howell that because the meeting was unlawful, Defendant Howell was still the Sheriff.

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2. Complicating the vacancy timing and date, Commissioner Woodburn stated in his deposition that after being contacted by Commissioner Smith on 5 December, Commissioner Woodburn thought the meeting was necessary because "the sheriff's position needed to be dealt with because, you know, as of midnight on the 5th, we wouldn't have a sheriff." As this occurred on 5 December, a term expiring at midnight would be later that same night.

On 6 December 2022, Plaintiff filed a complaint in Anson County Superior Court seeking a declaratory judgment. He also filed a motion for a preliminary injunction. In his complaint and motion, Plaintiff requested that the trial court declare him as Sheriff and prohibit the Board from preventing him from taking office as Sheriff. A hearing was held in which Attorney Forbes informed the trial court that he had "retracted" the statement that he made to Plaintiff the previous evening because the "[c]ounty was not going to take a position as to this issue and it was for the court" to decide. In a subsequent deposition, Attorney Forbes represented that he did not "know that [he necessarily] retracted" the statement, but only meant to convey that he did not have the authority to make the statement because it was for the courts to decide.

Following the hearing on Plaintiff's motion for a preliminary injunction, the trial court denied Plaintiff's motion.

Later that day, at 6:00 p.m., the Board convened for their regularly scheduled meeting. Present at this meeting were Commissioners Bricken, Mims, Woodburn, Smith, and Gatewood. Also present were Commissioners Priscilla Little and Jamie Caudle, who had been sworn in at the start of the meeting, replacing out-going Commissioners Sims and Sturdivant.

During the meeting, Commissioner Gatewood motioned to appoint Defendant Howell as Anson County Sheriff "effective immediately and extending through the next four years." Commissioner Caudle seconded this motion. Commissioner Smith questioned the legality of the motion and inquired as to whether there was even a vacancy given Plaintiff's appointment the previous day, but no further discussion was had.[3] The Board voted six to one—Commissioner Smith being the one—to bring to a vote the motion to appoint Defendant Howell as Sheriff. The motion to appoint Defendant Howell as Sheriff was repeated, and the Board voted four to three to appoint Defendant Howell as Anson County Sheriff.

On 7 December 2023, Plaintiff filed an amended complaint for declaratory judgment, and motion for preliminary injunction and permanent

3. The minutes from the 6 December meeting indicate the Board went into a closed session to consult with Attorney Forbes about "a potential or actual claim, administrative procedure, or judicial action" that could be brought pursuant to N.C. Gen. Stat. § 143-318.11(a)(3). As this was a closed session, however, there is no evidence in the Record showing what was said during that discussion or whether it addressed Commissioner Smith's concerns.

injunction, again requesting the trial court declare him Anson County Sheriff. The amended complaint alleged that Attorney Forbes informed Plaintiff that the 5 December "meeting was not illegal, and that Plaintiff was appointed as Sheriff for Anson County[.] . . . Further, [Attorney Forbes] stated . . . that the [5 December meeting] was valid and legal and that was the reasoning for retracting his previous statements." During Attorney Forbes' deposition, however, he emphatically denied ever stating that the 5 December meeting was "valid and legal."

The trial court denied Plaintiff's request to declare him Anson County Sheriff, and Defendant Howell was sworn in as Sheriff. In denying Plaintiff's request, the trial court advised Plaintiff that the appropriate action would be a quo warranto.

On 19 December 2023, Plaintiff requested that the North Carolina Attorney General grant Plaintiff leave to file a quo warranto action. On 4 January 2023, the North Carolina Department of Justice declined to bring a quo warranto action against Defendant Howell on behalf of Plaintiff but permitted Plaintiff to file such an action in the name of the State.

On 10 February 2023, Plaintiff filed a quo warranto complaint in Anson County Superior Court against Anson County, the Board, all seven commissioners in their official capacities (collectively "Defendant Anson County"), and Defendant Howell (collectively "Defendants"). The quo warranto complaint alleged that the Board did not have the authority to appoint Defendant Howell to the office of Anson County Sheriff because no vacancy existed after the 5 December meeting.

On 16 March 2023, Defendant Howell filed an answer to Plaintiff's quo warranto complaint, asserting Plaintiff failed to state a claim upon which relief could be granted. On 28 March 2023, Defendant Anson County filed an amended answer and asserted a counterclaim for declaratory judgment, arguing the 5 December meeting was not in fact an "emergency meeting," and as such, the meeting was not properly noticed.

On 17 April 2023, Defendant Howell filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. On 21 April 2023, Defendant Anson County filed a separate motion for judgment on the pleadings. Defendants argued the 5 December meeting was not properly noticed, and the Board did not have a proper quorum because only two commissioners attended in person; therefore, Plaintiff's appointment to Sheriff was unlawful.

On 26 April 2023, Plaintiff filed a motion for summary judgment arguing there were no genuine issues of material fact, and he was

entitled to judgment as a matter of law. Plaintiff also filed a motion to dismiss Defendant Anson County's counterclaim.

On 8 May 2023, the trial court held a hearing on Defendants' motions for judgment on the pleadings, Plaintiff's motion to dismiss Defendant Anson County's counterclaim for declaratory judgment, and Plaintiff's motion for summary judgment. At the hearing, all parties agreed that whichever motion the trial court ruled on would be dispositive of all of the motions. On 10 May 2023, the trial court issued an order granting Defendants' motions for judgment on the pleadings. On 5 June 2023, Plaintiff filed a notice of appeal to this Court.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, Plaintiff argues that it was an error for the trial court to grant Defendants' motions for judgment on the pleadings. Plaintiff also argues it was an error to deny Plaintiff's motion to dismiss Defendant Anson County's counterclaim and Plaintiff's motion for summary judgment. We conclude that the trial court did not err in granting judgment on the pleadings in favor of Defendants, as the face of Plaintiff's quo warranto complaint shows he was appointed at an unlawful meeting where there was neither a true "emergency" nor a quorum. We therefore do not reach Plaintiff's motion to dismiss Defendant Anson County's counterclaim nor his motion for summary judgment.

A. Quo Warranto Action

[1] Plaintiff argues the Board's 5 December appointment of Plaintiff to fill the term of Sheriff "should be deemed valid until and only if a proper proceeding is initiated and a court concludes that the appointment shall be declared void." Plaintiff further argues that in order to initiate the proper proceeding to contest an action of the Board, a person must file suit under N.C. Gen. Stat. § 143-318.16A and, as no person ever filed such a suit to challenge Plaintiff's appointment, he remains the lawful Sheriff. We disagree.

A quo warranto action may be brought by the Attorney General in the name of the State, or the Attorney General may grant a private person leave to bring an action in the name of the State, "[w]hen a person usurps, intrudes into, or unlawfully holds or exercises any public office . . . ." N.C. Gen. Stat. § 1-515(1) (2023); *see also Swaringen v. Poplin*,

211 N.C. 700, 702, 191 S.E. 746, 747 (1937) ("One of the chief purposes of quo warranto . . . is to try the title to an office."). "A usurper is one who undertakes to act officially without any actual or apparent authority." *In re Wingler*, 231 N.C. 560, 564, 58 S.E.2d 372, 375 (1950).

Here, Plaintiff filed a quo warranto complaint arguing Defendant Howell's appointment to Anson County Sheriff was "void and of no effect" because no one challenged Plaintiff's 5 December appointment to Sheriff, and there was therefore no vacancy for Defendant Howell to fill. Moreover, in his appellate brief, Plaintiff represented—without citing to legal support—that a quo warranto action is "used to resolve a dispute over whether a specific person has the legal right to hold the public office that he or she occupies; in this instance, this action was brought because [Defendant] Howell and Anson County were usurping the office of [] Sheriff." In Plaintiff's own words, when the trial court reviewed Plaintiff's quo warranto complaint, it was required to "resolve a dispute over whether a specific person has the legal right to hold" the title of Sheriff, *i.e.*, to determine whether Defendant Howell usurped Plaintiff's position as Sheriff. To make this determination, the trial court would have to determine if Plaintiff was in fact lawfully appointed to the position of Sheriff during the 5 December meeting. If Plaintiff was not lawfully appointed, Defendant Howell could not have usurped Plaintiff's position. If, on the other hand, Plaintiff had been lawfully appointed, Defendant Howell's appointment would have usurped Plaintiff's position. *See In re Wingler*, 231 N.C. at 564, 58 S.E.2d at 375.

Accordingly, because Plaintiff placed the issue of his appointment up for judicial review by filing the quo warranto complaint, Defendants were not required to challenge Plaintiff's 5 December appointment by filing suit pursuant to N. C. Gen. Stat. § 143-318.16A. Having concluded the trial court could determine whether Plaintiff was lawfully appointed to Sheriff, and Defendants were not required to file their own suit challenging Plaintiff's 5 December appointment, we now turn to whether the trial court erred by granting Defendants' motions for judgment on the pleadings.

B. Judgment on the Pleadings

[2] In challenging the trial court's order granting Defendants' motions for judgment on the pleadings, Plaintiff makes no arguments explaining why his 5 December appointment was lawful. Instead, he again argues that Defendants were required to challenge Plaintiff's appointment under N.C. Gen. Stat. § 143-318.16A, and absent any such challenge, Plaintiff's quo warranto complaint shows he was entitled to assume the

role of Anson County Sheriff. As Plaintiff has generally challenged the trial court's order, we will conduct our review to determine whether the order was made in error.

Defendants argue the trial court did not err in granting judgment on the pleadings because the face of Plaintiff's quo warranto complaint shows that he is not entitled to the relief sought because his appointment to the position of Sheriff occurred at an unlawful meeting in which improper procedure was followed. We agree.

1. Standard of Review

We review a trial court's decision on a grant of judgment on the pleadings *de novo*. *N.C. Farm Bureau Mut. Ins. Co. Inc. v. Hebert*, 385 N.C. 705, 711, 898 S.E.2d 718, 724 (2024) (alterations in original) (citations omitted). A party who files for a judgment on the pleadings "must show that 'the [pleadings] . . . fail[] to allege facts sufficient to state a cause of action or admit[] facts which constitute a complete legal bar' to a cause of action." *Id.*

> In determining whether to grant a motion for judgment on the pleadings, [t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial are deemed admitted by the movant for the purposes of the motion.

Benigno v. Sumner Constr., Inc., 278 N.C. App. 1, 4, 862 S.E.2d 46, 49–50 (2021) (alteration in original) (citation omitted). When considering a motion for judgment on the pleadings, "[t]he trial judge is to consider only the pleadings and any attached exhibits, which become part of the pleadings." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984).

2. Lawfulness of the 5 December Meeting

In arguing that the 5 December meeting was procedurally improper, Defendants contend, more specifically, that the Board acted unlawfully when it called an "emergency meeting" without a true emergency existing and when it appointed Plaintiff without a quorum.

"In order to take valid action, a board of county commissioners must act . . . in a meeting duly held as prescribed by law." *Land-of-Sky*

Reg'l Council v. Henderson Cnty., 78 N.C. App. 85, 89, 336 S.E.2d 653, 656 (1985).

a. *Nature of the 5 December Meeting*

We first address Defendants' argument that there was no "emergency" when the meeting was called.

As defined by the Open Meetings Laws, "an 'emergency meeting' is one called because of generally unexpected circumstances that require immediate consideration by the public body." N.C. Gen. Stat. § 143-318.12(f) (2023).

> For any other meeting, except for an emergency meeting, the public body shall cause written notice of the meeting stating its purpose (i) to be posted on the principal bulletin board of the public body or . . . at the door of its usual meeting room, and (ii) to be mailed, e-mailed, or delivered to each newspaper, wire service, radio state, and television station that has filed a written request for notice with the clerk or secretary of the public body[.] . . . This notice shall be posted and mailed, e-mailed, or delivered at least 48 hours before the time of the meeting.

N.C. Gen. Stat. § 143-318.12(b)(2).

"If any vacancy occurs in the office of sheriff, the coroner of the county shall execute all process directed to the sheriff until the first meeting of the board of county commissioners next succeeding such vacancy[.]" N.C. Gen. Stat. § 162-5(a) (2023). "In those counties where the office of coroner has been abolished, the chief deputy sheriff . . . shall perform all the duties of the sheriff until the board of county commissioners appoint some person to fill the unexpired term." N.C. Gen. Stat. § 162-5(b).

Here, the face of Plaintiff's quo warranto complaint shows that the 5 December meeting was not an "emergency meeting" because, first, it states that the Board met on 1 December 2022 to discuss the looming Anson County Sheriff vacancy. Attached to the quo warranto complaint were the 1 December meeting's minutes, which show the Board was aware that there would be a vacancy as of 5 December, but determined no action was needed on the subject until the regularly scheduled 6 December meeting. Thus, there was not a "generally unexpected circumstance" that required immediate consideration by the Board. *See* N.C. Gen. Stat. § 143-318.12(f).

Second, the quo warranto complaint represented that Defendant Howell had been appointed to assume the role of interim Sheriff following Sheriff Reid's untimely death. Defendant Howell, therefore, would have remained in the interim role of Sheriff until such time when the Board met at their next regularly scheduled meeting and appointed someone to the office of Anson County Sheriff. *See* N.C. Gen. Stat. § 162-5(a).

As the 5 December meeting was not an "emergency meeting," the Board was required to give notice of the meeting forty-eight hours in advance. Attached to Plaintiff's quo warranto complaint is an email sent by Clerk Cannon on 5 December at 5:29 p.m. notifying the commissioners that Commissioner Woodburn had called an "emergency meeting." The meeting's minutes reflect that the meeting began just sixteen minutes later—far short of the required forty-eight hours. *See* N.C. Gen. Stat. § 143-318.12(b)(2).

Accordingly, the face of Plaintiff's quo warranto complaint shows that the 5 December meeting was not an "emergency meeting" as no unexpected circumstances existed, and the public therefore was not properly noticed. *See* N.C. Gen. Stat. § 143-318.12(b), (f). Thus, the trial court did not err in granting Defendants' motions for judgment on the pleadings. *See Hebert*, 385 N.C. at 711, 898 S.E.2d at 724.

b. *Quorum*

Even if the 5 December meeting had qualified as an emergency meeting, the Board lacked the quorum necessary to lawfully appoint Plaintiff to Sheriff. Plaintiff pled in his quo warranto complaint that the Board voted on his appointment with a quorum because he received four out of seven votes. In Defendant Howell's motion for judgment on the pleadings, he argued, conversely, that the "face of the [c]omplaint, together with the exhibits attached, reveals Plaintiff is not entitled to the relief he seeks" because, in relevant part, "[t]his hastily-called meeting was personally attended by only two members of the seven-member Board. Chairman Woodburn himself failed to show up." Defendant Anson County likewise argued in its motion for judgment on the pleadings that "[t]he [Board] did not have a proper quorum to vote during the [5 December meeting] with only two of the seven [] Commissioners present at the meeting."

"A majority of the membership of the board of commissioners constitutes a quorum[,]" which is required for an action of a public board to be valid. N.C. Gen. Stat. § 153A-43(a) (2023); *see also Cleveland Cotton Mills v. Comm'rs of Cleveland Cnty.*, 108 N.C. 678, 680–81, 13 S.E.2d

271, 272 (1891) ("[A]n act . . . done by an indefinite body . . . is valid if passed by a majority of those present at a legal meeting."). In Anson County, there are seven members of the Board of Commissioners. A quorum therefore consists of a majority, or four commissioners. *See* N.C. Gen. Stat. § 153A-43(a).

Pursuant to Section 166A-19.24, "[n]otwithstanding any other provision of law, upon issuance of a declaration of emergency under [N.C. Gen. Stat. §] 166A-19.20, any public body within the emergency area may conduct remote meetings[.]" N.C. Gen. Stat. § 166A-19.24(a) (2023). A "remote meeting" is "[a]n official meeting . . . with between one and all of the members of the public body participating by simultaneous communications[,]" *i.e.* by telephone. N.C. Gen. Stat. § 166A-19.24 (i)(3)–(4). If a member participates in a meeting remotely during a state of emergency pursuant to N.C. Gen. Stat. § 166A-19.24(a), that member "shall be counted as present for the purposes of whether a quorum is present[.]" N.C. Gen. Stat. § 153A-43(b).

In this case, the 5 December meeting minutes Plaintiff attached to the quo warranto complaint as an exhibit do not lend legal or factual support to the contention that the Board had a quorum. To have a proper quorum on 5 December 2022, the Board was required to have four commissioners physically present to appoint Plaintiff to the office of Anson County Sheriff because there was no state of emergency in effect that would have permitted remote participation. *See* Exec. Order No. 267 (August 15, 2020) (rescinding Executive Order 116 that put in place a state of emergency in March 2020 and "[a]ll other provisions of Executive Order No. 116, and all other Executive Orders conditioned upon the State of Emergency declared in Executive Order No. 116"); *see also* N.C. Gen. Stat. § 166A-19.24(a). Despite this, only two of the seven total commissioners—Commissioners Sturdivant and Smith—were physically present at the 5 December meeting. The 5 December meeting minutes clearly show that Commissioners Woodburn, Sims, and Bricken participated in the 5 December meeting by conference call, thus rendering it a "remote meeting" because three of the participants were using simultaneous communication to participate. *See* N.C. Gen. Stat. § 166A-19.24 (i)(3)–(4). Plaintiff's appointment, therefore, passed with only two out of seven votes present—which is not a quorum. Without a quorum, Plaintiff was not lawfully appointed to the position of Anson County Sheriff, and the Board therefore had a vacancy in which to appoint Defendant Howell to fill. *See Cleveland Cotton Mills*, 108 N.C. at 680–81, 13 S.E.2d at 272.

Accordingly, the face of Plaintiff's quo warranto complaint, along with the attached exhibits, show Plaintiff was not appointed to Sheriff

by a quorum of the Board, in violation of N.C. Gen. Stat. § 153A-43(a). The trial court, therefore, did not err in granting Defendants' motion for judgment on the pleadings. *See Hebert*, 385 N.C. at 711, 898 S.E.2d at 724.

As Plaintiff's quo warranto complaint demonstrates that the 5 December meeting was not an emergency meeting, nor did the Board have a quorum, Defendants have sufficiently shown that Plaintiff's quo warranto complaint "admits facts which constitute a complete legal bar." *See id*. The trial court therefore did not err by granting Defendants' motions for judgment on the pleadings.

IV. Conclusion

We conclude the trial court did not err in granting Defendants' motions for judgment on the pleadings because the face of Plaintiff's quo warranto complaint demonstrated that he was not lawfully appointed to the position of Anson County Sheriff on 5 December 2022 as there was no emergency necessitating the meeting and the Board lacked a quorum at the meeting.

AFFIRMED.

Judge GRIFFIN concurs.

Judge THOMPSON dissents in a separate writing.

THOMPSON, Judge, dissenting.

The dispositive question presented by this case is not who holds the title of Anson County Sheriff, but whether the Anson County Board of Commissioners violated the North Carolina Open Meetings Law by appointing and swearing in plaintiff Cannon as the Anson County Sheriff absent an emergency and, therefore, a quorum on 5 December 2022. Because there has been no challenge to the *presumably lawful* actions of "the proper authority" to fill the vacancy, the Anson County Board of Commissioners, "upon a proper proceeding," the statutory remedies set forth in N.C. Gen. Stat. §§ 143-318.16 or 143-318.16A for alleged violations of the Open Meetings Law, I would conclude that the trial court erred in granting defendants' motion on the pleadings, and I respectfully dissent.

North Carolina law presumes that, "[a]ny person who shall, by the proper authority, be admitted and sworn into any office, shall be held,

deemed, and taken, by force of such admission, *to be rightfully in such office until*, by judicial sentence, *upon a proper proceeding*, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void." N.C. Gen. Stat. § 128-6 (2023) (emphases added). It is the public policy of our State that the "public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions . . . exist solely to conduct the people's business . . . [and] that the hearings, deliberations, and actions of these bodies be conducted openly." *Id.* § 143-318.9. Our legislature has provided for *two* remedies for alleged violations of the Open Meetings Law, N.C. Gen. Stat. §§ 143-318.16 and 143-318.16A.

The first remedy allows for "mandatory or prohibitory *injunctions* to enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii) continuing violations of this Article." *Id.* § 143-318.16 (emphasis added). Alternatively, "[a]ny person may institute *a suit* in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void." *Id.* § 143-318.16A(a) (emphasis added). Moreover, "[a] suit seeking declaratory relief under this section *must be commenced within 45 days* following the initial disclosure of the action that the suit seeks to have declared null and void." *Id.* § 143-318.16A(b) (emphasis added). "If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection." *Id.* (emphasis added).

Finally, "[i]n making the determination whether to declare the challenged action null and void, the court *shall consider the following and any other relevant factors*" including:

> (1) The extent to which the violation affected the substance of the challenged action;
>
> (2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;
>
> (3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;
>
> (4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;

> (5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;
>
> (6) *Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.*

Id. § 143-318.16A(c) (emphases added).

The majority asserts that "the face of [p]laintiff's quo warranto complaint shows he was appointed at an unlawful meeting where there was neither a true 'emergency' nor a quorum" and "therefore [the majority] do[es] not reach [p]laintiff's motion to dismiss [d]efendant Anson County's counterclaim nor his motion for summary judgment." However, the deficiency in the majority's analysis lies in the fact—established by our legislature— that once an individual has been sworn into public office by the proper authority, they are presumed to be in that office lawfully.

To declare that the action of a public body, the Anson County Board of Commissioners' appointment of plaintiff Cannon as Anson County Sheriff on 5 December 2022, was taken, considered, discussed, or deliberated in violation of the Open Meetings Law, *somebody* needed to allege so by seeking relief through the appropriate proceedings. Those "proper proceeding[s]," *id.* § 128-6, are an injunction pursuant to N.C. Gen. Stat. § 143-318.16, or "[a] suit seeking declaratory relief under this section [that] must be commenced within 45 days following the initial disclosure of the actions the suit seeks to have declared null and void" pursuant to N.C. Gen. Stat. §143-318.16A(a)-(b). These remedies were not pursued *by anyone*.

Today's majority opinion misapprehends the dispositive issue raised by this case: whether the Anson County Board of Commissioners violated the Open Meetings Law on 5 December 2022 by appointing and swearing in plaintiff Cannon as Anson County Sheriff absent an emergency and, therefore, a quorum? Again, as noted above, our legislature has determined, as a matter of public policy, that the actions of a public body are presumed to be lawful; one who seeks to challenge the actions of a public body for violating the Open Meetings Law has two avenues to do so: by *seeking an injunction* pursuant to N.C. Gen. Stat. § 143-318.16, or by *bringing suit* within the appropriate period of time—forty-five days—pursuant to N.C. Gen. Stat. § 143-318.16A.

Applying the *mandatory* considerations from N.C. Gen. Stat. § 143-318.16A(c), it is possible that the majority is correct, that plaintiff

Cannon *may not* have lawfully been sworn in as the Anson County Sheriff because there *may not* have been an emergency,[1] and thereby not a quorum, at the 5 December 2022 meeting of the Anson County Board of Commissioners. However, this is not the dispositive issue raised by this case, as we need not determine, *at this juncture*, whether Anson County *not having a sheriff* for a period of time, albeit just one day in the instant case, constituted an emergency such that remote attendance of the commissioners at the 5 December 2022 meeting counted for purposes of a quorum,[2] because *nobody pursued the appropriate remedies* for us to address this question.

A proper resolution of plaintiff Cannon's quo warranto action—which alleged that the 6 December 2022 Board of Commissioners "did not have the authority to make any appointment to the office of Anson County Sheriff as no vacancy existed after the [5 December] 2022, appointment of [plaintiff Cannon] to the office of the Anson County Sheriff"—would have agreed with plaintiff Cannon's position. *Even if* plaintiff Cannon was not lawfully appointed and sworn in as Anson County Sheriff on 5 December 2022, there was no legal challenge to plaintiff Cannon's appointment and swearing in pursuant to the appropriate statutory remedies for an alleged violation of the Open Meetings Law.

Because no challenge was brought to the *presumably lawful* actions of a *public body*, the Anson County Board of Commissioners, through the proper proceedings—an injunction, or a suit seeking declaratory relief brought within forty-five days following the initial disclosure of the actions the suit seeks to have declared null and void—plaintiff Cannon is the Anson County Sheriff. He became the Anson County Sheriff upon his appointment and swearing in by the proper authority, the Anson County Board of Commissioners, on 5 December 2022; he maintains that title absent a challenge thereto. For these reasons, I would vacate the order of the trial court, award summary judgment in plaintiff Cannon's favor, and I respectfully dissent.

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1. I would posit that the majority's analysis is not correct, that there was an "emergency"; I also note that the statute does not require a "true emergency" as the majority asserts, but simply an "emergency," which the statute defines as "generally unexpected circumstances." N.C. Gen. Stat. § 143-318.12(f).

2. This question is more appropriately addressed under the mandatory statutory considerations set forth by our legislature to challenges of the actions of a public body; for example, actions that were "committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article." N.C. Gen. Stat. § 143-318.16A(c)(6).

STATE OF NORTH CAROLINA
v.
RUSTY RYAN ANDERSON, DEFENDANT

No. COA23-821

Filed 6 August 2024

1. Evidence—hearsay—exceptions—statements made for medical diagnosis or treatment—eyewitness account of abuse—reasonably pertinent to diagnosis

At defendant's trial for sexual offenses committed against his two minor daughters, where a pediatrician specializing in child maltreatment testified about her medical examination of one of the daughters, the trial court properly admitted the daughter's hearsay statement to the pediatrician that defendant had inappropriately touched her sister. The daughter's statement qualified as one "made for purposes of medical diagnosis or treatment" under the hearsay exception in Evidence Rule 803(4), since the daughter made the statement during her own medical exam, which was not limited to a physical examination but also involved assessing her mental health. Therefore, although the statement seemingly had more to do with what happened to her sister, the statement was reasonably pertinent to the daughter's diagnosis by the pediatrician because her eyewitness account of her sister's sexual abuse would undoubtedly have affected her mental health.

2. Evidence—prior consistent statement—improper corroboration—objection waived—evidence of similar character

At defendant's trial for sexual offenses committed against his two minor daughters, the trial court erred by allowing defendant's half-brother to testify that his stepsister mentioned seeing defendant sexually abusing the half-brother's then-five-year-old daughter, where the trial court did so "to corroborate." The stepsister did not testify at defendant's trial, so her out-of-court statement was inadmissible as a prior consistent statement because there was no in-court testimony to corroborate. Nevertheless, the court's error did not prejudice defendant because he had waived any objection to that testimony by failing to object to other evidence of a similar character, including in-court testimony from the half-brother's daughter and defendant's written statement to law enforcement, both of which described the stepsister witnessing the abuse referred to in her out-of-court statement.

3. Criminal Law—prosecutor's closing argument—improper statement of law—Evidence Rule 404(b)—prejudice

At defendant's trial for sexual offenses committed against his two minor daughters, the trial court was not required to intervene ex mero motu when the prosecutor improperly explained Evidence Rule 404(b) (allowing evidence of prior bad acts for reasons other than to show defendant's propensity to commit an offense) during closing arguments, stating that the "best predictor of future behavior is past behavior" and that "[o]ne of the things that tells you . . . how somebody acts is some things that they've done in the past." Although the prosecutor's statements were grossly improper, they did not prejudice defendant where, given the State's overwhelming evidence of defendant's guilt, there was no reasonable possibility that the jury would have acquitted defendant absent the improper statements.

Appeal by Defendant from judgment entered 3 February 2023 by Judge W. Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 17 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tracy Nayer, for the State.

Phoebe W. Dee, for Defendant-Appellant.

CARPENTER, Judge.

Rusty Ryan Anderson ("Defendant") appeals from judgment after a jury convicted him of one count of statutory sexual offense with a child by an adult and one count of taking indecent liberties with a child. On appeal, Defendant argues the trial court erred by: (1) admitting Dr. Calabro's testimony; (2) admitting Christopher Anderson's testimony; and (3) failing to intervene *ex mero motu* during the State's closing argument. After careful review, we discern no prejudicial error.

I. Factual & Procedural Background

On 2 August 2021, a grand jury indicted Defendant for three counts of statutory sexual offense with a child by an adult. On 10 October 2022, a grand jury indicted Defendant for three counts of taking indecent liberties with a child. These charges alleged the victims to be Lana and Anna,[1]

1. We use pseudonyms to protect the identity of the juveniles. *See* N.C. R. App. P. 42(b).

Defendant's daughters. The State began trying Defendant on 30 January 2023 in Cleveland County Superior Court, and trial evidence tended to show the following.

Teresa Vick, a social worker for the Cleveland County Department of Social Services, investigated sexual-abuse allegations made against Defendant. Lana told Vick that Defendant "put his finger in her and did it to [Anna]. [Lana] stated that [Defendant] put his finger in [her] front privates, but it was a long time ago when [she] was four." Lana told Vick that Defendant did the same to Anna when she was three years old.

Vick also spoke with Anna and asked her if anyone ever touched her between her legs. Anna said "yes" and "pointed to her back—her bottom and said, '[Defendant] put his finger in my butt,' and she told—and she told her mommy. And then she said he put his finger in her butt again, and her mommy kicked [Defendant] out."

Anna testified and described how Defendant "touched [her] no-no spot," which is "[s]omething really bad," and "where [she] pee[s]," and said that "[i]t hurt" and "made [her] body feel bad." Lana also testified that she was in the room and saw Defendant touch Anna in her "no-no spot," and that his finger made Anna's clothes rise up "like when you pull them up."

Dr. Michelle Calabro, a pediatrician, examined both Lana and Anna at the Children's Advocacy Center of Cleveland County. The State tendered Dr. Calabro as "an expert in the field of pediatrics with a concentration in child maltreatment." Dr. Calabro first testified about her examination of Lana. Dr. Calabro's examination of Lana was "a medical exam." In these examinations, Dr. Calabro "treat[s] it as an expanded medical exam like you would receive in the office." These examinations include an "interview."

Concerning recommended treatments after these examinations, Dr. Calabro "usually recommend[s] when kids have gone through a traumatic event such as something like sexual abuse or even changes in family, where they live, [she] recommend[s] some counseling. [She] do[es] typically like the trauma-focused cognitive therapy." The challenged portion of Dr. Calabro's testimony includes the following:

> **The State**: Did you interview [Lana] alone, as is your habit?
>
> **Dr. Calabro**: I did.
>
> **The State**: What did [Lana] tell you about why she was there for the exam that day?
>
> . . . .

> **Dr. Calabro**: You know, we started off traditionally that, you know, she was, you know, in second grade and at school she was an A student, and it was actually advanced. When she said—when I got kind of to the specifics of why she was here, she did say that "Dad"—and she identified "Dad" as [Defendant]—
>
> **Defense Counsel**: Objection to the hearsay.
>
> **The State**: Your Honor, I would contend, A, that it's not hearsay; that it's substantive evidence; the statement was made for the purposes of medical diagnosis and treatment and admissible for that purpose.
>
> **Trial Court**: All right. It's overruled. You may continue.
>
> **The State**: Go ahead.
>
> **Dr. Calabro**: She said that he touched [Anna] in what she called the no-no spot.

Dr. Calabro then discussed Anna's examination. Anna told Dr. Calabro that Defendant touched her "no-no spot" with his finger and pointed to her genital area as her "no-no spot." Anna told Dr. Calabro that Defendant "touched it" two times and said that Defendant would "touch it when [s]he was taking a bath." Anna told Dr. Calabro that Defendant "touched both no-no spots, meaning the front and the back," said that Defendant "put his finger inside her bottom," and said that "it hurt and made it bleed." Anna told Dr. Calabro that Defendant "touched her sister as well."

Defendant's half brother, Christopher Anderson, testified about events concerning Defendant and Christopher's daughter, Hailie, when she was five years old:

> **The State**: How did you find out about that?
>
> **Christopher**: I was told by Skylar.
>
> **The State**: And what did Skylar tell you?
>
> **Christopher**: That—
>
> **Defense Counsel**: Objection to the hearsay.
>
> **Christopher**: —she was—
>
> **Trial Court**: Hold on.
>
> **The State**: Hold on one second.
>
> **Trial Court:** The objection is overruled. It's being offered to corroborate, as the previous instruction indicated. You may continue.

First, "Skylar" is Christopher's stepsister. Second, the trial court's "previous instruction" was as follows:

> when evidence has been received tending to show that an earlier time a witness made a statement which may be consistent or may conflict with the testimony at this trial, you must not consider such earlier statement. You are simply examining whether or not the statement is consistent, corroborates or impeaches the testimony of another witness. You're only to use it for that purpose.

Christopher then testified that Skylar told him that "she had witnessed [Defendant] do inappropriate things" to Hailie. After hearing this, Christopher reported Defendant to the Lincoln County Sheriff's Office. Skylar did not testify at trial.

Hailie, who was nineteen years old during trial, testified that Defendant, her uncle, sexually assaulted her when she was five years old. Hailie said that she and Defendant were on the couch at her grandparents' house when Defendant "put his hands in [her] pants and did put a finger in [her] vagina." When asked what made Defendant stop touching her, Hailie said: "I don't really remember. I know Skylar was there." Defendant did not object to this testimony.

The State entered State's Exhibit 4 into evidence without objection. State's Exhibit 4 was a statement written by Defendant; Defendant wrote the statement in the Lincoln County Sheriff's Office on 5 March 2009, after Christopher reported Defendant's abuse.

In the signed statement Defendant recounted, among other things: "I put my hands inside Hailie's pants and touched Hailie's vagina. I put my finger inside her vagina a little. The next thing I remember, Skylar was coming around the corner. I knew she saw me, but she didn't say anything to me." Defendant continued: "I touched Hailie one other time with my hand on the outside of her vagina, but I don't remember when. I don't know why I did these things, but I need some help. I'm sorry to everybody."

Defendant offered no evidence.

During the State's closing argument, the prosecutor explained to the jury that evidence "about someone's past" is called "404(b) evidence." The prosecutor posed the following rhetorical questions to the jury:

> So why is it that it matters if [Defendant] stuck his finger in his five-year-old niece in her no-no spot, what she called her private? Why does it matter if he licked the vagina of

> his four-year-old niece . . . years ago? What does that tell you about whether he did something to [Anna] when she was five years old or three or four? What does that tell you?

The prosecutor continued:

> Well, it's something that in fact does help you make that determination. The best predictor of future behavior is past behavior. One of the things that tells you what—how somebody acts is some things that they've done in the past. Now, you don't convict somebody of something just because they've been in trouble in the past, but you look at the circumstances of what they've done in the past and see if they help you see a pattern, a common scheme, if they help you determine what somebody's intent is.

Defendant did not object to the State's closing argument.

On 3 February 2023, the jury convicted Defendant of one count of statutory sexual offense with a child by an adult and one count of taking indecent liberties with a child. The trial court sentenced Defendant to one term of between 339 and 467 months of imprisonment, followed by a consecutive term of between 25 and 39 months of imprisonment. The trial court also ordered Defendant to register as a sex offender for the rest of his life, and if Defendant is ever released, to enroll in satellite-based monitoring for ten years after his release. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

The issues on appeal are whether the trial court erred by: (1) admitting Dr. Calabro's testimony; (2) admitting Christopher Anderson's testimony; and (3) failing to intervene *ex mero motu* during the State's closing argument.

IV. Analysis

A. Dr. Calabro's Testimony

[1] On appeal, Defendant first argues that the trial court erred by allowing Dr. Calabro to testify about an out-of-court statement made by Lana. But before addressing the merits of Defendant's argument,

we must address the State's assertion that Defendant failed to preserve this argument.

"No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court . . . ." N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (2023); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Here, while testifying about her examination of Lana, Dr. Calabro stated that "[Lana] did say that 'Dad'—and she identified 'Dad' as [Defendant]." Defendant's counsel then "[o]bject[ed] to the hearsay." This objection "clearly presented the alleged error"—that Dr. Calabro's testimony was hearsay—and the objection clearly concerned Dr. Calabro's recitation of Lana's statements. *See* N.C. Gen. Stat. § 8C-1, Rule 103(a)(1). Therefore, Defendant's hearsay argument concerning Dr. Calabro's testimony is preserved for our review. *See id.*

We review a trial court's hearsay rulings de novo. *State v. Miller*, 197 N.C. App. 78, 87–88, 676 S.E.2d 546, 552 (2009). Under a de novo review, this 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)).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). Said another way, hearsay is "(1) an out-of-court statement (2) offered for proof of the matter asserted." *State v. Kelly*, 75 N.C. App. 461, 465, 331 S.E.2d 227, 231 (1985). Hearsay is generally inadmissible. N.C. Gen. Stat. § 8C-1, Rule 802 (2023).

There are exceptions, however, to the general exclusion of hearsay. *See*, *e.g.*, N.C. Gen. Stat. § 8C-1, Rule 803(4) (2023). Under Rule 803(4), "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are "not excluded by the hearsay rule." *Id.*

Put differently, "Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis

or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000) (citing *State v. Aguallo*, 318 N.C. 590, 595–97, 350 S.E.2d 76, 80–81 (1986)). But Rule 803(4) does not apply to all declarants: It is "quite clear that only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay." *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 842 (1994).

Here, Dr. Calabro testified about her examination of Lana, and the challenged portion of Dr. Calabro's testimony includes the following:

> **State**: Did you interview [Lana] alone, as is your habit?
>
> **Dr. Calabro**: I did.
>
> **State**: What did [Lana] tell you about why she was there for the exam that day?
>
> . . . .
>
> **Dr. Calabro**: You know, we started off traditionally that, you know, she was, you know, in second grade and at school she was an A student, and it was actually advanced. When she said—When I got kind of to the specifics of why she was here, she did say that "Dad"—and she identified "Dad" as [Defendant]—
>
> **Defense Counsel**: Objection to the hearsay.
>
> **State**: Your Honor, I would contend, A, that it's not hearsay; that it's substantive evidence; the statement was made for the purposes of medical diagnosis and treatment and admissible for that purpose.
>
> **Trial Court**: All right. It's overruled. You may continue.
>
> **Dr. Calabro**: She said that [Defendant] touched [Anna] in what she called the no-no spot.

First, Dr. Calabro's testimony concerning Lana's statement about Anna was hearsay. Lana made this statement out of court because she made it at the Children's Advocacy Center of Cleveland County. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c). And because the State tried to admit the testimony under an exception to hearsay, the State was attempting to offer it for the truth of the matter asserted. *See id.* § 8C-1, Rule 803. Put another way: The statement was offered for its truth because if it was not, it would not be hearsay—and if the statement was not hearsay, offering it as an *exception* to hearsay would be pointless. *See id.* Therefore, Dr. Calabro's testimony about Lana's statement concerning Anna was hearsay because Lana made the statement out of court, and

the State offered it for the truth of the matter asserted. *See Kelly*, 75 N.C. App. at 465, 331 S.E.2d at 231.

Nonetheless, the trial court properly admitted Lana's statement under Rule 803(4). Lana's challenged statement, however, involved Anna, which raises a concern: Perhaps Lana's statement was not made by "the person being diagnosed or treated," thus making Rule 803(4) inapplicable. *See Jones*, 339 N.C. at 146, 451 S.E.2d at 842. At first glance, Lana's statement about what happened to *Anna* seems irrelevant to a medical diagnosis of *Lana*. *See id.* at 146, 451 S.E.2d at 842. From there, it follows that in order for Lana's statement about Anna to be "reasonably pertinent to diagnosis or treatment," the diagnosis or treatment must have been for Anna. *See Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667. Otherwise, the hearsay is barred under *Jones* because it was not made by "the person being diagnosed or treated." *See Jones*, 339 N.C. at 146, 451 S.E.2d at 842.

But this concern is misplaced, as Lana was indeed the person being diagnosed. Dr. Calabro, "an expert in the field of pediatrics with a concentration in child maltreatment," examined Lana. Dr. Calabro's examination of Lana was "a medical exam," which Dr. Calabro "treat[s] . . . as an expanded medical exam like you would receive in the office." These examinations include an interview.

Concerning common follow-up treatments, Dr. Calabro "usually recommend[s] when kids have gone through a traumatic event, such as something like sexual abuse or even changes in family, where they live, [she] recommend[s] some counseling. [She] do[es] typically like the trauma-focused cognitive therapy." In other words, Dr. Calabro's exams are not limited to physical examination. Rather, as illustrated by her interview process and her recommended counseling, Dr. Calabro also examines a patient's mental health.

Accordingly, Lana's statement about Anna was "made for purposes of medical diagnosis or treatment," *see Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667, because Lana made the statement during her own medical exam, which was not limited to physical examination. And Lana's statement was "reasonably pertinent to diagnosis," *see id.* at 284, 523 S.E.2d at 667, because her statement concerned an eyewitness account of her sister's sexual abuse, which undoubtedly affected Lana's mental health.

Therefore, as stated above, the trial court properly admitted Lana's statement under Rule 803(4) because Lana was "the person being diagnosed or treated," *see Jones*, 339 N.C. at 146, 451 S.E.2d at 842, and her statement was "made for purposes of medical diagnosis" and was

"reasonably pertinent to diagnosis," *see Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667.

B. Skylar's Statements

[2] Next, Defendant argues that the trial court erred by allowing Christopher to testify about out-of-court statements made by Skylar. In sum, we agree with Defendant; the trial court erred. Nonetheless, Defendant was not prejudiced by this error because he waived any objection to Christopher's testimony.

As detailed above, hearsay is "(1) an out-of-court statement (2) offered for proof of the matter asserted." *Kelly*, 75 N.C. App. at 465, 331 S.E.2d at 231. A witness's out-of-court statements offered to corroborate his own testimony, however, is not offered "for the truth of the matter asserted." *See*, *e.g.*, *State v. Holden*, 321 N.C. 125, 143, 362 S.E.2d 513, 526 (1987) ("Prior consistent statements made by a witness are admissible for purposes of corroborating the testimony of that witness, if it does in fact corroborate his testimony."); *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303 (1991) ("A witness's prior consistent statements may be admitted to corroborate the witness's courtroom testimony.").[2]

"Corroboration is the process of persuading the trier of the facts that a witness is credible." *State v. Ramey*, 318 N.C. 457, 468, 349 S.E.2d 566, 573 (1986) (quoting *State v. Riddle*, 316 N.C. 152, 156–57, 340 S.E.2d 75, 77–78 (1986)). "Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached." *Id.* at 468, 349 S.E.2d at 573 (quoting *Riddle*, 316 N.C. at 156–57, 340 S.E.2d at 77–78).

Here, Christopher testified about what Defendant did to Hailie when she was five years old. The relevant testimony is as follows:

The State: How did you find out about that?

---

2. A similar rule is codified in the Federal Rules of Evidence. *See* Fed. R. Evid. 801(d)(1)(B) (explaining that a statement is "not hearsay" if the "declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . is consistent with the declarant's testimony and is offered . . . to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying"). The General Assembly has not codified our corroboration rule, however. *See* N.C. Gen. Stat. §§ 8C-1, Rules 801–06. Rather, our corroboration rule, concluding that an out-of-court statement offered to corroborate testimony is not offered for the "truth of the matter asserted," is a creature of caselaw. *See State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739–40 (2009). How a statement can be offered to "corroborate," yet not be offered for its truth, is unclear. Nonetheless, we are bound by stare decisis. *See In re Civ. Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

> **Christopher**: I was told by Skylar.
>
> **The State**: And what did Skylar tell you?
>
> **Christopher**: That—
>
> **Defense Counsel**: Objection to the hearsay.
>
> **Christopher**: —she was—
>
> **Trial Court**: Hold on.
>
> **The State**: Hold on one second.
>
> **Trial Court**: The objection is overruled. It's being offered to corroborate, as the previous instruction indicated. You may continue.

Christopher then testified that Skylar told him that "she had witnessed [Defendant] do inappropriate things" to Hailie. After hearing this, Christopher reported Defendant to the Lincoln County Sheriff's Office.

Christopher testified about Skylar's out-of-court statement, and the trial court admitted Christopher's testimony "to corroborate." But the out-of-court statement offered for corroboration was made by Skylar. Skylar, though, did not testify at trial. Because Skylar did not testify at trial, there was nothing for her to corroborate: "A witness's prior consistent statements may be admitted to corroborate the witness's *courtroom testimony*." *See Harrison*, 328 N.C. at 681, 403 S.E.2d at 303 (emphasis added). Skylar did not give courtroom testimony, so her out-of-court statements could not be offered to corroborate. *See id.* at 681, 403 S.E.2d at 303. Accordingly, the trial court erred by admitting testimony about Skylar's out-of-court statements.

The State, however, argues that Defendant waived any objection to Christopher's testimony about Skylar's statements because the State properly admitted, without objection, other evidence that supported Skylar's statements to Christopher. For this argument, the State points to two pieces of evidence: (1) Hailie's testimony that she "kn[e]w Skylar was there" when Defendant sexually assaulted her; and (2) State's Exhibit 4, in which Defendant admitted to sexually assaulting Hailie, and that "[Skylar] saw [him], but she didn't say anything to [him]."

"Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Anthony*, 354 N.C. 372, 409, 555 S.E.2d 557, 582 (2001) (quoting *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995)). "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Hudson*, 331 N.C.

122, 151, 415 S.E.2d 732, 747–48 (1992) (quoting *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)).

Here, the trial court erred by admitting the following testimony from Christopher: that Skylar told him that "she had witnessed [Defendant] do inappropriate things" to Hailie. But Defendant did not object to Hailie's own testimony—in which she testified that she "kn[e]w Skylar was there" when Defendant sexually assaulted her. Further, Defendant did not object to State's Exhibit 4, in which he admitted to sexually assaulting Hailie, and that "[Skylar] saw [him], but she didn't say anything to [him]."

Both Hailie's testimony and State's Exhibit 4 are "of a similar character" to Christopher's challenged testimony. *See Hudson*, 331 N.C. at 151, 415 S.E.2d at 747–48. Indeed, Hailie's testimony and State's Exhibit 4 support the same proposition as Christopher's challenged testimony: Defendant sexually assaulted Hailie, and Skylar witnessed the assault. Therefore, despite the trial court's error, Defendant waived any objection to Christopher's challenged testimony concerning Skylar. *See Anthony*, 354 N.C. at 409, 555 S.E.2d at 582.

C. The State's Closing Argument

[3] In his final argument, Defendant asserts that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*."[3] *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998)). "[I]n order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial." *Id.* at 133, 558 S.E.2d at 107–08.

To establish prejudice, "the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *State v. Fletcher*, 370 N.C. 313, 320, 807 S.E.2d 528, 534 (2017) (citing *State v. Ratliff*, 341 N.C. 610, 617, 461 S.E.2d 325, 329 (1995)). To clear the prejudice hurdle, a defendant

3. *Ex mero motu* is analogous to *sua sponte*. A court intervenes *ex mero motu* when it does so "voluntarily," without prompting from counsel. *Ex mero motu*, Black's Law Dictionary (11th ed. 2019).

must overcome the presumption that juries follow a trial court's legal instructions. *See State v. Prevatte*, 356 N.C. 178, 254, 570 S.E.2d 440, 482 (2002) (quoting *State v. McCarver*, 341 N.C. 364, 384, 462 S.E.2d 25, 36 (1995)) ("Jurors are presumed to follow a trial court's instructions.").

"As a general proposition, parties are given wide latitude in their closing arguments to the jury, with the State being entitled to argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom." *Fletcher*, 370 N.C. at 319, 807 S.E.2d at 534 (*purgandum*). Nonetheless, incorrect statements of law are improper. *Id.* at 319, 807 S.E.2d at 534.

Defendant's specific claim concerning the State's closing argument is that the prosecutor incorrectly explained Rule 404(b) to the jury. Under Rule 404(b), "[e]vidence 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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023). But Rule 404(b) allows evidence of "[o]ther crimes, wrongs, or acts" for purposes other than to show the defendant "acted in conformity therewith." *Id.* Such purposes include attempting to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

Rule 404(b) is 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. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). "[Rule 404(b) evidence] 'is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.' " *State v. Davis*, 239 N.C. App. 522, 532, 768 S.E.2d 903, 910 (2015) (alteration in original) (quoting *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012)).

Here, during the State's closing argument, the prosecutor explained to the jury that evidence "about someone's past" is called "404(b) evidence." The prosecutor posed the following rhetorical questions to the jury:

> So why is it that it matters if [Defendant] stuck his finger in his five-year-old niece in her no-no spot, what she called her private? Why does it matter if he licked the vagina of his four-year-old niece . . . years ago? What does that tell you about whether he did something to [Anna] when she was five years old or three or four? What does that tell you?

The prosecutor continued:

> Well, it's something that in fact does help you make that determination. The best predictor of future behavior is past behavior. One of the things that tells you what—how somebody acts is some things that they've done in the past. Now, you don't convict somebody of something just because they've been in trouble in the past, but you look at the circumstances of what they've done in the past and see if they help you see a pattern, a common scheme, if they help you determine what somebody's intent is.

The prosecutor attempted to align her closing with Rule 404(b) by telling the jury that they could "look at the circumstances of what [Defendant has] done" in order to "see a pattern, a common scheme," or "determine what [Defendant's] intent [was]." And under our caselaw, Rule 404(b) is indeed a "general rule of inclusion," *see Coffey*, 326 N.C. at 278–79, 389 S.E.2d at 54, allowing evidence of a prior act so "long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime," *see Davis*, 239 N.C. App. at 532, 768 S.E.2d at 910.

Nonetheless, the prosecutor erred when she said: "The best predictor of future behavior is past behavior. One of the things that tells you what—how somebody acts is some things that they've done in the past." This is the exact propensity purpose prohibited by Rule 404. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b). Therefore, the prosecutor's closing argument here was improper. *See Fletcher*, 370 N.C. at 319, 807 S.E.2d at 534. The next question, then, is whether the prosecutor's closing remarks were prejudicial. *See Jones*, 355 N.C. at 133, 558 S.E.2d at 107–08.

First, Defendant must rebut the presumption that the jury followed the trial court's legal instructions, which Defendant does not challenge. *See Prevatte*, 356 N.C. at 254, 570 S.E.2d at 482. Second, Defendant must counter the ample evidence in this case. Social worker Teresa Vick testified that Lana and Anna told Vick about Defendant's repeated sexual abuse. Further, Dr. Calabro testified about the same. And indeed, both Lana and Anna, themselves, testified about Defendant's repeated sexual abuse. Defendant, who admittedly "need[s] some help," offered no evidence at trial. Considering the State's evidence of guilt, and Defendant's dearth of evidence to the contrary, there is not a "reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *See Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534.

In sum, although the prosecutor's closing argument was improper, Defendant has failed to show that he was prejudiced by it. *See Jones*,

355 N.C. at 133, 558 S.E.2d at 107–08. Accordingly, the trial court did not err by failing to intervene *ex mero motu* during the State's closing argument. *See id.* at 133, 558 S.E.2d at 107.

V. Conclusion

We conclude that the trial court did not err by admitting Dr. Calabro's testimony, that Defendant waived his argument concerning Christopher's testimony, and that, although the State's closing was improper, the trial court did not err by failing to intervene *ex mero motu*.

NO PREJUDICIAL ERROR.

Judges WOOD and GORE concur.

STATE OF NORTH CAROLINA
v.
CHAD DAVID BARTON, DEFENDANT

No. COA23-1148

Filed 6 August 2024

1. Appeal and Error—petition for writ of certiorari—satellite-based monitoring order—meritorious argument—extraordinary circumstances

In an appeal from orders requiring defendant to submit to satellite-based monitoring (SBM), although defendant's notice of appeal was deficient (because he failed to specify which court he was appealing to and did not reference the orders from which he appealed), defendant's petition for writ of certiorari was granted based on a showing of extraordinary circumstances, since the trial court likely erred concerning the SBM orders, and unwarranted SBM constitutes substantial harm.

2. Appeal and Error—petition for writ of certiorari—guilty plea—error in probation sentence—extraordinary circumstances

In an appeal from judgments entered after defendant pleaded guilty to four counts of second-degree exploitation of a minor, although defendant's notice of appeal was deficient (because he failed to specify which court he was appealing to and did not reference the judgments from which he appealed), defendant's petition for writ of certiorari was granted based on a showing of

extraordinary circumstances, since the trial court likely erred concerning defendant's probation sentence, and an unwarranted extension of probation constitutes substantial harm.

3. Satellite-Based Monitoring—period of five years—defendant scored in low risk range—no supporting evidence—orders reversed without remand

In a criminal matter in which defendant pleaded guilty to four counts of second-degree exploitation of a minor, where defendant scored a "1" on the STATIC-99R—which placed him in the low risk range for sexual recidivism—the trial court erred by ordering defendant to submit to five years of satellite-based monitoring (SBM) without making additional findings of fact regarding the need for the highest possible level of supervision. Where the State presented no evidence to support findings of a higher level of risk or to support SBM, the trial court's orders were reversed without remand.

4. Probation and Parole—probation ordered to run consecutive to post-release supervision—rule of lenity—improper increase in penalty

In a criminal matter in which, because defendant pleaded guilty to four counts of second-degree exploitation of a minor—an offense requiring registration—defendant was given a post-release supervision period of five years, the trial court erred by sentencing defendant's probation (also five years) to run consecutively to his post-release supervision. Where the relevant statute, N.C.G.S. § 15A-1346, generally required probation to run concurrently with periods of probation, parole, or imprisonment (with an exception for imprisonment as determined by a trial court), but was silent as to post-release supervision, the appellate court applied the rule of lenity to conclude that the trial court's sentence impermissibly increased the penalty placed on defendant in the absence of clear legislative intent. The probation judgments were vacated and the matter was remanded to the trial court for the parties to enter into a new plea agreement or for the matter to proceed to trial.

Appeal by Defendant from judgments entered 1 May 2023 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 14 May 2024.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon B. Mayes, for Defendant-Appellee.

CARPENTER, Judge.

Chad David Barton ("Defendant") appeals from the trial court's final judgments and the trial court's satellite-based monitoring ("SBM") orders. On appeal, Defendant argues that the trial court erred by: (1) ordering Defendant to submit to SBM; and (2) sentencing Defendant to probation after his post-release supervision. After careful review, we agree with Defendant. We therefore reverse the SBM orders without remand, and we vacate the probation judgments and remand to the trial court.

I. Factual & Procedural Background

During the 1 May 2023 criminal session of Brunswick County Superior Court, Defendant pleaded guilty to four counts of second-degree exploitation of a minor. The trial court entered four judgments. In the first judgment, the trial court sentenced Defendant to an active sentence of between twenty-five and ninety months of imprisonment. Second-degree exploitation of a minor is a reportable offense under section 14-208.6, so the first judgment required Defendant to submit to five years of post-release supervision. *See* N.C. Gen. Stat. §§ 14-208.6(4), 15A-1368.2(c) (2023).

In the next three judgments, the trial court suspended each active sentence for sixty months of probation, to run consecutively with the first judgment. In these judgments, the trial court specified that probation would begin "at the expiration of the sentence" imposed in the first judgment, as opposed to "when the defendant is released from incarceration." The trial court orally reiterated that "probation is not going to begin to run until the conclusion of his post-release supervision."

The trial court then moved to an SBM hearing. SBM is a system that provides (1) "[t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology" and (2) "[r]eporting of [the] subject's violations of prescriptive and proscriptive schedule or location requirements." N.C. Gen. Stat. § 14-208.40(c)(1)–(2) (2023). Other than Defendant's STATIC-99R results, the State offered no evidence concerning SBM.

A STATIC-99R "is an actuarial instrument designed to estimate the probability of sexual and violent recidivism among male offenders who have already been convicted of at least one sexual offense against

a child or non-consenting adult." *State v. Morrow*, 200 N.C. App. 123, 125 n.3, 683 S.E.2d 754, 757 n.3 (2009) (quoting N.C. Dep't of Correction Policies–Procedures, No. VII.F Sex Offender Management Interim Policy 9 (2007)). Defendant scored a "1" on his STATIC-99R, placing him in the "low risk range" for recidivism.

Based on Defendant's STATIC-99R, the trial court orally ordered Defendant to submit to five years of SBM. Specifically, the trial court said:

> That based on a risk assessment by the Department of Adult Correction and Juvenile Justice, specifically, the Static-99R, which is incorporated herein by reference, the Court finds that the defendant received a total score of 1, which indicates that the defendant is at average risk for sexual recidivism. That based on this, the Court finds that the defendant requires the highest possible level of supervision and monitoring, and satellite-based monitoring constitutes a reasonable search of the defendant in this case. The Court therefore orders that upon release from imprisonment, the defendant shall enroll in satellite-based monitoring for a period of five years. And the same findings, obviously, on the suspended sentence.

The trial court then entered two written SBM orders, which required Defendant to submit to a total of five years of SBM after his release from prison. The trial court did not make additional findings concerning SBM.

On 12 May 2023, Defendant filed written notice of appeal. The notice, however, did not state that the appeal was to this Court, and the notice did not reference the judgment or order from which Defendant appealed. On 2 June 2023, Defendant filed a proper notice of appeal. On 22 January 2024, Defendant filed a petition for writ of certiorari ("PWC"), addressing his appeal from the SBM proceeding. On 6 May 2024, Defendant filed an additional PWC, addressing his appeal from the plea proceeding.

II. Jurisdiction

Here, Defendant filed two PWCs: the first addressing the SBM proceeding, and the second addressing the plea proceeding. We will address our jurisdiction in that order.

A. SBM Proceeding

[1] SBM proceedings are civil. *State v. Brooks*, 204 N.C. App. 193, 194–95, 693 S.E.2d 204, 206 (2010). Therefore Appellate Rule 3, rather than Rule

4, applies to SBM proceedings. *See* N.C. R. App. P. 3. Generally under Rule 3, an appellant must file a notice of appeal "within thirty days after entry of judgment." N.C. R. App. P. 3(c)(1). The notice must "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 3(d). Timely filing a proper notice of appeal is a jurisdictional requirement. *See Whitlock v. Triangle Grading Contractors Dev., Inc.*, 205 N.C. App. 444, 446, 696 S.E.2d 543, 545 (2010).

We may sanction parties for failing to adhere to our Rules of Appellate Procedure, N.C. R. App. P. 25(b), and we may do so by dismissing their appeal, N.C. R. App. P. 34(b)(1). Dismissal is proper when the appellant's rule violations are jurisdictional. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

We lack jurisdiction over Defendant's appeal from the SBM orders because Defendant did not timely file a proper notice of appeal. *See Whitlock*, 205 N.C. App. at 446, 696 S.E.2d at 545. So without jurisdictional relief, we must dismiss Defendant's appeal concerning SBM. *See Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365. Defendant, however, requested relief by filing a PWC.

A PWC is a "prerogative writ" that we may issue to expand our jurisdiction. *See* N.C. Gen. Stat. § 7A-32(c) (2023). But issuing a PWC is an extraordinary measure. *See Cryan v. Nat'l Council of YMCAs of the U.S.*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023). Accordingly, a petitioner must satisfy a two-part test before we will issue the writ. *Id.* at 572, 887 S.E.2d at 851. "First, a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Id.* at 572, 887 S.E.2d at 851 (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021)). "Second, a writ of certiorari should issue only if there are 'extraordinary circumstances' to justify it." *Id.* at 572–73, 887 S.E.2d at 851 (quoting *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982)).

"We require extraordinary circumstances because a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839). "If courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839). An extraordinary circumstance "generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice.' " *Id.* at 573, 887

S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020)).

Here, Defendant has shown that the trial court likely erred concerning SBM, and unwarranted SBM is a substantial harm. Therefore, we grant Defendant's first PWC. *See id.* at 572, 887 S.E.2d at 851.

B. Plea Proceeding

[2] Plea proceedings are criminal. *See* N.C. Gen. Stat. § 15A-1444 (2023). Generally, a defendant "is entitled to appeal as a matter of right when final judgment has been entered." *Id.* § 15A-1444(a). But when a defendant enters a guilty plea, his right to appeal is limited. *See id.* § 15A-1444(a2). A defendant, however, "may petition the appellate division for review by writ of certiorari." *Id.* § 15A-1444(e).

Defendant has shown that the trial court likely erred concerning his probation sentence. And like SBM, an unwarranted extension of probation is a substantial harm. Therefore, we also grant Defendant's second PWC. *See Cryan*, 384 N.C. at 573, 887 S.E.2d at 851.

III. Issues

The issues on appeal are whether the trial court erred by: (1) ordering Defendant to submit to SBM; and (2) sentencing Defendant to probation after his post-release supervision.

IV. Analysis

A. SBM

[3] In his first argument, Defendant asserts that the trial court erred by ordering him to submit to SBM without making additional findings of fact. We agree.

When reviewing SBM orders, "this Court reviews the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Harding*, 258 N.C. App. 306, 321, 813 S.E.2d 254, 265 (2018) (quoting *State v. Springle*, 244 N.C. App. 760, 765, 781 S.E.2d 518, 521–22 (2016)).

When a STATIC-99R places a defendant in the "low risk range," a trial court must make additional findings in order to impose SBM. *See State v. Jones*, 234 N.C. App. 239, 243, 758 S.E.2d 444, 447–48 (2014) (requiring additional findings concerning a " 'moderate-low' risk" defendant, which applies *a fortiori* to a "low risk" defendant). Specifically,

a trial court may order a low-risk defendant to submit to SBM only if the trial court "makes 'additional findings' regarding the need for the highest possible level of supervision and where there is competent record evidence to support those additional findings." *See id.* at 239, 243, 758 S.E.2d at 447–48 (quoting *State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011)).

A trial court's order requiring SBM must be reversed, without remand, if the defendant is low risk, and "the State presented no evidence to support findings of a higher level of risk or to support [SBM]." *See id.* at 243, 758 S.E.2d at 448 (quoting *State v. Kilby*, 198 N.C. App. 363, 370–71, 679 S.E.2d 430, 434 (2009)).

Here, Defendant scored a "1" on his STATIC-99R, placing him in the "low risk range" for recidivism. Therefore, the trial court needed to make additional findings supporting the need for SBM. *See id.* at 243, 758 S.E.2d at 447–48. The State, however, presented no evidence concerning SBM, and the trial court failed to make additional findings. Accordingly, we reverse the SBM orders without remand. *See id.* at 243, 758 S.E.2d at 448.

B. Probation After Post-Release Supervision

[4] In his second and final argument, Defendant asserts that the trial court erred by sentencing Defendant's probation to run consecutively with his post-release supervision. Defendant offers two separate statutory arguments for his position: (1) that section 15A-1368.5 requires his post-release supervision to run concurrently with his probation; and (2) that section 15A-1346 requires his probation to run concurrently with his post-release supervision. *See* N.C. Gen. Stat. §§ 15A-1368.5, -1346 (2023). We agree with Defendant's second argument: Section 15A-1346 requires probation to run concurrently with post-release supervision. *See id.* § 15A-1346.

We review sentencing questions de novo. *State v. Patterson*, 269 N.C. App. 640, 645, 839 S.E.2d 68, 73 (2020). Under a de novo review, this 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)).

Probation and post-release supervision are distinct. Probation is served in lieu of imprisonment. *See State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). Post-release supervision, on the other hand, is served after the supervisee is released from prison. N.C. Gen. Stat.

§ 15A-1368(a)(1) (2023). But probation and post-release supervision are similar because both are forms of supervision. *See id.* §§ 15A-1343; 15A-1368(a)(1).

Here, Defendant's offenses require registration, so his period of post-release supervision is five years. *Id.* § 15A-1368.2(c) ("For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years."). And here, the trial court sentenced Defendant to five years of probation to begin at the end of Defendant's post-release supervision. Therefore, the trial court sentenced Defendant to be "supervised" for ten years: five under post-release supervision, and five under probation. The question is whether sections 1368.5 or 1346 prohibit this.

Under section 15A-1368.5:

> A period of post-release supervision begins on the day the prisoner is released from imprisonment. Periods of post-release supervision run concurrently with any federal or State prison, jail, probation, or parole terms to which the prisoner is subject during the period, only if the jurisdiction which sentenced the prisoner to prison, jail, probation, or parole permits concurrent crediting of supervision time.

Id. § 15A-1368.5.

"[P]eriod" refers to "[p]eriods of post-release supervision." *See id.* Here, the trial court sentenced Defendant to begin his probation after his post-release supervision. So, assuming the trial court had authority to do this, Defendant is not subject to probation "during the period" of post-release supervision. *See id.* If the assumption is accurate, the "run concurrently" clause is inapplicable to Defendant's sentence. *See id.*

To test the assumption, we must look to section 15A-1346, which details when probation commences. *Id.* § 15A-1346(a)–(b). Under section 15A-1346:

> (a) Commencement of Probation. – Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.
>
> (b) Consecutive and Concurrent Sentences. – If a period of probation is being imposed at the same time a period of

> imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.

Id.

"Except as provided in subsection (b)," subsection (a) clearly says that probation "runs *concurrently with any other period of probation, parole, or imprisonment*." *Id.* (emphasis added). And subsection (b) clearly says that "probation may run either concurrently or consecutively with the term of *imprisonment*, as determined by the court." *Id.* (emphasis added). We have held that the consecutive caveat in subsection (b) only applies to imprisonment—not probation. *State v. Canady*, 153 N.C. App. 455, 459–60, 570 S.E.2d 262, 265–66 (2002).

So the general rule is that probation must run concurrently with other periods of "probation, parole, or imprisonment." N.C. Gen. Stat. § 15A-1346. And there is an exception—but only for imprisonment. *See Canady*, 153 N.C. App. at 459–60, 570 S.E.2d at 265–66. Section 15A-1346, however, does not mention post-release supervision, *see* N.C. Gen. Stat. § 15A-1346, and no caselaw directly answers whether probation can run consecutively with post-release supervision.

We recognize that a missing statutory provision "does not justify judicial legislation." *Ebert v. Poston*, 266 U.S. 548, 554, 45 S. Ct. 188, 190, 69 L. Ed. 435, 438 (1925). But this case presents an unavoidable binary problem: Either (1) probation can run consecutively with post-release supervision, or (2) probation cannot run consecutively with post-release supervision. We cannot decline to resolve this issue, and leave Defendant in limbo, simply because the General Assembly failed to speak on the matter.

Section 15A-1346 is not ambiguous; it simply does not mention post-release supervision, let alone whether probation can run consecutively with post-release supervision. *See* N.C. Gen. Stat. § 15A-1346. In other words, the General Assembly has not clearly stated whether probation can run consecutively with post-release supervision. *See id.* And under the rule of lenity, we cannot "interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985).

Therefore, we cannot interpret section 15A-1346 to allow probation to run consecutively with post-release supervision because doing so would "increase the penalty that it places on" Defendant. *See id.* at 577, 337 S.E.2d at 681. Accordingly, the trial court erred when it sentenced Defendant to submit to probation after post-release supervision; Defendant's probation must run concurrently with his post-release supervision. *See* N.C. Gen. Stat. § 15A-1346. The General Assembly may certainly address this issue by statute if it deems our analysis to be contrary to its intent. This Court, however, declines to enter the legislative lane when the General Assembly has not clearly stated its preference.

On remand, "the parties must return to their respective positions prior to entering into the [plea] agreement." *State v. High*, 271 N.C. App. 771, 845 S.E.2d 150 (2020) (citing *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) ("Where a sentence is imposed in error as part of a plea agreement, the proper remedy is rescission of the entire plea agreement, and the parties must return to their respective positions prior to entering into the agreement and may choose to negotiate a new plea agreement."), *rev'd per curiam for the reasons stated in the dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012)). Accordingly, "the plea agreement must be set aside in its entirety, and the parties may either agree to a new plea agreement or the matter should proceed to trial on the original charges in the indictments." *State v. Green*, 266 N.C. App. 382, 392, 831 S.E.2d 611, 618 (2019).

V. Conclusion

We conclude that the trial court erred by imposing SBM on Defendant and by sentencing Defendant's probation to run consecutively with his post-release supervision. We reverse the SBM orders without remand, and we vacate the probation judgments and remand to the trial court.

REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges STROUD and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
DAQUON ROLLO CORROTHERS

No. COA23-865

Filed 6 August 2024

1. Appeal and Error—preservation of issues—waiver—constitutional challenge—evidence in murder trial—collected pursuant to allegedly tainted warrants—no motion to suppress

In a prosecution for first-degree murder, defendant did not preserve for appellate review his argument that the trial court committed plain error by failing to suppress evidence obtained pursuant to multiple search warrants, which defendant alleged were tainted by law enforcement's unlawful search of his residence. Defendant did not file a motion to suppress the evidence, and therefore he waived his constitutional challenge to the search warrants. His petition for a writ of certiorari was denied on appeal, as was his request for review pursuant to Appellate Rule 2.

2. Search and Seizure—effective assistance of counsel—no motion to suppress filed—evidence obtained pursuant to warrants—taint purged

In a first-degree murder case, where law enforcement applied for warrants to search defendant's residence and phone after an officer observed a hole in the ground (where the victim's body was later found) within the curtilage of defendant's house, defendant did not receive ineffective assistance of counsel where his trial attorney did not move to suppress evidence seized pursuant to the search warrants. Even if the officer's warrantless search of the curtilage at defendant's home had been unlawful, the warrants were still supported by probable cause based on information acquired independently of the officer's unlawful entry, including phone records placing defendant and the victim at defendant's house at the time of the murder, thereby purging the warrants of any taint.

3. Homicide—first-degree murder—motions to dismiss and to set aside verdict—substantial evidence

The trial court in a first-degree murder prosecution properly denied defendant's motion to dismiss during trial and his subsequent motion to set aside the guilty verdict, because the State presented substantial evidence from which a jury could reasonably infer defendant's guilt, including: a long exchange of text messages

between defendant and the victim, some of which were sent the day that the victim went missing, in which the victim agreed to purchase drugs from defendant; cellular phone records placing both the victim and defendant at defendant's residence during the time of the murder; and evidence that the projectiles removed from the victim's body were consistent with the shotgun shell casing and gun found inside defendant's residence.

Appeal by defendant from judgments entered 10 October 2022 by Judge Tiffany Peguise-Powers in Columbus County Superior Court. Heard in the Court of Appeals 5 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for the State.

Drew Nelson for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from the judgments entered upon a jury's verdicts finding him guilty of first-degree murder and robbery with a dangerous weapon. On appeal, Defendant argues that the trial court committed plain error in admitting certain evidence at trial, and that he received ineffective assistance of counsel as a result of his trial counsel's failure to file a motion to suppress that evidence. Defendant also contends that the trial court erroneously denied his motions to dismiss and motion to set aside the jury's verdict. After careful review, we dismiss Defendant's appeal in part, and conclude that he received a fair trial, free from error.

BACKGROUND

At a social gathering on the evening of 27 January 2020 at Derby's, a hangout in Columbus County, the victim Alex Moore asked Regina Spaulding, a family friend of Moore's, to lend him $400.00 in cash to help him "get his four-wheeler fixed and whatnot[.]" Spaulding understood this "to mean a drug deal, to be honest[,]" and lent Moore the money. Moore told her that he was going to Defendant's home, less than five minutes away, and then would return. Moore also texted Spaulding a screenshot of Defendant's phone number.

Spaulding became concerned when Moore failed to return after a couple of hours. She called Moore, who told her that he "was coming home." But Moore "never showed back up[,]" so Spaulding continued to call him. However, her calls went straight to voicemail, then automated

text messages were sent to her cellular phone from Moore's cellular phone saying, "I'll call you back."

After several hours, Spaulding called Marcus Solomon, another friend, told him what happened, and asked him to call Moore. When Moore did not answer Solomon's calls, Spaulding went to Moore's residence; however, neither Moore nor his truck were there. Spaulding told Moore's father that they were looking for Moore.

Early the next morning, on 28 January 2020, Spaulding discovered Moore's empty truck parked at a cemetery. Moore's father reported him to authorities as missing that day.

On 4 February 2020, Columbus County Sheriff's Detective Paul D. Rockenbach "initiated the assistance of Special Agent J. Bain with the North Carolina State Bureau of Investigation[,] who was able to pin-point a more accurate last known location of the cellular phone belonging to [Moore]." Agent Bain identified Defendant's Clarkton residence ("the Property") as the last location of Moore's cellular phone and determined that Moore's cellular phone "was at this location for approximately thirty minutes prior to going offline" on the evening of 27 January 2020.

Detective Rockenbach traveled to the Property that same day, 4 February 2020. He knocked on the door, but no one answered. Detective Rockenbach observed that there were four vehicles parked outside the house and a wheelchair on the front porch. Solomon had opined to Detective Rockenbach that Defendant should not have been "physically able to hurt" Moore. From this, Detective Rockenbach concluded that the wheelchair may have belonged to "the individual . . . Moore was going to see to complete [the] drug transaction[,]" i.e., Defendant. While at the Property, Detective Rockenbach walked about the front and rear of the house, "look[ing] around the curtilage[.]" Around the rear of the house, Detective Rockenbach noticed a hole in the ground.

On 5 February 2020, Detective Rockenbach secured a search warrant for the Property. Officers executed the search warrant that day and located Moore's body inside a "hole approximately six feet in length, maybe three to four feet in width, and . . . filled with water[.]" The hole "[a]ppeared to be manmade [and] dug by hand[.]" Officers extracted Moore's body after pumping the water out of the hole. They also located "two burn piles in the back part of the residence."

An autopsy revealed that Moore suffered gunshot wounds to several areas of the body, including his head, abdomen, ribs, and forearm, as well as blunt-force injuries. The associate chief medical examiner

testified that the cause of Moore's death was multiple gunshot wounds, most of which likely would have been fatal in isolation.

On 6 February 2020, Detective Rockenbach obtained a search warrant for Defendant's cellular phone records.

On 3 June 2020, a grand jury returned a true bill of indictment charging Defendant with murder. On 9 December 2020, a grand jury returned a second true bill of indictment charging Defendant with robbery with a dangerous weapon based on the allegation that Defendant stole "$400.00 from the person . . . of Alex Moore."

On 9 September 2022, FBI Special Agent Harrison Putnam obtained the cellular phone records in this case, including for Defendant's AT&T cellular phone and Moore's Verizon cellular phone. The records showed that Moore's Verizon cellular phone entered the coverage area of the Property and vehicle-recovery location at approximately 6:11 p.m. on the evening of 27 January 2020. From approximately 6:12 to 6:34 p.m., Moore's cellular phone remained "right in the area of [the Property]," and was "definitely there or near that location" during this period.

Records from Defendant's AT&T cellular phone likewise revealed that "sometime between 6:23 and 6:38 [p.m.], [Defendant's] AT&T phone traveled . . . to the coverage area of the Emerson tower[,]" which Special Agent Putnam described as "the cell site [he] would most expect to provide coverage to the vehicle recovery location and the [Property]." Special Agent Putnam testified that Defendant's AT&T cellular phone remained in the coverage area of the Emerson tower until approximately 6:47 p.m. on the evening of 27 January 2020.

This matter came on for a jury trial on 29 September 2022. On 10 October 2022, the jury returned verdicts finding Defendant guilty of first-degree murder and robbery with a dangerous weapon. The trial court sentenced Defendant to life imprisonment without parole for the first-degree murder conviction, and a concurrent, active term of 64 to 89 months for the robbery with a dangerous weapon conviction.

Defendant gave oral and written notice of appeal.

DISCUSSION

Defendant argues that "the trial court committed plain error by failing to suppress the evidence collected pursuant to the search warrant issued for . . . [the Property], the search warrant related to [Defendant's] phone, and the follow-on warrants[,]" in that the search warrants were tainted by Detective Rockenbach's alleged unlawful 4 February search of the curtilage of Defendant's residence. However, Defendant neglected to

file a motion to suppress this evidence. Accordingly, on 19 October 2023, Defendant filed in this Court a petition for writ of certiorari requesting that we invoke Rule 2 of our Rules of Appellate Procedure to allow review of his unpreserved constitutional arguments.

Defendant further argues that "[s]hould this Court decline to exercise its authority under Rule 2 or determine that the trial court did not commit plain error, this Court should hold that [Defendant] received ineffective assistance of counsel" due to trial counsel's failure to file a motion to suppress the evidence seized pursuant to the search warrants.

Lastly, Defendant contends that the trial court erred by denying his motions to dismiss the first-degree murder charge and his motion to set aside the jury's verdict finding him guilty of first-degree murder.

I. Plain Error Review

[1] Defendant first argues that "the trial court committed plain error by failing to suppress the evidence collected pursuant to the search warrant issued" for the Property, as well as "the search warrant related to [Defendant's] phone, and the follow-on warrants."

During Defendant's trial, Detective Rockenbach testified that, on 4 February 2020, he traveled to the Property and attempted to conduct a "knock and talk." He explained: "I knocked on the door. There were several cars there, and nobody came to the door, so I went back out, and . . . I noticed a hole." As Detective Rockenbach recalled, "we got to go out [to the Property] on the 4th, check it out, and nobody comes to the place. I see an area of interest as I'm walking around the curtilage, and I go and apply for a search warrant."

In light of this admission by Detective Rockenbach that he observed a hole on the Property prior to applying for the search warrants, Defendant contends that all subsequent evidence required suppression by the trial court, and that the trial court committed plain error in not suppressing the evidence.

In *State v. Miller*, our Supreme Court "h[e]ld that [the] defendant's Fourth Amendment claims [were] not reviewable on direct appeal, even for plain error, because he completely waived them by not moving to suppress [the] evidence . . . before or at trial." 371 N.C. 266, 267, 814 S.E.2d 81, 82 (2018). "Fact-intensive Fourth Amendment claims like these require an evidentiary record developed at a suppression hearing. Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant's plain error arguments." *Id.* at 270, 814 S.E.2d at 83–84.

As the *Miller* Court explained:

> When a defendant does not move to suppress . . . the State does not get the opportunity to develop a record pertaining to the defendant's Fourth Amendment claims. Developing a record is one of the main purposes of a suppression hearing. At a suppression hearing, both the defendant and the State can proffer testimony and any other admissible evidence that they deem relevant to the trial court's suppression determination.

Id. at 270, 814 S.E.2d at 84.

In light of the holding in *Miller*, we cannot review for plain error the merits of Defendant's arguments concerning the trial court's failure to suppress evidence. *See id.* at 273, 814 S.E.2d at 85–86 (remanding to this Court "for consideration of [the] defendant's ineffective assistance of counsel claim" where "the Court of Appeals should not have conducted plain error review in the first place").

Accordingly, we deny Defendant's petition for writ of certiorari and his request that we invoke Rule 2 of our Rules of Appellate Procedure to review for plain error Defendant's unpreserved constitutional challenge, and we dismiss this portion of his appeal.

II. Ineffective Assistance of Counsel

[2] Next, Defendant argues that his trial counsel "provided ineffective assistance by failing to file a motion to suppress the evidence" obtained pursuant to the search warrants issued after Detective Rockenbach's observation of the hole behind the Property.

"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, [. . .] 80 L. Ed. 2d 674 (1984)[,]" which was adopted by our Supreme Court in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). *State v. Harris*, 255 N.C. App. 653, 657, 805 S.E.2d 729, 733 (2017). "First, the defendant must show that counsel's performance was deficient." *Id.* (citation omitted). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* (citation omitted). "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." *Id.* at 658, 805 S.E.2d at 733 (cleaned up).

"[A]n ineffective assistance of counsel claim brought on direct review will be decided on the merits when the cold record reveals that

no further investigation is required." *Id.* (cleaned up); *e.g.*, *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (providing, for example, that the cold appellate record may be sufficient to decide a claim of ineffective assistance of counsel that "may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing"), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

To demonstrate that counsel's performance was deficient, a defendant must show that his attorney committed such serious errors during trial that the attorney "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Harris*, 255 N.C. App. at 657, 805 S.E.2d at 733 (citation omitted), in other words, that "counsel's conduct fell below an objective standard of reasonableness[,]" *Braswell*, 312 N.C. at 561–62, 324 S.E.2d at 248. Trial counsel's decision not to file a motion to suppress evidence does not fall below "an objective standard of reasonableness[,]" *State v. Canty*, 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012) (citation omitted), *disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013), and therefore, does not evince that the attorney's performance was deficient "where the search . . . that led to the discovery of the evidence was lawful[,]" *id.*

In this case, Defendant asserts that "the central question raised in [his] brief" is "whether the warrant application was 'prompted by' the illegal search" of the curtilage when Detective Rockenbach first visited the Property. By contrast, the State contends that "[g]iven that Moore's last known location was Defendant's residence and he had been missing for approximately one week, there was probable cause to search Defendant's residence."

We conclude that the cold record establishes that Detective Rockenbach's observation of the hole during his walk about the Property after his unsuccessful "knock and talk" on 4 February 2020 did not prompt the warrant applications when viewed in light of the totality of the circumstances, which supported the trial court's determinations of probable cause. Accordingly, we agree with the State on this issue.

"The Fourth Amendment to the United States Constitution protects the people from unreasonable searches and seizures." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302 (2016) (citation omitted). Article I, Section 20 of the North Carolina Constitution "likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *Id.* at 293, 794 S.E.2d at 302–03.

"At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable

governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31, 150 L. Ed. 2d 94, 100 (2001) (cleaned up). This heightened expectation of privacy extends not only to the home itself, but also to the home's curtilage. *See State v. Grice*, 367 N.C. 753, 759–60, 767 S.E.2d 312, 317–18, *cert. denied*, 576 U.S. 1025, 192 L. Ed. 2d 882 (2015). As our Supreme Court has explained, "the curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *Id.* at 759, 767 S.E.2d at 317 (citation omitted).

A "knock and talk" investigation does not implicate the Fourth Amendment: "no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as the front door of a house." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011). Nonetheless, the "curtilage . . . protects the privacies of life inside the home[,]" *Grice*, 367 N.C. at 760, 767 S.E.2d at 318 (cleaned up), and the Fourth Amendment therefore protects the curtilage of one's home, absent the existence of circumstances permitting an exception to the warrant requirement. *See, e.g.*, *id.* ("On one end of the [Fourth Amendment] spectrum, we have the home, which is protected by the highest constitutional threshold and thus may only be breached in specific, narrow circumstances. On the other end, we have open fields, which even though they may be private property may be reasonably traversed by law enforcement under the Fourth Amendment."); *State v. Marrero*, 248 N.C. App. 787, 794, 789 S.E.2d 560, 566 (2016) (explaining that "[a]n exigent circumstance is found to exist in the presence of an emergency or dangerous situation" (cleaned up)).

"[A] warrant may be issued only on a showing of probable cause." *Allman*, 369 N.C. at 293, 794 S.E.2d at 302 (cleaned up). "[A]n application for a search warrant must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items . . . are in the place to be searched." *Id.* at 294, 794 S.E.2d at 303 (cleaned up).

Probable cause exists when the supporting affidavit "gives the magistrate reasonable cause to believe that the search will reveal the presence of the items sought on the premises described in the warrant application, and that those items will aid in the apprehension or conviction of the offender." *Id.* (cleaned up). The magistrate is permitted to "draw reasonable inferences from the available observations" in the affidavits. *Id.* (cleaned up). As long as the totality of the circumstances "yield[s] a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue [the] warrant." *Id.*

Moreover, a search warrant is valid despite a prior unlawful entry "where the information used to obtain the search warrant was not derived from an initial unlawful entry, but rather came from sources wholly unconnected with the unlawful entry and was known to the agents well before the initial unlawful entry." *State v. Robinson*, 148 N.C. App. 422, 430, 560 S.E.2d 154, 160 (2002). Accordingly, "the dispositive question is whether the search warrant . . . was based on, or prompted by, information obtained from the officers' warrantless entry," or whether it was "based on information acquired independently of the warrantless entry so as to purge the search warrant of the primary taint." *Id.*

Here, we need not consider whether Detective Rockenbach unlawfully entered the rear curtilage of the home. It is plain that the affidavit attached to the initial search warrant application provides abundant support for the issuance of a search warrant, even absent an allegation regarding Detective Rockenbach's observation of the hole. The initial warrant application established that Moore had been missing for approximately one week; that he was last known to be headed to the Property to conduct a drug deal; that Moore's cellular phone was pinpointed at the Property, where it went offline after 30 minutes; and that individuals at the Property were not answering the door. For the subsequent search warrants, Detective Rockenbach additionally averred that "Moore's remains were found on the property in which [Defendant] lives." Detective Rockenbach's affidavit supporting the application to search the Property makes no reference to the hole, and the facts alleged in the application reveal that the allegations "came from sources wholly unconnected with the [alleged] unlawful entry and w[ere] known to [Detective Rockenbach] before the initial [alleged] unlawful" walk about the curtilage of the Property. *Id.*

The search warrants were supported by probable cause—they were not "based on, or prompted by, information obtained from" Detective Rockenbach's alleged unlawful entry, but rather "on information acquired independently of the warrantless entry so as to purge the search warrant of [any] primary taint." *Id.*

"[F]ailure to file a motion to suppress is not ineffective assistance of counsel where the search . . . that led to the discovery of the evidence was lawful." *Canty*, 224 N.C. App. at 517, 736 S.E.2d at 535. Accordingly, Defendant has failed to demonstrate that he received ineffective assistance of counsel, and we dismiss this claim.

III. Motions to Dismiss and Motion to Set Aside Verdict

[3] Lastly, Defendant contends that the "trial court erred by failing to grant the motions to dismiss made during the trial and the motion to set

aside the verdict" for the charge of murder because, even "viewing the evidence in the light most favorable to the [S]tate, there was not substantial evidence that [he] murdered Alex Moore."

A. Standard of Review

"We review the denial of a motion to dismiss based on an insufficiency of evidence de novo." *State v. Steele*, 281 N.C. App. 472, 476, 868 S.E.2d 876, 880, *disc. review denied*, 382 N.C. 719, 878 S.E.2d 809 (2022).

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Osborne*, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (citation omitted). "Substantial evidence" is simply that amount of evidence "necessary to persuade a rational juror to accept a conclusion." *Id.* (citation omitted). The evidence is "considered in the light most favorable to the State[,]" and "the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (cleaned up). Evidence unfavorable to the State "is not to be taken into consideration." *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000).

"[I]f the record developed before the trial court 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." *Osborne*, 372 N.C. at 626, 831 S.E.2d at 333 (cleaned up).

"The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss, i.e., whether there is substantial evidence of each essential element of the crime." *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000).

B. Analysis

In the present case, the State charged Defendant with murder pursuant to N.C. Gen. Stat. § 14-17. Section 14-17 provides, in pertinent part, that "[a] murder which shall be perpetrated by means of a . . . willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any . . . robbery . . . shall be deemed to be murder in the first degree[.]" N.C. Gen. Stat. § 14-17(a) (2023). The jury found Defendant guilty of first-degree murder on the basis of both "malice, premeditation and deliberation" as well as "[u]nder the first[-]degree felony murder rule[.]"

"When viewed in the light most favorable to the State, sufficient evidence supported the inference that Defendant" committed the first-degree murder of Moore. *State v. Rogers*, 255 N.C. App. 413, 416, 805 S.E.2d 172, 174 (2017). Spaulding testified that Moore left on the evening that he went missing to conduct "a drug deal" with Defendant at Defendant's home. Before he left, Moore sent Spaulding a screenshot of Defendant's contact information.

The State introduced into evidence a long exchange of text messages between Defendant and Moore, including texts from the day that Moore went missing. In these texts, the two men arranged the details of Moore's pending drug purchase from Defendant. Detective Rockenbach testified that the "last exchange to" Defendant was Moore saying that he was "outside" at 6:14 p.m., and that "[t]he rest of the messages are just from [Defendant] to [Moore]'s phone." Special Agent Putnam also analyzed Moore's Verizon cellular phone records, which showed that Moore's cellular phone entered the coverage area of the Property and vehicle-recovery location at approximately 6:11 p.m. on the evening of 27 January 2020. From approximately 6:12 to 6:34 p.m., Moore's cellular phone remained "right in the area of the [Property]" and was "definitely there or near that location" during this period.

Special Agent Putnam also provided evidence regarding Defendant's AT&T cellular phone data, which showed that "sometime between 6:23 and 6:38 [p.m.], [Defendant's] AT&T phone traveled . . . to the coverage area of the Emerson tower[,]" which Special Agent Putnam described as "the cell site [that he] would most expect to provide coverage to the vehicle recovery location and the [Property]." Special Agent Putnam also testified that Defendant's AT&T cellular phone remained within the coverage area of the Emerson tower until approximately 6:47 p.m. on the evening of 27 January 2020.

Additionally, the State presented evidence that upon searching Defendant's home, officers discovered one shotgun shell casing under the couch and another on a space heater, as well as a long gun. In Defendant's bedroom, officers discovered additional 9-millimeter ammunition. Forensic firearms examiner Kelby Glass of the Cumberland County Sheriff's Office testified "that the projectiles that were removed from the body of" Moore were "consistent with the ammo that was found in [Defendant's] room[.]"

We conclude that, viewed in the light most favorable to the State, this constitutes substantial evidence from which a jury could reasonably infer Defendant's guilt of murder. *See Rogers*, 255 N.C. App. at 416, 805

S.E.2d at 174–75. Accordingly, the trial court did not err when it denied Defendant's motions to dismiss or motion to set aside the jury's verdict. *See Osborne*, 372 N.C. at 626, 831 S.E.2d at 333; *Duncan*, 136 N.C. App. at 520, 524 S.E.2d at 811.

CONCLUSION

Defendant failed to preserve for appellate review his constitutional challenge to the search warrants in this case. We deny his petition for writ of certiorari and dismiss that portion of Defendant's appeal. In addition, Defendant has not shown that trial counsel's performance was deficient, and we dismiss Defendant's claim of ineffective assistance of counsel. Finally, the trial court did not err in denying Defendant's motions to dismiss or motion to set aside the jury's verdict.

DISMISSED IN PART; NO ERROR IN PART.

Judges WOOD and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
WILLIAM DAWSON, DEFENDANT

No. COA23-801

Filed 6 August 2024

1. Appeal and Error—statutory review of life imprisonment without parole—recommendation to parole commission—right to appeal

After a resident superior court judge reviewed defendant's sentence for life imprisonment without parole (for first-degree murder committed in 1997) pursuant to N.C.G.S. § 15A-1380.5 (a statute enacted in 1994 and repealed in 1998) upon defendant's motion, defendant had the right to appeal the trial court's recommendation to the Parole Commission that defendant should not be granted parole and that his sentence should not be altered or commuted. Although the relief available under section 15A-1380.5 was very slight, the court's recommendation was a final judgment, and language contained in subsection (f) of that statute reflected legislative intent to provide a defendant with the right to appeal from a recommendation.

2. Appeal and Error—statutory review of life imprisonment without parole—recommendation to parole commission—insufficient findings

After a resident superior court judge reviewed defendant's sentence for life imprisonment without parole (for first-degree murder) pursuant to N.C.G.S. § 15A-1380.5 (now repealed) upon defendant's motion, the trial court's order making its recommendation to the Parole Commission—that defendant should not be granted parole and that his sentence should not be altered or commuted—was vacated where the trial court's findings mostly consisted of mere recitations of procedural history and were insufficient as a whole to allow for meaningful appellate review of the court's reasoning in reaching its recommendation. The matter was remanded for the trial court to make additional findings, reconsider its recommendation, or, in its discretion, to consider additional information provided by the State.

Appeal by Defendant from order entered 16 January 2023 by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

DILLON, Chief Judge.

In 1999, Defendant William Dawson was sentenced to life without parole. In 2022, he sought review of his criminal sentence pursuant to N.C. Gen. Stat. § 15A-1380.5 (now repealed). He appeals the trial court's recommendation to the parole board pursuant to that statute that he "not be granted parole nor should his judgment be altered or commuted." We vacate and remand for further proceedings.

I. Background

This appeal concerns the proper application of G.S. 15A-1380.5, which was enacted by our General Assembly in 1994, but repealed in 1998.

In 1994, our General Assembly enacted legislation which allowed a defendant to be sentenced to life without parole ("LWOP") for

first-degree murder. To mitigate the otherwise finality of an LWOP sentence, our General Assembly also enacted G.S. 15A-1380.5, which provides a defendant sentenced to LWOP and who has served 25 years, the opportunity to have his sentence reviewed. Under that statute (hereinafter the "Statute"), a resident superior court judge is to review the defendant's case and make a recommendation to the Governor or agency designated by the Governor as to whether the defendant's LWOP sentence should be altered or commuted. In 2019, Governor Roy Cooper designated the Post-Release Supervision and Parole Commission (the "Parole Commission") to be the recipients of such recommendations.

In 1998, our General Assembly repealed the Statute. Notwithstanding, the Statute remains available for defendants sentenced to LWOP for crimes committed between 1 October 1994 and 1 December 1998. *See State v. Young*, 369 N.C. 118, 794 S.E.2d 274 (2016) (discussing the process under the Statute for which a defendant sentenced to LWOP for a crime committed between 1994 and 1998 may seek review).

Defendant was indicted for first-degree murder in 1997 for allegedly killing an individual that same year. In 1999, a jury found him guilty of first-degree murder, and the trial court sentenced him to LWOP.

In July 2022, Defendant filed a motion in the trial court requesting that his sentence be reviewed by a resident superior court judge pursuant to the Statute.

After reviewing Defendant's case, by order entered 16 January 2023 (the "Order"), the trial court recommended to the Parole Commission that Defendant should not be granted parole, nor should his 1999 LWOP sentence be altered or commuted. Defendant appeals.

II. The Statute

As this appeal concerns the proper interpretation of a statute that has been repealed, the text of the Statute is reproduced below:

> (a) For the purposes of this Article the term "life imprisonment without parole" shall include a sentence imposed for "the remainder of the prisoner's natural life."
>
> (b) A defendant sentenced to life imprisonment without parole is entitled to review of that sentence by a resident superior court judge for the county in which the defendant was convicted after the defendant has served 25 years of imprisonment. The defendant's sentence shall be reviewed again every two years as provided by this section, unless the sentence is altered or commuted before that time.

> (c) In reviewing the sentence the judge shall consider the trial record and may review the defendant's record from the Department of Correction, the position of any members of the victim's immediate family, the health condition of the defendant, the degree of risk to society posed by the defendant, and any other information that the judge, in his or her discretion, deems appropriate.
>
> (d) After completing the review required by this section, the judge shall recommend to the Governor or to any executive agency or board designated by the Governor whether or not the sentence of the defendant should be altered or commuted. The decision of what to recommend is in the judge's discretion.
>
> (e) The Governor or an executive agency designated under this section shall consider the recommendation made by the judge.
>
> (f) The recommendation of a judge made in accordance with this section may be reviewed on appeal only for an abuse of discretion.

N.C. Gen. Stat. § 15A-1380.5 (1995) (repealed 1998).

III. Analysis

A. Defendant's Right to Appeal

[1] We first consider whether Defendant has the right to appeal from a recommendation made by a trial court to the Parole Commission under the Statute concerning his LWOP sentence. For the reasoning below, we conclude that he does.

It is true that, as explained by our Supreme Court, the recommendation by a trial court to the Parole Commission is not binding on anyone:

> Ultimately, "[t]he decision of what to recommend is in the judge's discretion," and the only effect of the judge's recommendation is that "[t]he Governor or an executive agency designated under this section" must "consider" it.

Young, 369 N.C. at 124–25, 794 S.E.2d at 279 (citing § 15A–1380.5(e)).

The only language in the Statute which references appellate procedure is in its last subsection, providing that "[t]he recommendation of a judge made in accordance with this section may be reviewed on appeal only for an abuse of discretion." N.C. Gen. Stat. § 15A-1380.5(f). This

language states the legal standard we are to use when reviewing a trial court's recommendation on appeal. However, it does not expressly provide a defendant the *right* to an appeal. We conclude, though, from this and statutory provisions that our General Assembly intended to provide a defendant with the right to an appeal from a recommendation.

In reaching our conclusion, we note that our General Assembly has provided our Court with "jurisdiction to review upon appeal *decisions* of" a trial court. N.C. Gen. Stat. § 7A-26 (2023) (emphasis added). We further note that the Statute refers to the trial court's recommendation to the Parole Commission as a "decision" by that court. N.C. Gen. Stat. § 15A-1380.5(d).

Further, a defendant has *the right* to appeal to our Court from a decision that is a "final judgment of a superior court[.]" N.C. Gen. Stat. § 7A-27(b)(1) (2023). Here, the Statute provides Defendant the right to seek a type of relief in the superior court, though admittedly this relief is *extremely slight*. *See Young*, 369 N.C. at 124, 794 S.E.2d at 279 (stating that a positive recommendation by a trial court to the Parole Commission "might increase the chance that [an LWOP] sentence will be altered or commuted[.]"). That is, under the Statute a defendant is *not* entitled to a decision from the trial court whether his LWOP sentence should be altered or commuted. Rather, the Statute only provides an entitlement to a decision by the trial court whether to *recommend* to the Parole Commission that his LWOP sentence be altered or commuted, a recommendation which the Parole Commission "must 'consider[.]' " *Id.* at 125, 794 S.E.2d at 279.

Though the relief available is slight, it is relief that our General Assembly made available to certain defendants. We, therefore, construe a trial court's recommendation to the Parole Commission under the Statute to be a final judgment, as it "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) (emphasis added). Accordingly, Defendant is entitled to a review of the trial court's action for an abuse of discretion.

B. Abuse of Discretion

[2] We now review the trial court's recommendation to the Parole Commission that Defendant's LWOP sentence not be altered or commuted at this time.

An abuse of discretion "occurs where the trial judge's determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *State v. Reed*, 355 N.C.

150, 155, 558 S.E.2d 167, 171 (2002) (citations and internal quotation marks omitted).

Under subsection (c) of the Statute, the trial court "*shall* consider the trial record[.]" N.C. Gen. Stat. § 15A-1380.5(c) (emphasis added). Therefore, a trial court's refusal to consider the trial record before making a recommendation would be an abuse of discretion. *See*, *e.g.*, *Harris v. Harris*, 91 N.C. App. 699, 705–06, 373 S.E.2d 312, 316 (1988) (concluding failure to follow a statutory mandate is an abuse of discretion).

The Statute also provides that the reviewing judge "*may* review . . . the health condition of the defendant" and "any other information as the judge, in his or her discretion, deems appropriate." N.C. Gen. Stat. § 15A-1380.5(c) (emphasis added).

Defendant argues that the trial court failed to make adequate findings to support its recommendation to the Parole Commission.

The absence of sufficient findings of fact in an order may prevent our Court from conducting meaningful appellate review. *See Martin v. Martin*, 263 N.C. 86, 138 S.E.2d 801 (1964). As our Supreme Court has explained:

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

Here, most of the trial court's findings contained in the Order were mere recitations of procedural history, including a list of the materials the trial court considered. Specifically, the Order states that the court considered the record from Defendant's trial, as required by the Statute. The Order also states that the court considered other information, including letters from the victim's family, Defendant's criminal history, Defendant's prison record, letters from Defendant's family, and evidence from Defendant concerning his poor health.

However, the only finding in the Order concerning the information the trial court reviewed was that Defendant was in poor health and suffered from multiple health issues, a finding which would support an opposite recommendation than that ultimately made by the trial court. There certainly was information before the trial court from which it could have made findings to support its recommendation to the Parole Board. However, we conclude the findings in the Order are insufficient for us to conduct a meaningful review of the trial court's reasoning.

We, therefore, vacate the Order and remand the matter to the trial court. On remand, the trial court may make additional findings to support its recommendation or may reconsider its recommendation. Further, the trial court may, in its discretion, consider additional information as allowed by the Statute.

VACATED AND REMANDED.

Judges STADING and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
KRISTA MARIE FREEMAN

No. COA24-120

Filed 6 August 2024

1. Jury—instruction not requested—lesser-included offense—plain error standard proper—not shown

Where a defendant failed to request an instruction on the lesser-included offense of misdemeanor child abuse (N.C.G.S. § 14-318.2(a)), the proper appellate standard of review was plain error (rather than invited error), a standard defendant did not meet in light of evidence that repeated punishments she inflicted on the five-year-old victim resulted in bruised and swollen feet so painful the child had difficulty walking—clear and positive evidence of great pain and suffering that constituted "serious physical injury," an essential element of the greater offense charged (felony child abuse resulting in serious physical injury pursuant to N.C.G.S. § 14-318.4(a5)).

2. Evidence—felony child abuse—serious physical injury—reckless disregard for human life—substantial evidence—motion to dismiss properly denied

The trial court did not err in denying defendant's motion to dismiss a charge of felony child abuse for insufficient evidence of "serious physical injury" and "reckless disregard for human life" where the evidence, viewed in the light most favorable to the State, was substantial on each challenged element, in that: (1) the repeated punishments defendant inflicted on the five-year-old victim resulted in bruised and swollen feet so painful the child had difficulty walking, causing him great pain and suffering; and (2) defendant's provision of water, foot soaks, and lotion to the victim did not assuage her indifference to the child's health and safety.

3. Child Abuse, Dependency, and Neglect—felony child abuse—jury instruction on lawful corporal punishment—exemption not applicable—plain error not shown

In a felony child abuse prosecution, the trial court did not plainly err in failing to instruct the jury regarding lawful corporal punishment by a parent where the evidence was insufficient that defendant, the fiancée of the victim's mother, was acting in loco parentis; moreover, even assuming that she had been acting in that capacity, overwhelming evidence was presented from which a jury could conclude that defendant's punishments—including making the five-year-old victim run in place for long periods of time three to four times in a week, resulting in bruised and swollen feet so painful the child could not walk normally—were rooted in malice, thus making any potential exemption under the lawful corporal punishment principle inapplicable.

Appeal by Defendant from judgment entered 27 March 2023 by Judge Patrick Thomas Nadolski in Montgomery County Superior Court. Heard in the Court of Appeals 12 June 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for the Defendant.

WOOD, Judge.

Krista Freeman ("Defendant") appeals from a judgment entered upon a jury verdict finding her guilty of felony child abuse resulting in serious physical injury. On appeal, Defendant raises three issues, including the challenge of two unpreserved objections to the jury instructions, and that the trial court erred when it denied her motion to dismiss. For the reasons that follow, we hold Defendant received a fair trial free from error.

I. Factual and Procedural Background

This appeal stems from injuries sustained by the minor child, Brandon,[1] who was five years old and in the first grade at the time of the abuse. Brandon lived with his biological mother, Tiffani Pike, and Tiffani's fiancée, Defendant. Despite no biological relation, Brandon called Defendant "momma" and seemingly regarded her as his second mom. On 21 September 2021, Brandon got into an altercation with another student at the end of the school day. As he waited to board the school bus, Brandon kicked the student, and the children began pushing one another. Brandon's teacher separated the students and then ensured they loaded the bus safely. Once the children left, his teacher called Brandon's home to discuss the incident; Defendant answered the phone. She informed Defendant of what had happened that afternoon and that she continuously had behavioral issues with him in class. Defendant apologized for Brandon's behavior, stated they were having similar issues at home, and that Ms. Pike would be upset to hear about this situation.

When Brandon arrived at his bus stop, Defendant was waiting. The bus monitor, known as "Ms. Mollie" around school, observed Brandon exit the bus and heard Defendant say to Brandon "get your ass in the car." As punishment for the events at school, Defendant made Brandon run in place for at least forty-five minutes. Brandon did not attend school the next day but returned to school the following day on 23 September 2021. On the morning of his return to school, his bus monitor Ms. Mollie noticed Brandon was moving very slowly as he walked up the steps of the school bus and that it hurt him to get up the stairs. She approached him and he stated, "Ms. Mollie, I'm in so much pain." Once at school, Brandon's teacher also made similar observations. She observed that Brandon looked very uncomfortable walking, was not walking flat footed, and kept saying that his feet hurt. The teacher notified the

1. A pseudonym is used to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

guidance counselor about the situation who then reported the matter to Montgomery County Department of Social Services ("DSS").

Na'La Brown, a social worker with DSS, came to the school to assess Brandon. Initially, she noticed him walking on his heels in a "waddle." The bottoms of his feet were red and swollen. When asked about his feet, Brandon told Ms. Brown that he had been running in place from lunchtime until dinner time. She further observed bruises on his cheeks; knots on his cheeks and cheekbones; darkened under-eyes; a cut on his eyebrow; knots on the top of his head; and a large, scabbed knot on the back of his head. When asked about those injuries, Brandon stated one of the knots on his face was from a time when he slipped and fell while getting a drink out of the refrigerator for "momma." He also told Ms. Brown that the knot on the center of his head was from an incident when "a ghost hit him in the head with a broom" and the name of the ghost was "Michael Freeman." Ms. Brown asked Brandon to undress so she could check for more injuries and photograph his condition. She discovered more bruises on his legs and a larger, puffy bruise spanning from the bottom of his buttock to the back of his knee. Afterwards, Brandon returned to his classroom and Ms. Brown left the school to visit Brandon's residence.

Ms. Brown arrived at the home and spoke with Ms. Pike and Defendant. She informed them that DSS received a call about Brandon's injuries and appearance at school and needed them to come into the DSS office to have a conversation with Brandon present. Despite some resistance from Ms. Pike, Defendant informed Ms. Brown that they would get ready and meet her at the DSS office. Ms. Brown returned to the school to get Brandon and take him to the DSS office. As they were driving, Brandon complained that his feet hurt and asked if she could carry him when they arrived. Upon arrival, Brandon met with two law enforcement officers who made similar observations to Ms. Brown. The officers observed wounds and bruises on his face; a wound on the back of his head; red and swollen feet; him standing with his right leg and foot pointed outward bearing the majority of his weight on his left leg; he waddled when he walked; and that he needed assistance to stand up, undress, dress, and sit down. The officers photographed Brandon's injuries and recorded a video of him walking.

After the officer's examination, Brandon sat in Ms. Brown's office where he ate and watched videos while she completed paperwork. Ms. Pike and Defendant arrived at the DSS office where they were asked by the officers if they were willing to speak at the Sheriff's office. They agreed. Defendant was interviewed first and was questioned about

Brandon's injuries and the form of punishment used when Brandon misbehaved. Defendant admitted to using several forms of punishment, including running in place; running laps around the house; standing in a corner and holding one foot up if he cried, lasting between five minutes to an hour and a half; doing "yard work" which consisted of throwing objects in the dumpster; and flipping cinder blocks across the yard until he reached the dumpster. The time per punishment varied, with the time increasing by five-minute intervals if Brandon cried. Defendant further admitted that on the night prior, Brandon's punishment had been to run in place for forty-five minutes and that this form of punishment had been used the previous week approximately three to four times. Defendant also stated that she would make Brandon walk to the bus stop less than one mile from their home, while she drove her vehicle in front of him. She explained that Brandon sustained the injury on the back of his head while he was walking to the bus stop because he fell on the gravel. She reported that some of the bruising on his leg was from a time when he got stuck in the dumpster while throwing objects away. Lastly, Defendant stated she had spanked him before, but he responded by laughing, so now she just threatens him with a "butt whooping." After Defendant and Ms. Pike were interviewed, the officer placed them both under arrest. Defendant was charged with felony child abuse resulting in serious injury.

Thereafter, Brandon was taken to the hospital for an assessment of his injuries. The doctor who evaluated Brandon noted excessive bruising, an abrasion on his head, and swelling on his feet. The doctor reported that Brandon's evaluation raised "some red flags" and while his bruising did not seem "accidental," he could not definitively say what caused his injuries. He was also concerned about the swelling on Brandon's feet, as that was unusual for a five-year-old. Ultimately, after a series of tests and scans, the doctor advised that Brandon receive "supportive care, Tylenol, Motrin, [and] icing." After his evaluation, Brandon was taken to his first foster care placement.

On 4 October 2021, approximately two weeks after Brandon came into DSS care, Ms. Brown took Brandon to the Butterfly House Child Advocacy Center for physical and mental evaluation. During his physical examination, Brandon told the nurse "momma hit him with a belt," that both parents would shut his door so that he could not get food, that he felt "a little bit scared" at home, and that his parents instructed him to not say that he had been hit. The nurse described his physical appearance as slender with some overall bruising indicative of non-accidental trauma. After reviewing all the information in Brandon's

case and information from her own examination, the nurse concluded that Brandon was physically and emotionally abused. She further concluded that there may be grounds for neglect based on the number of cavities Brandon had and how he, at times, was not allowed to access food. The nurse recommended dental care and trauma-focused behavioral therapy counseling.

He began therapy on 28 September 2022 at Sandhills Pediatrics, where he saw Ms. Willms for post-traumatic stress treatment. During the sessions, Brandon expressed love and protection towards his parents, but also trouble with how his parents treated him. During one particular session, Brandon explained that he was nervous about beginning unsupervised visits and was worried about Ms. Pike and Defendant getting angry at him. During another session he shared that "bad things happen for bad behavior" and "if he would cry, he would get hit with a belt."

On 4 October 2021, Defendant was indicted for felony child abuse inflicting serious physical injury to Brandon, including bruised, swollen, unmoving feet and legs, resulting in pain. Defendant came on for trial during the 20 March 2023 session of Montgomery County Superior court. At trial, after the State rested its case, Defendant moved to dismiss based on insufficiency of evidence. The trial court denied the motion. Following the close of Defendant's evidence, Defendant renewed the motion to dismiss, and the trial court again denied the motion. At the charge conference, neither party objected to the proposed jury instructions nor requested that a lesser-included instruction be submitted to the jury. The trial court instructed the jury in accordance with the pattern jury instructions on felony child abuse by reckless disregard for human life in the care of a child resulting in serious physical injury. N.C.P.I.-Crim. 239.55D. The jury returned a verdict of guilty to felony child abuse resulting in serious physical injury. The trial court sentenced Defendant to 13 to 25 months of imprisonment. The trial court suspended Defendant's sentence with the condition that she serve four months in the local jail and five years on probation following release. Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant argues the trial court erred (1) in failing to instruct the jury on the lesser-included offense of misdemeanor child abuse; (2) in denying Defendant's motion to dismiss the charge of felony child abuse resulting in serious injury; and (3) by failing to instruct on a parent's right to administer corporal punishment.

A. Misdemeanor Child Abuse

[1] Defendant first asserts that the trial court plainly erred when it failed to instruct the jury on misdemeanor child abuse as a lesser-included offense of felony child abuse resulting in serious injury. The State contends because Defendant did not request an instruction on the lesser-included offense, did not object to the proposed instructions, and did not request any special instructions, such failure amounts to invited error, precluding plain error review. We disagree. Defendant's failure to request the jury instruction does not equate to invited error.

"Our courts have consistently applied the invited error doctrine when a defendant's affirmative actions directly precipitate error." *State v. Miller*, 289 N.C. App. 429, 433, 889 S.E.2d 231, 234 (2023) (citations omitted). However, "our courts have declined to apply the invited error doctrine where such specific and affirmative actions are absent." *Id.* (citations omitted). In *State v. Hooks*, the defendant was given "numerous opportunities" to object to the proposed jury instructions and each time "indicated his satisfaction with the trial court's instructions." 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001). In that case, our Supreme Court reviewed the instructional error under the plain error standard, rather than under the invited error doctrine. Here, Defendant did not object to the jury instructions and did not request an instruction on the lesser-included offense. Like *Hooks*, Defendant had the opportunity to object and ultimately indicated her assent to the instructions. However, this does not constitute an affirmative act; rather, it is the failure to object that is considered on appeal. Accordingly, we decline to apply the invited error doctrine and review Defendant's argument under the plain error standard.

Under plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (cleaned up). Stated differently, a defendant must establish that "absent the error the jury probably would have reached a different verdict." *Id.* (cleaned up). Moreover, "it must be probable, not just possible" that a different verdict would have been reached. *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (citation omitted). The standard is applied "cautiously and only in the exceptional case," which "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (cleaned up).

To determine whether Defendant was entitled to an instruction on the lesser-included offense of misdemeanor child abuse, we must assess if "the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citations omitted). However, "when the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct [the jury] on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980) (citation omitted). Moreover, the trial judge must instruct the jury as to the lesser-included offense if: "(1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982) (citation omitted).

Here, Defendant was charged under N.C. Gen. Stat. § 14-318.4(a5) for felonious child abuse resulting in serious physical injury, which is defined as:

> (a5) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class G felony if the act or omission results in serious physical injury to the child.

By contrast, the separate, lesser offense of felony child abuse inflicting serious physical injury is misdemeanor child abuse, which states:

> (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2(a). Thus, one difference between the two offenses is the degree of injury to the child. "Serious physical injury" is defined as "[p]hysical injury that causes great pain and suffering. The term includes serious mental injury." N.C. Gen. Stat. § 14-318.4(d)(2). This Court has outlined factors to determine whether an injury is a "serious physical injury," including: (1) hospitalization, (2) pain, (3) loss

of blood, and (4) time lost from work. *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 210 (2004) (citation omitted). If it is injury to a child, "courts should also review whether the child was unable to attend school or other activities." *State v. Williams*, 184 N.C. App. 351, 356, 646 S.E.2d 613, 616 (2007). Determining whether an injury satisfies the "serious physical injury" standard is generally a decision for the jury. *Id.* (citations omitted).

Defendant argues that Brandon's injuries satisfied the "physical injury" standard under misdemeanor child abuse rather than the "serious physical injury" standard under felony child abuse. Specifically, Defendant asserts that Brandon's injuries of "swollen feet and a bruise" are insufficient to meet the serious physical injury threshold because the injuries did not require hospitalization, result in a loss of blood, nor led to great pain and suffering. Further, Defendant points to evidence tending to show that Brandon self-reported a pain level of zero at the hospital and the doctor only recommended "supportive care, Tylenol, Motrin, [and] icing, if needed." Therefore, Defendant contends the evidence was equivocal on whether Brandon's injuries were "serious physical injuries" or "physical injuries" such that the jury likely would have found Defendant guilty of misdemeanor, rather than felonious, child abuse.

We first note, "[t]here is no requirement in the statute or in our case law that an injury require immediate medical attention in order to be a 'serious physical injury.' " *Williams*, 154 N.C. App. 176, 180, 571 S.E.2d 619, 622 (2002). The need for medical attention may be considered but it is not an element that the State is required to prove. *See Hardy*, 299 N.C. at 456, 263 S.E.2d at 718-19. Instead, the evidence must be "clear and positive" that Brandon sustained injuries that resulted in "great pain and suffering." *Id.*; *see also* N.C. Gen. Stat. § 14-318.4(d)(2). We hold that the evidence presented at trial sufficiently satisfied this requirement.

Defendant admitted that she punished Brandon by forcing him to run in place for forty-five minutes on the day before he was taken into DSS' care. She further informed law enforcement that this type of punishment was used approximately three to four times the week prior. Brandon did not attend school the next day, *and* upon his return to school the following day, the bus monitor observed that Brandon moved slowly and was in pain when he climbed the stairs. Brandon told the bus monitor "I'm in so much pain." Brandon's teacher testified that he looked uncomfortable when he walked and that he continuously complained that his feet hurt. Ms. Brown, the social worker, noticed that Brandon walked with a "waddle" and that his feet were red and swollen. Later, Brandon asked Ms. Brown to carry him into the DSS office because it

hurt to walk. Law enforcement officers observed that Brandon's right leg and foot were pointed outward, and that he put most of his weight on his left leg. Additionally, Brandon needed help to stand up, undress, dress, and sit down. When Brandon was evaluated at the hospital, the doctor noted that his injuries raised "red flags," the bruising appeared nonaccidental, and the swelling on his feet was unusual for a five-year-old child. Further, at trial the jury was shown photographs of Brandon's injuries and the video taken by law enforcement that showed Brandon's inability to walk correctly.

Defendant also admitted to other types of punishment that may have contributed to Brandon's injuries. Some punishments included flipping cinder blocks across the yard to a dumpster, standing in the corner lifting one foot up at a time, doing laps around the house, and walking to the bus stop as she drove her vehicle in front of him. Defendant acknowledged that the length of the punishment was dependent upon whether Brandon cried. Crying extended the time. Defendant argues that because the indictment only lists "bruised, swollen, unmoving feet and legs," the other injuries and forms of punishment should not be considered when analyzing the severity of Brandon's injuries. However, Defendant disclosed to law enforcement the different forms of punishment she used, which are all relevant when considering Brandon's condition.

"Injuries are serious as a matter of law when the evidence is not conflicting and is such that reasonable minds could not differ on the serious nature of the injuries inflicted." *State v. Church*, 99 N.C. App. 647, 656, 394 S.E.2d 468, 473 (1990) (citation omitted). In totality, the evidence here demonstrated Brandon experienced "great pain and suffering" and that his injuries were such that a reasonable mind could not differ on the serious nature of Brandon's condition. N.C. Gen. Stat. § 14-318.4(d)(2); *Id.* The undisputed testimonial evidence provided by the bus monitor, his teacher, the DSS social worker, and law enforcement officers, revealed Brandon was in great pain and could not walk properly. Brandon confided in these individuals, expressing the amount of pain he was in, and even asked to be carried because it hurt him to walk. The video and photographs shown to the jury depicted bruising, swelling, the outward direction that his right leg faced when standing, and showed him struggling to walk. A punishment that results in a child being unable to walk normally and repeatedly expressing to others that he was in pain is undoubtedly of a "serious nature." *Id.* For these reasons, we hold that the injuries Brandon sustained, as a result of punishment by Defendant, are within the scope and level of severity of a "serious physical injury." N.C. Gen. Stat. § 14-318.4(a5). Thus, because the evidence is clear as to the elements of felony child abuse inflicting

serious physical injury, a lesser-included instruction on misdemeanor child abuse was unwarranted. The trial court did not err, much less plainly err, in not instructing the jury on misdemeanor child abuse as a lesser-included offense of felony child abuse resulting in serious injury.

B. Motion to Dismiss

[2] Defendant next challenges the trial court's denial of her motion to dismiss the charge of felonious child abuse based on insufficient evidence of "serious physical injury" and "reckless disregard for human life." 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) (citation omitted). When ruling on a motion to dismiss, the trial court assesses whether the State presented substantial evidence of each essential element of the offenses charged. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Wilkins*, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809 (2010) (citation omitted). "[T]he trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455–56 (2000) (citation omitted). "The evidence must be viewed in the light most favorable to the State. Contradiction and discrepancies in the evidence are to be resolved by the jury." *State v. Wilson*, 181 N.C. App. 540, 542, 640 S.E.2d 403, 405 (2007) (cleaned up).

As discussed above, Defendant was convicted of felonious child abuse under N.C. Gen. Stat. § 14-318.4(a5). "Under § 14–318.4(a5), a parent of a young child is guilty of [felony] child abuse if the parent's willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life *and* the parent's act or omission results in serious [physical] injury to the child." *State v. Frazier*, 251 N.C. App. 840, 841, 795 S.E.2d 654, 656 (2017) (cleaned up). As noted previously in our discussion of the "serious physical injury," the State presented sufficient evidence that Brandon sustained injuries that resulted in "great pain and suffering." N.C. Gen. Stat. § 14-318.4(d)(2). Likewise, the State presented sufficient evidence to allow a reasonable jury to infer that Brandon suffered a serious physical injury as a result of Defendant's actions. Therefore, we hold the trial court did not err in denying Defendant's motion to dismiss as to this element under N.C. Gen. Stat. § 14-318.4(a5).

Defendant further argues that her actions do not rise to the level of "reckless disregard for human life." *Id.* The child abuse statute does not explicitly define what is considered "reckless disregard." However, in

Oakman, this Court held "culpable or criminal negligence may satisfy the intent requirement of felonious child abuse." *State v. Oakman*, 191 N.C. App. 796, 801, 663 S.E.2d 453, 457 (2008). Further, "[c]ulpable or criminal negligence has been defined as such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Id.* (citation omitted).

In the present case, Defendant contends "[w]hile [she] did discipline Brandon, she remained attentive as to his medical condition by providing water [breaks while running] and the aftermath of this running in place did not require any medical care beyond foot soaks and lotion." We are unpersuaded. When viewing the evidence in the light most favorable to the State, it shows that Brandon suffered injuries due to Defendant's carelessness and indifference towards Brandon's well-being. This is exhibited by Defendant's forcing Brandon to run in place upwards of forty-five minutes as a form of punishment the day before and "three to four times" the week prior to him being taken into DSS' care with additional time being added if he cried during the punishment. Defendant's actions ultimately resulted in Brandon being temporarily unable to walk normally. Providing Brandon with water breaks and the remedy of foot soaks and lotion does not assuage Defendant's indifference towards Brandon's health and safety. Furthermore, with the crime of felony child abuse, "[t]he evil the legislature seeks to prevent is the performance of a act upon a child, by one charged with the care of the child, inflicting serious bodily injury." *Oakman*, 191 N.C. App. at 799, 663 S.E.2d at 456 (citations omitted). Consistent with this purpose, Defendant was entrusted with the care of Brandon, but chose to administer various types of punishments which were reckless, unsafe, and led to Brandon experiencing injuries and pain. Thus, we hold the State presented substantial evidence of "serious physical injury" and "reckless disregard for human life." Accordingly, the trial court did not err when it denied Defendant's motion to dismiss the charge of felony child abuse.

C. Corporal Punishment Instruction

[3] Defendant's final argument on appeal is that the trial court plainly erred when it failed to provide the jury with an instruction on lawful corporal punishment. Defendant did not preserve this challenge during trial; therefore, this unpreserved objection is reviewed under the plain error standard. *State v. Williams*, 291 N.C. App. 497, 501, 895 S.E.2d 912, 916 (2023) (citation omitted). "[E]ven when the plain error rule is applied, [i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in

the trial court." *State v. Collington*, 375 N.C. 401, 411, 847 S.E.2d 691, 698 (2020) (cleaned up).

"Parents have a constitutional right to raise their children as they see fit, including, in this State, using corporal punishment within certain limits." *State v. Demick*, 288 N.C. App. 415, 437, 886 S.E.2d 602, 618 (2023). Accordingly, "as a general rule, a parent (or one acting *in loco parentis*) is *not* criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment." *Id.* (citation omitted). However, a parent is not exempt under this principle when:

> (1) where the parent administers punishment which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other permanent injury; (2) where the parent does not administer the punishment honestly but rather to gratify his own evil passions, irrespective of the physical injury inflicted; or (3) where the parent uses cruel or grossly inappropriate procedures or devices to modify a child's behavior.

State v. Varner, 252 N.C. App. 226, 228, 796 S.E.2d 834, 836 (2017) (cleaned up). Within these limitations, a parent may still be held criminally responsible if, from the evidence, it would lead a jury to infer "a conviction in their minds that the defendant did not act honestly in the performance of duty, according to a sense of right, but rather under the pretext of duty, for the purpose of gratifying malice." *Id.* at 229, 796 S.E.2d at 836 (cleaned up).

As a preliminary matter, the constitutional protection for parents to raise their children "as they see fit," including the limited use of corporal punishment, may be raised by a parent or one acting in *loco parentis*. *Demick*, 288 N.C. App. at 437, 886 S.E.2d at 618. The *loco parentis* relationship is "established where the person intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance." *Gibson v. Lopez*, 273 N.C. App. 514, 521, 849 S.E.2d 302, 306 (2020) (cleaned up). However, one is not in *loco parentis* "from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child" rather, "it is a question of intent to assume parental status." *Id.* at 519, 849 S.E.2d at 305 (cleaned up). Here, Defendant is not Brandon's biological parent and there is insufficient evidence to support the conclusion that at the time of the abuse she was acting in *loco parentis*. Defendant is the fiancée of Brandon's mother, but the evidence presented does not indicate whether she intended to assume the status

as Brandon's mother nor if she provided support and maintenance to Brandon. Accordingly, Defendant is not afforded this constitutional protection and the doctrine of corporal punishment is inapplicable here.

Assuming *arguendo* that Defendant was acting in *loco parentis*, Defendant's argument still fails. Defendant urges this Court to grant a new trial based on the trial court's failure to instruct on a parent's right to administer corporal punishment. In doing so, Defendant analogizes her case to *Varner*, where this Court reversed the defendant's conviction and remanded the case to the trial court, based on the trial court's failure to fully instruct the jury on corporal punishment. *Varner*, at 230, 796 S.E.2d at 837. In *Varner*, the trial court instructed the jury that it could find the defendant guilty if it determined that the type of discipline was not "moderate", but it failed to explain that "moderate" meant "any punishment that did not produce a 'lasting' injury. *Id.* Thus, the jury was required to use their own "reason and common sense" when interpreting the term. *Id.* The court in *Varner* also explained that there was insufficient evidence from which a jury could have concluded that the defendant's form of punishment was "calculated to cause permanent injury." *Id.* However, the Court further stated there was sufficient evidence from which a jury may have found that the defendant acted with malice. *Id.* ("Defendant cursed and yelled at his son prior to administering the paddling . . . which is *some* evidence of malice . . . [however] a jury could [also] reasonably find . . . [d]efendant administered the paddling without malice"). Thus, the Court, based on a preserved objection, granted the defendant a new trial because the trial court did not adequately instruct the jury. Significantly, the Court noted that the State could have, but failed to, request an instruction on malice; if so, the jury could have convicted the defendant based on malice "irrespective of the extent of the physical injuries." *Id.* at 230-31, 796 S.E.2d at 837.

In the present case, we hold that a jury could reasonably infer that Defendant acted with malice; therefore, the absence of a jury instruction on corporal punishment did not prejudice Defendant. ("For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *Juarez*, 369 N.C. at 358, 794 S.E.2d at 300 (citation omitted)). The following evidence of malice was presented at trial: Defendant punished Brandon by forcing him to run in place for forty-five minutes, however, Brandon stated that it lasted from lunchtime to dinner time; Defendant extended the punishment if he cried; Defendant additionally disciplined Brandon by forcing him to run laps around the house, stand on one foot, throw items in a dumpster, including cinder blocks, walk nearly a mile to the bus stop, and threatened him with a "butt whooping." Brandon

informed a nurse he had been hit with a belt, was occasionally locked in his room so he could not eat, and was instructed by his parents not to say he had been hit. He further shared during therapy that "bad things happen for bad behavior" and "if he [cried], he would get hit with a belt."

Thus, overwhelming evidence was presented at trial from which a jury could conclude that Defendant's disciplinary punishments were rooted in malice. Defendant made Brandon run in place for long periods of time, which occurred approximately three to four times that week. The jury was shown photographs and video evidence of Brandon's injuries, which made it clear that this type of punishment was continuously used to the point where it became painful for Brandon to walk. The extended use of this punishment, along with the aforementioned forms of discipline, tends to demonstrate that Defendant acted "for the purpose of gratifying malice." *Demick*, 288 N.C. App. at 438, 886 S.E.2d at 619 (citation omitted). Accordingly, since "[o]verwhelming evidence of guilt can defeat a plain error claim on prejudice grounds[,]" we hold Defendant cannot show the required prejudice under this standard of review. *Id.* (cleaned up).

III. Conclusion

Defendant was not entitled to a jury instruction on the lesser-included offense of misdemeanor child abuse because the evidence presented at trial satisfied all the elements of felony child abuse inflicting serious injury under N.C. Gen. Stat. § 14-318.4(a5). Additionally, the trial court did not err when it denied Defendant's motion to dismiss the charge of felony child abuse as the State presented substantial evidence as to each element of the offense. Lastly, the trial court did not plainly err by not providing the jury with an instruction on lawful corporal punishment. We hold Defendant received a fair trial free from error.

NO ERROR.

Judge HAMPSON concurs.

Judge MURPHY concurs in Part II-B and concurs in result only in Parts II-A and II-C.

STATE OF NORTH CAROLINA
v.
ABIGAIL LYNN HOLLIS, DEFENDANT

No. COA23-838

Filed 6 August 2024

Evidence—hearsay—business records exception—authentication—affidavit—not notarized—signed under penalty of perjury

After defendant made several unauthorized purchases using corporate credit cards she received through her employment, the trial court in the resulting embezzlement prosecution properly admitted records of defendant's purchases—from the credit card company and from a vendor—under the business records exception to the rule against hearsay (Evidence Rule 803(6)), where the records were accompanied by letters from employees of the credit card company and the vendor stating that the records met the requirements listed in Rule 803(6). Although the letters were not notarized, they still qualified as "affidavits" because they were signed under penalty of perjury; therefore, the letters were sufficient to authenticate the evidence under Rule 803(6).

Appeal by Defendant from Judgment entered 1 November 2022 by Judge Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 15 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Torrey D. Dixon, for the State.

Patterson Harkavy LLP, by Christopher A. Brook, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Abigail Lynn Hollis (Defendant) appeals from her conviction for Embezzlement of Property Received by Virtue of Office or Employment in the Amount of $100,000 or More. The Record before us tends to reflect the following:

Defendant worked for American Fire Technologies (AFT) beginning in 2006. Her responsibilities included managing company purchases,

billing, coordinating accounting functions, and data entry, including entering credit card purchases into AFT's accounting system. As part of these responsibilities she would review AFT employees' monthly expenses on their respective corporate credit cards and submit approved purchases for payment by the company.

AFT issued Defendant a corporate SunTrust credit card to use for purchases which were authorized by the company. Defendant was also issued an Amazon card and could make approved expenditures on Amazon's website. Unlike other employees, Defendant reconciled her own records of payments with these cards and was not overseen by the company's Controller.

While making travel reservations for the company, Diane Coffin, an AFT administrative assistant, discovered records of two unusual airline tickets. These tickets, purchased with Defendant's corporate SunTrust credit card, were for first-class flights to the Bahamas and were in the name of Defendant's daughter and Defendant's daughter's fiancé. Coffin reported the tickets to her supervisor, Amanda Holtz, who served as AFT's Controller at the time.

Holtz noted that Defendant at times would fail to file statements for her corporate SunTrust credit card or would file PDF versions that looked different from the statements filed by other employees. When asked for clarification on these statements, Defendant sometimes responded vaguely or aggressively. After being notified of the purchase of the airline tickets, Holtz reviewed banking statements obtained from SunTrust and compared them to the spending reports and statements Defendant had entered into the company records. Her review revealed discrepancies between the monthly statements obtained directly from SunTrust and those filed by Defendant, as well as additional expenses that did not appear to her to be justifiable business expenses. Holtz identified a total of $360,480.84 of suspicious transactions made between 2013 and 2018.

Paul Hayes, an owner of AFT, continued the investigation alongside his wife Paula, who was hired by the company to further evaluate the SunTrust and Amazon records. They compared the statements received from SunTrust and Amazon to those filed by Defendant, noting whether each individual record was for a legitimate business expense and to where purchased goods had been shipped. Statements submitted by Defendant to the company appeared to have been altered in multiple ways, including descriptions of purchases and the digits in the amounts of charges. Amazon purchases not authorized by the company included pet accessories, clothing, and furniture, totaling $23,335.58

in unauthorized purchases. Unauthorized purchases made with the SunTrust card included, among others, clothing, pet supplies, boat and vehicle expenses, and travel expenses. In total, the investigation revealed $188,815.35 of unauthorized purchases made with the SunTrust card.

Defendant was charged with Embezzlement in the Amount of $100,000 or More. Her case went to trial on 24 October 2022.

At trial, the State proffered the SunTrust and Amazon records of Defendant's credit card purchases, both of which were produced directly from the companies. In lieu of testimony of the records' custodians, each of these records was accompanied by documents intended to authenticate them. The SunTrust records were accompanied by a "certification" signed by Nellie Robertson, described as "the custodian of records for SunTrust bank." The Amazon records were accompanied by a "Certificate of Authenticity" from Amazon Law Enforcement Response Specialist Anne Kurle. Each of these documents indicated it was signed under penalty of perjury, but neither was notarized or otherwise confirmed by oath or affirmation before an officer with the authority to administer such an oath.

The SunTrust records were initially admitted without objection. The State subsequently proffered the Amazon records, which Defendant objected to on authentication grounds. Defendant at that time also noted the same objection to the admission of the SunTrust records, while acknowledging they had already been admitted as evidence. The trial court admitted both sets of records into evidence.

The jury found Defendant guilty of Embezzlement, and the trial court sentenced her to 76-93 months' imprisonment. Defendant gave oral notice of appeal.

Issue

The sole issue in this case is whether hearsay evidence presented under the business records exception—the SunTrust and Amazon records—may be properly authenticated by an affidavit made under penalty of perjury when that affidavit was not sworn before a notary public or other official authorized to administer oaths.

Analysis

Generally, we review trial court decisions to admit or exclude evidence for abuse of discretion. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006). But we review *de novo* a trial court's admission of evidence over a party's hearsay objection. *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015).

However, there is an apparent conflict in our caselaw as to our standard of review when the hearsay objection is rooted in the authentication of the proffered evidence. Under one line of cases, we have reviewed authentication of documentary evidence under the same *de novo* standard as the trial court's admission of such evidence. *See State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) ("A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.") (citing *State v. Owen*, 130 N.C. App. 505, 510, 503 S.E.2d 426, 430 (1998)); *State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (2014) (citing *Crawley*). In other cases, we have reviewed similar rulings for abuse of discretion. *See In re Foreclosure by Goddard & Peterson, PLLC*, 248 N.C. App. 190, 198, 789 S.E.2d 835, 842 (2016); *State v. Mobley*, 206 N.C. App. 285, 696 S.E.2d 862 (2010) (reviewing for abuse of discretion trial court's admission of jailhouse phone call over authentication objection).

We need not resolve this apparent conflict because this case hinges on a single question of law: whether a signed, but not notarized, document, made under penalty of perjury, is sufficient to authenticate evidence admitted under the business records exception to the rule against hearsay. A trial court abuses its discretion when it acts under a misapprehension of law. *Cash v. Cash*, 284 N.C. App. 1, 7, 874 S.E.2d 653, 658 (2022). Thus, our analysis is the same whether reviewing under a *de novo* standard or for abuse of discretion.

The State argues that Defendant failed to preserve her arguments for appeal. Defendant timely objected to the admission of the Amazon records, preserving that issue for our review. Defendant in her brief concedes that her counsel failed to timely object to the admission of the SunTrust records but "specifically and distinctly" requests that we review that admission for plain error. N.C. R. App. P. 10(c)(4). Therefore, both evidentiary issues are properly before this Court on appeal, albeit under separate standards of review: harmless error for the Amazon records and plain error for SunTrust. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Before applying these separate standards of prejudice, however, we must first determine if the trial court erred by admitting the hearsay evidence in question.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). Hearsay statements are generally inadmissible unless they fall within an exception enumerated by our General Statutes or Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802.

One such exception to the general rule against hearsay is the business records exception, under which certain records of regularly conducted activity are admissible whether or not the declarant is available as a witness. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2021).[1] These records are admissible if they are "(i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation[.]" *Id.* The records must be authenticated by a witness who is familiar with them and the system under which they are made. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985). That witness need not be the person who originally made the records. *In re S.D.J.*, 192 N.C. App. 478, 482-83, 665 S.E.2d 818, 821 (2008). Nor must that foundation be laid through testimony of a live witness: the foundational requirements of Rule 803(6) may be satisfied "by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal of Rule 902 of the Rules of Evidence." N.C. Gen. Stat. § 8C-1, Rule 803(6). In lieu of live testimony, the proponent may submit:

> [a]n affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant's knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded[.]

In re S.W., 175 N.C. App. 719, 725, 625 S.E.2d 594, 598 (2006); N.C. Gen. Stat. § 8C-1, Rule 803(6).

The State laid the foundation for both the Amazon and SunTrust records by presenting letters from employees of each company. The letter accompanying the SunTrust records is signed by Nellie Robinson and states that she is the custodian of records for SunTrust bank, the attached documents are true and accurate copies of business records made and kept in the course of regularly conducted business activity, made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters. The Amazon records are accompanied by an email from Anne Kurle, a "Law Enforcement

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1. We note that our General Assembly has modified this rule subsequent to Defendant's trial. S.L. 2023-151. The rule now explicitly allows for authentication of business records "by a certification that complies with 28 U.S.C. § 1746 made by the custodian or witness." 28 U.S.C. § 1746 grants unsworn written statements made under penalty of perjury the same legal effect as a statement sworn to before a notary public. The modified Rule 803(6) went into effect 1 March 2024.

Response Specialist" who states the records are made in the ordinary course of business, were created at or near the time of the transactions or events reflected, were and kept as a part of a regular business activity. Each of these letters thus includes the statements necessary to authenticate their respective records.

Each letter also acknowledges that it was made under penalty of perjury. However, neither letter is notarized or otherwise indicates that it was sworn to before a notary or other public official. The question before us is whether these letters qualify as an "affidavit," as required by Rule 803(6), despite lacking a notarial seal.

The traditional definition of an affidavit requires that it be sworn to and subscribed before a notary public: "An affidavit is '(a) written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.' " *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972) (quoting *Affidavit*, *Black's Law Dictionary* (Rev. 4th ed. 1968). Generally, "[d]ocuments which are not under oath may not be considered as affidavits." *In re Ingram*, 74 N.C. App. 579, 580, 328 S.E.2d 588, 589 (1985).

This requirement is not universal, however, and our courts have recently begun to recognize circumstances under which affidavits are valid without having been witnessed by a notary. In *Gyger v. Clement*, our Supreme Court held that affidavits presented under N.C. Gen. Stat. § 52C-3-315(b), which applies to child support cases involving parties residing out of state, were not required to be notarized. 375 N.C. 80, 846 S.E.2d 496 (2020).

As the Court noted in that case, notarial signature is not required in all circumstances in all jurisdictions, and there are signs of a trend away from that requirement, particularly when statements are made under penalty of perjury. 375 N.C. at 85, 856 S.E.2d at 500. The Black's Law Dictionary definition of affidavit, for example, was modified in the Tenth Edition to define it as "a voluntary declaration of fact written down and sworn by a declarant, *usu*[*ally*] before an officer authorized to administer oaths." *Affidavit*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added). Likewise, in federal proceedings, "written declarations made under penalty of perjury are permissible in lieu of a sworn affidavit subscribed to before a notary public." 375 N.C. at 85, 846 S.E.2d at 500; *see* 28 U.S.C. § 1746. A statement given under penalty of perjury "alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not." *Id.*

In holding Section 52C-3-315(b) did not require affidavits to be notarized if given under penalty of perjury, the Court noted that the legislature had enacted the statutory scheme to address "the challenges of interstate and international document production." 375 N.C. at 82, 846 S.E.2d at 499. The statute in question in that case is a subsection of N.C. Gen. Stat. § 52C-3-315, which creates "Special rules of evidence and procedure" for child support proceedings involving out-of-state parties. It provides:

> An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this State.

N.C. Gen. Stat. § 52C-3-315(b).

The Court rejected the argument that this provision required affidavits filed under it to be notarized, recognizing that the plain language of "the provision instead simply requires an 'affidavit' to be 'given under penalty of perjury.' " 375 N.C. at 83, 846 S.E.2d at 499. It noted this was an exception to the general rule under our caselaw, which "expects affidavits to be notarized if they are to be admissible." *Id.* (citing *Alford v. McCormac*, 90 N.C. at 152-53 (1884)). The Official Commentary to the statutory scheme emphasized that it represented a "deviation from the ordinary rules of evidence" in order to facilitate interstate and international proceedings. *Id.* (citing N.C. Gen. Stat. § 52C-3-315 (2019), Official Comment (2015)). The statute also mirrors the Uniform Interstate Family Support Act, which explicitly "replace[d] the necessity of swearing to a document 'under oath' with the simpler requirement that the document be provided 'under penalty of perjury.' Unif. Interstate Fam. Support Act § 316 (2001). The legislature recognized the difficulty of obtaining affidavits from international witnesses for use in child support claims, given that other nations have different legal practices than ours and "in certain locations obtaining notarization of affidavits may be impractical or impossible." *Gyger* at 84, 846 S.E.2d at 499. "If notarization were required for affidavits involving international parties, many relevant and helpful materials likely would not be presentable before the court." *Id.* at 84, 846 S.E.2d at 500.

Unlike in *Gyger*, this case does not "involve special rules of evidence due to special circumstances." 375 N.C. at 86, 846 S.E.2d at 501. However, it does involve affidavits made under penalty of perjury, which

the court in *Gyger* recognized as a similar indicium of credibility as an oath before a notary:

> [A]ffidavits may be valid and acceptable in some circumstances even when not sworn to in the presence of an authorized officer.
>
> One such circumstance is when an affidavit is submitted under penalty of perjury. Affidavits without notarization may still be substantially credible. When a statement is given under penalty of perjury, it alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not. *The form of the administration of the oath is immaterial*, provided that it involves the mind of the witness, the bringing to bear [of the] apprehension of punishment [for untruthful testimony].

375 N.C. at 85, 846 S.E.2d at 500 (emphasis added).

In a case virtually identical to this one, albeit unpublished and therefore uncontrolling, we have interpreted *Gyger* to allow authentication of business records via unnotarized affidavit made under the penalty of perjury. In *State v. Wilson*, the defendant was charged with embezzlement for writing unauthorized checks drawn on her employer's account. 286 N.C. App. 381, 878 S.E.2d 683, 2022 WL 16557419 at *1 (2022) (unpublished). The State introduced Wells Fargo bank records documenting the transactions, accompanied by "declarations from Wells Fargo employees declaring under penalty of perjury that the business records were accurate." *Id.* at *2. We held that, in light of *Gyger*, it was not error to admit the bank records. *Id.* at *3. We also recognized that, even if the trial court had erred, admitting the bank records was not an error so fundamental as to constitute plain error. *Id.*

Although *Wilson* does not control our decision in this case, we agree with its reasoning. The purpose of authentication is to show that "the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901. Defendant's argument that the affidavits in this case do not do so rests in the assumption that they are insufficiently credible if not sworn before a notary. However, each of the affidavits at issue in this case acknowledge that they were made under penalty of perjury, "bringing to bear the apprehension of punishment for untruthful testimony." *Gyger*, 375 N.C. at 85, 846 S.E.2d at 500. The purpose of an oath before a notary is to impart to the affiant the importance of stating the truth, and explicit acknowledgement of the penalty of perjury evinces a similar level of credibility.

As the Court recognized, the legislature can explicitly require an affidavit be made under oath before an official and has done so when it deems it necessary in a particular context. *Gyger*, 375 N.C. at 85, 846 S.E.2d at 500 (citing N.C. Gen. Stat. § 52C-3-311 (2019)). Not only does Rule 803(6) contain no such explicit requirement, but the legislature has subsequently modified the statute to explicitly allow authentication via statements made under penalty of perjury, in accord with 28 U.S.C. § 1746. S.L. 2023-151; N.C. Gen. Stat. § 8C-1, Rule 803(6) (2024). While our analysis is performed under the previous version of the statute, the legislature has made clear that notarization is not necessary to show an affidavit has the requisite credibility to authenticate business records.

We recognize that, following *Gyger*, our Supreme Court maintained that its opinion did not greenlight a general expansion of our definition of "affidavit" in all contexts. In *In re S.E.T.*, the petitioner in a termination of parental rights case attempted service by publication but failed to file an affidavit showing the "circumstances warranting the use of service by publication" as required by Rule 4(j1) of our Rules of Civil Procedure. 375 N.C. 665, 670, 850 S.E.2d 342, 346 (2020). She argued on appeal that her attorney's signature on the motion for leave to serve by publication satisfied the affidavit requirement because pleadings need not be accompanied by an affidavit but only signed by an attorney, and that signature certifies that the attorney "has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . ." N.C. Gen. Stat. § 1A-1, Rule 11(a). The Court held that this did not obviate the requirement of an affidavit where that affidavit was specifically required by statute, and that despite the attorney's signature the motion could not be treated as an affidavit because it was not confirmed by an oath or affirmation. *S.E.T.*, 375 N.C. at 672, 850 S.E.2d at 347 n. 4 "(Unlike the situation before the Court in our recent decision in *Gyger* . . . nothing in the statutory provisions at issue in this case in any way suggests that the term 'affidavit' as used in N.C.G.S. § 1A-1, Rule 4(j1), should be understood in any way other than in its traditional sense.").

S.E.T. is distinct from this case in at least two specific ways. First, the motion in *S.E.T.* did not explicitly acknowledge that it was made under penalty of perjury. Second, it was made in the context of service by publication, a method of service that is "in derogation of the common law," and therefore statutes authorizing it are strictly construed. *Harrison v. Hanvey*, 265 N.C. 243, 247, 143 S.E.2d 593, 596 (1965).

Similarly, un-notarized affidavits held insufficient in other cases, including those cited by Defendant, did not include an acknowledgement that they were made under penalty of perjury. In *State v. Lester* we held the trial court correctly excluded cell phone records that the State attempted to authenticate via signed affidavits from Verizon employees. 291 N.C. App. 480, 489, 895 S.E.2d 905, 911 (2023). None of the affidavits indicated they were made under penalty of perjury. *See also In re Ingram*, 74 N.C. App. 579, 328 S.E.2d 588 (1985) (petition for involuntary commitment not made under oath could not be considered affidavit). Given *Gyger*'s recognition that the penalty of perjury "alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not," thereby making an un-notarized affidavit "substantially credible," 375 N.C. at 85, 846 S.E.2d at 500, this case is distinguishable from those.

The letters from SunTrust and Amazon employees, made under penalty of perjury and communicating that the records were made in the course of a regularly conducted business activity, made at or near the time of the activity by a person with knowledge of it, and that it was the regular practice of the business to make such a record, fulfill the purpose of authentication. The trial court did not reversibly err by admitting the records into evidence. Therefore, the records were properly considered by the jury in reaching its verdict. Consequently, the trial court did not err in entering judgment upon the jury verdict.

Conclusion

Accordingly, for the foregoing reasons, there was no error at trial and the Judgment is affirmed.

NO ERROR.

Judges WOOD and STADING concur.

STATE v. JONES

[295 N.C. App. 234 (2024)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
JOSEPH CLAYTON JONES, DEFENDANT

No. COA23-1062

Filed 6 August 2024

1. Evidence—prior conviction elicited on cross despite stipulation—relevancy—impeachment of witness

In defendant's trial for multiple offenses including possession of a firearm by a felon, in which he asserted that the guns found in his home were not his, the trial court did not abuse its discretion by allowing the State to ask defendant's mother on cross-examination about her knowledge of defendant's prior conviction (also for possession of a firearm by a felon) even though defendant had already conceded that he was a convicted felon in order to avoid the prior conviction being heard by the jury. The prior conviction was relevant to impeach the mother's credibility as a witness after she stated that she had "never known" defendant to have any guns, since she admitted being present in the courtroom when defendant pleaded guilty to the older charge. Although there was a chance that the jury would use the information to defendant's detriment in deciding whether defendant was the owner of the guns in the present case, the possibility of undue prejudice did not outweigh the legitimate probative value of the evidence.

2. Drugs—possession of methamphetamine—constructive possession—defendant absent—drug located in bedroom

In defendant's trial for drug and firearm offenses, the State presented substantial evidence from which a jury could conclude that defendant constructively possessed methamphetamine, which was found in a trailer that defendant owned and lived in, even though defendant was not present when law enforcement conducted the search. The drug was found on a mirror table at the foot of defendant's bed along with digital scales, drug paraphernalia, and a glass smoke pipe; further, defendant told a visitor while in jail that officers probably "found something on that mirror."

Appeal by defendant from a judgment entered 24 February 2023 by Judge Julia Lynn Gullett in Cleveland County Superior Court. Heard in the Court of Appeals 15 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander H. Ward, for the State.

W. Michael Spivey for defendant-appellant.

DILLON, Chief Judge.

Defendant Joseph Clay Jones appeals from a judgment entered upon a jury's verdict convicting him of possession of a firearm by a felon, possession of a weapon of mass destruction, and possession of methamphetamine. We conclude that he received a fair trial, free of reversible error.

I. Background

Defendant argues that the trial court erred by allowing improper character evidence to be admitted and by denying Defendant's motion to dismiss for insufficiency of the evidence.

The evidence presented at trial tends to show: On 25 January 2022, Defendant's girlfriend reported to the police that Defendant, a convicted felon, had guns in his house. Upon obtaining a search warrant for Defendant's house, officers found firearms and methamphetamine in Defendant's bedroom. As a result, Defendant was charged with three crimes: (1) possession of a firearm by a felon; (2) possession of a weapon of mass destruction; and (3) possession of methamphetamine.

At trial, Defendant objected to the admission of evidence concerning his prior conviction and renewed his objection when the State sought to elicit the evidence before the jury. At the close of evidence, Defendant made a motion to dismiss for insufficiency of the evidence, which the trial court denied. Both issues were preserved for appellate review.

The jury found Defendant guilty on all charges, and the trial court entered a judgment consistent with the jury's verdict. Defendant appeals.

II. Analysis

A. Prior Conviction Evidence

[1] Defendant argues that the trial court abused its discretion when it allowed, over Defendant's objection, the State's cross-examination of one of Defendant's witnesses about Defendant's prior conviction for possession of a firearm by a felon.

At trial, Defendant conceded that he was a convicted felon, thus satisfying the State's burden on one of the elements of the firearm

possession charge. Defendant conceded this fact because he did not want the jury to hear that the felony for which he had previously been convicted (in 2018) was also for possession of a firearm by a felon. His defense in the trial in the present case was that the firearms found in his home were not his. Accordingly, evidence that he had been previously convicted of possession of firearms would cut against his defense.

In his defense, Defendant called his mother as a witness. She testified that she had never known Defendant to possess firearms—specifically stating that she knew Defendant would "know better," that "[h]e would never do something like that," that she had "never seen [Defendant] have any guns at all, ever," that she had "never known [Defendant] to have any guns, period," and that she had "never known him to possess a gun."

However, she admitted that she was in the courtroom in 2018 when her son pleaded guilty to his prior felony and had spoken to Defendant's attorney at that time, though she also testified she did not know for what felony he had pleaded guilty.

During cross-examination, the State sought to question Defendant's mother about Defendant's 2018 conviction for possession of a firearm by a felon. The State argued, in part, that the mother's testimony, that she had "never known" Defendant to possess a firearm, opened the door for cross-examination about her knowledge of his 2018 conviction. Specifically, the State wanted to impeach her testimony by showing she was not being truthful, as she admitted being in the courtroom when Defendant essentially admitted (by pleading guilty) to possessing a firearm at some point in the past.

The trial court ruled that Defendant's prior conviction was relevant, in part, for "regular cross-examination," such as to show bias, knowledge, etc.

Accordingly, the State was permitted to cross-examine Defendant's mother, asking her, "Are you aware that on November 6th of 2018, your son was convicted of possession of a firearm by a convicted felon?"

Defendant argues that—because he initially stipulated to the fact that he was a convicted felon—the evidence of his prior conviction was not relevant and should have been excluded under N.C. Gen. Stat. § 8C-1, Rule 404(a) (2024) ("Evidence of a person's character . . . is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]").

We first consider whether the 2018 conviction was relevant evidence. N.C. Gen. Stat. § 8C-1, Rule 402 (stating that relevant evidence is

generally admissible). Whether evidence is relevant is a question of law, the admission of which we review *de novo*. *See State v. Hightower*, 168 N.C. App. 661, 667, 609 S.E.2d 235, 239, *disc. review denied*, 359 N.C. 639, 614 S.E.2d 533 (2005).

We conclude the evidence that Defendant had pleaded guilty in his mother's presence to possessing firearms was relevant *to impeach her credibility* as a witness; specifically, to impeach her testimony that she had never known her son to possess guns. *See* N.C. Gen. Stat. § 8C-1, Rule 607 ("The credibility of a witness may be attacked by any party[.]").

Notwithstanding, not all relevant evidence is admissible. The trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. We review the trial court's Rule 403 determination for an abuse of discretion. *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015); *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (holding that under Rule 403 the trial court judge has sound discretion regarding whether to exclude evidence as unduly prejudicial).

Evidence of Defendant's pleading guilty in 2018 with his mother in the courtroom is probative to show that Defendant's mother was not being truthful during her direct testimony. There is, however, a chance that Defendant would be unduly prejudiced by the jury hearing about his 2018 plea/admission to possessing a firearm. That is, there is a chance the jury would use that information to help form their belief that he must have been the owner of the guns found in his home for which he was being tried in this case. However, we cannot say that the trial court abused its discretion by failing to determine that any undue prejudice outweighed the legitimate probative value for which the 2018 plea was offered, to impeach Defendant's witness.

B. Motion to Dismiss

[2] Defendant also argues that the trial court erred in denying his motion to dismiss the charge of possession of methamphetamine for insufficiency of the evidence. Specifically, he argues that the evidence presented against him was not sufficient to show his constructive possession of the methamphetamine found.

We review a trial court's denial of a motion to dismiss *de novo*. *See State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018). So long as there is substantial evidence to support a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied "even if the evidence likewise permits a reasonable inference of the defendant's innocence." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002).

"Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband." *State v. Earhart*, 134 N.C. App. 130, 136, 516 S.E.2d 883, 888 (1999) (citing *State v. Beaver*, 317 N.C. 643, 346 S.E.2d 476 (1986)). Constructive possession "can be reasonably inferred from the fact of ownership of the premises where contraband is found." *State v. Thorpe*, 326 N.C. 451, 455, 390 S.E.2d 311, 314 (1990). The defendant may have the requisite power to control, either "acting alone or in combination with others." *State v. Fuqua*, 234 N.C. 168, 170–71, 66 S.E.2d 667, 668 (1951).

Here, evidence showed that Defendant owned and inhabited a trailer in which officers discovered a substance that Defendant stipulated to be methamphetamine. Officers searched the trailer on a day that Defendant was not present. The drug was discovered on a mirror table at the foot of Defendant's bed. On Defendant's bedside table, officers also found digital scales, drug paraphernalia, and a glass smoke pipe. Additionally, the State presented evidence that, while on a jail phone call, Defendant told his visitor that the officers probably "found something on that mirror."

Since Defendant owned the premises on which the methamphetamine was found, the substance was found in his bedroom, and his statement in jail about "something on the mirror" seemed to suggest that he was aware of the presence and specific location of drugs in his home, we conclude that there was sufficient evidence from which the jury could find Defendant constructively possessed methamphetamine.

Defendant argues that because he was not home on the day that the methamphetamine was found, and because other individuals sometimes visited the home, the State cannot prove constructive possession. However, our Supreme Court has found the evidence to be sufficient to support a jury's finding of constructive possession where the defendant was absent at the time of the search and three other individuals were present. *See State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971).

III. Conclusion

We conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges ZACHARY and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
ALEJANDRO GONZALEZ LOPEZ

No. COA23-726

Filed 6 August 2024

1. Evidence—prior bad acts—sexual offense trial—child victims—uncharged acts against one sibling—common plan or scheme

In a trial for multiple sex offenses committed against each of two child victims (siblings whose mother defendant dated off and on for ten years), there was no error in the trial court's decision to allow the State to introduce evidence of sexual acts allegedly committed by defendant against the older victim for which defendant was not charged and which were alleged to have taken place a few years prior to the charged offenses. The evidence was admissible under Evidence Rule 404(b) to show a common plan, intent, or scheme to abuse both of the siblings because the acts were sufficiently similar and not so remote in time to the charged acts. Further, the trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence for purposes of Rule 403, where the court carefully considered the evidence first outside the presence of the jury and admitted a limited amount of testimony regarding the uncharged acts.

2. Sexual Offenses—child victim—date of offenses—variance between indictments and evidence—time not essential element

In a prosecution for multiple sexual offenses committed against a child victim, the trial court did not err by denying defendant's motion to dismiss the indictments. Although the indictments alleged that the offenses occurred within one calendar year but testimony from the victim regarding her age when the acts occurred indicated an earlier timeframe than the one alleged, defendant could not demonstrate prejudice from any variance between the indictments and the evidence produced at trial because the time of the offenses was not an essential element and there was no showing that defendant was deprived of a defense due to lack of specificity.

Appeal by defendant from judgments entered 6 September 2022 by Judge Michael D. Duncan in Rowan County Superior Court. Heard in the Court of Appeals 16 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Caryn Strickland for defendant-appellant.

ZACHARY, Judge.

Defendant Alejandro Gonzalez Lopez appeals from the trial court's judgments entered upon a jury's verdicts finding him guilty of one count each of statutory rape of a child by an adult, statutory sex offense with a child by an adult, statutory sexual offense with a person 15 years of age or younger, sexual offense with a child, and rape of a child, as well as two counts of taking indecent liberties with a child. After careful review, we conclude that Defendant received a fair trial, free from error.

BACKGROUND

The evidence at trial showed the following: Defendant sporadically dated the mother of D.M. and S.M.[1] from 2007 until 2017, and he lived with the family during various periods over that time. S.M. was born in July of 2000 and D.M. was born in October of 2005. The sisters alleged that Defendant sexually abused them.

According to D.M., during the summer before fifth grade when she was nine years old, Defendant "made [her] suck his penis[.]" A "short period of time" later, Defendant also attempted to "stick his penis into [D.M.'s] vagina[.]" Roughly one month after that first attempt, Defendant succeeded in "put[ting] his penis into [her] vagina[,]" causing D.M. "immense pain." D.M. also recalled an incident when Defendant followed her into the bathroom and "started to kiss" her. Defendant sexually abused D.M. "a lot of times" while her mother was at work.

In September of 2019, D.M. reported Defendant's sexual abuse to her pediatric physician's assistant, telling her that "things were better now because [Defendant] was out of the home[,]" but that "before fifth grade and during fifth grade . . . he was sexually abusing her." The physician's assistant notified the Rowan County Department of Social Services.

Subsequently, S.M. reported that Defendant had also engaged in sexual acts with her. Specifically, S.M. testified that in 2010, when she was ten years old, she and Defendant had intercourse in the home. According to S.M., she did not tell anyone about that assault because

1. We use the initials adopted by the parties to protect the identities of the minor victims.

Defendant convinced her that they "were in a relationship[.]" S.M. also recounted that when she was approximately 11 years old, Defendant "put his penis in [her] mouth[.]" She recalled a third incident in 2011 or 2012 during which Defendant "caress[ed] [her] breasts" and then became angry when she "wasn't acting pleased[,]" as well as another incident of digital penetration. Defendant regularly engaged in sexual acts with S.M. from 2012 until 2014.

On 17 February 2020, a Rowan County grand jury indicted Defendant for two counts of statutory rape of a child by an adult, two counts of statutory sex offense of a child by an adult, two counts of taking indecent liberties with a child, and one count of statutory sex offense with a person 15 years old or younger.

This matter came on for jury trial on 29 August 2022. On 6 September 2022, the jury found Defendant guilty of three offenses against D.M.—statutory rape of a child by an adult, statutory sex offense with a child by an adult, and taking indecent liberties with a child; and four offenses against S.M.—statutory sexual offense with a person who is under 15 years, taking indecent liberties with a child, sexual offense with a child, and rape of a child.

The same day, the trial court entered seven judgments, including two judgments sentencing Defendant to consecutive terms of 300 to 420 months in the custody of the North Carolina Division of Adult Correction for rape of a child and statutory rape of a child by an adult. The trial court sentenced Defendant to two additional consecutive terms of 16 to 29 months for each charge of indecent liberties with a child. The trial court also sentenced Defendant to three concurrent terms: 240 to 348 months for statutory sexual offense with a person under 15, and two terms each of 300 to 420 months for statutory sex offense with a child by an adult and sexual offense with a child.

Defendant gave oral notice of appeal.

DISCUSSION

On appeal, Defendant argues that "[t]he trial court erred by denying [his] motion to exclude other bad acts regarding an uncharged prior 2007 incident," because the evidence was inadmissible under Rule 404(b) of the North Carolina Rules of Evidence and "was unduly prejudicial under Rule 403." Additionally, Defendant argues that the trial court erroneously denied his motion to dismiss "the indictments regarding D.M. because the State failed to produce substantial evidence to prove the dates of the alleged offenses, which prejudiced [his] defense."

I. Evidence of Prior Bad Acts

[1] At trial, the State sought to introduce evidence of Defendant's uncharged acts of sexual abuse of S.M., which allegedly occurred in Cabarrus County beginning in 2007 when S.M. was seven or eight years old. On voir dire, S.M. testified that Defendant sexually abused her from 2007 to 2012, but that she had "blocked out" the specific details of those individual acts of sexual abuse:

> Q. Back when you lived [there] when you were seven years old [in 2007], can you tell the Court what, if anything, happened between you and [Defendant] sexually[?]
>
> A. While I was living in the [Cabarrus County apartment], I clearly remember [Defendant] putting blankets on the living room floor, and I clearly remember [him] laying down with me on the floor and rubbing his penis on my vagina. . . . I remember trying to get away but not being able to because [he] was holding me so hard. And I remember after [Defendant] was done ejaculating he let me go . . . .
>
> . . . .
>
> Q. . . . Was this the first time this happened or was there another time before this?
>
> A. I don't remember if this was the first time, but I do remember it happening many times.
>
> . . . .
>
> Q. So I just want to clarify then, from 2007 to 2009, did any type of sexual abuse occur between you and [Defendant]?
>
> A. Yes.
>
> Q. Do you recall how many times?
>
> A. Not exactly.
>
> Q. More than once?
>
> A. Yes.
>
> . . . .
>
> Q. Okay. And [this is] your first clear memory?
>
> A. Yes.

> Q. When you were interviewed by Sergeant DeSantis, did you describe for him all the events that happened from 2007 to 2009?
>
> A. No.
>
> Q. Why not?
>
> A. Because I blocked it all away.
>
> . . . .
>
> Q. . . . If you don't remember specific details, that's fine, but what I'm asking is from this incident in 2007 to the next clear memory that you have in 2010 did the sexual abuse stop?
>
> A. No.
>
> Q. So from this incident in 2007 up until your next clear memory in 2010, do I understand you correctly the sexual abuse continued, you have just blocked out specifics about those?
>
> A. Yes.

Upon its determination that this evidence was admissible to show Defendant's plan, intent, or scheme—in that the acts were sufficiently similar and not so remote that the probative value of the evidence outweighed any prejudicial effect—the trial court allowed S.M. to testify before the jury regarding these uncharged acts of sexual abuse.

A. Standard of Review

Rules of Evidence 404(b) and 403 have different standards of review, which on appellate review require "distinct inquiries." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). If the trial court has made findings of fact and conclusions of law regarding its Rule 404(b) ruling, then "we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Id.*

This Court then reviews the trial court's Rule 403 determination—whether the danger of unfair prejudice substantially outweighs the probative value of the evidence—for abuse of discretion. *Id.* "The balancing of these factors lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling

was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thaggard*, 168 N.C. App. 263, 269, 608 S.E.2d 774, 779 (2005) (cleaned up).

B. Analysis

Defendant first contends that the trial court erroneously concluded that "the evidence of uncharged conduct beginning in 2007 was admissible to show [Defendant's] 'plan, intent, or scheme' in abusing young girls." In addition, Defendant argues that "the admission of the evidence was highly prejudicial and outweighed any probative value under Rule 403."

Rule 404(b) of the North Carolina Rules of Evidence provides that "[e]vidence 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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023). Rule 404(b) "is a clear general rule of *inclusion*," and thus "such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (emphasis added) (cleaned up). Specifically, evidence of prior bad acts is relevant and admissible for purposes other than to show the defendant's criminal propensity, including 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).

Upon determining that evidence is admissible under Rule 404(b), "the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403." *State v. Carpenter*, 361 N.C. 382, 389, 646 S.E.2d 105, 110 (2007). Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403.

Our courts have "liberal[ly] . . . allow[ed] evidence of similar offenses in trials on sexual crime charges." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996). "The test for determining whether such evidence is admissible is whether the incidents establishing the common plan or scheme are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403." *Id.* at 615, 476 S.E.2d at 299.

"[P]rior acts are considered sufficiently similar . . . if there are some unusual facts present in both crimes[,]" although these facts need not

"rise to the level of the unique and bizarre." *State v. Pabon*, 380 N.C. 241, 259, 867 S.E.2d 632, 644 (2022) (cleaned up). "[W]hen otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking . . . ." *State v. Badgett*, 361 N.C. 234, 243, 644 S.E.2d 206, 212, *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007). Nonetheless, our Supreme Court has "permitted testimony as to prior acts of sexual misconduct which occurred more than seven years" prior to the offenses for which the defendant was being tried. *Frazier*, 344 N.C. at 615, 476 S.E.2d at 300; *see, e.g.*, *State v. Penland*, 343 N.C. 634, 654–55, 472 S.E.2d 734, 745 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725, *reh'g denied*, 520 U.S. 1140, 137 L. Ed. 2d 366 (1997).

In the case at bar, "the testimony in question tended to prove that [D]efendant's prior acts of sexual abuse occurred continuously over a period of [several] years and in a strikingly similar pattern." *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300. Both S.M. and D.M. were elementary-school-aged children when Defendant began sexually abusing them. The record shows that both victims considered Defendant to be their stepfather, and that D.M. and S.M. were the only children living in the home not biologically related to Defendant. Defendant had unfettered access to both victims most evenings while their mother worked.

We conclude that "this evidence presents a classic example of a common plan or scheme." *Id.*; *see also State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) ("When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan."). Thus, the 2007 conduct was "not too remote to be considered as evidence of [D]efendant's common plan or scheme to sexually abuse female family members, including the victims here." *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300.

Based on the similarity of the allegations and the temporal proximity, we conclude that the trial court admitted S.M.'s testimony regarding Defendant's uncharged acts for a proper purpose pursuant to Rule 404(b): to show a common plan or scheme.

Upon careful review, we also conclude that the trial court did not abuse its discretion in its Rule 403 analysis. The court acknowledged that the admission of this testimony would be prejudicial to Defendant; nevertheless, it determined after its full analysis that "the probative value outweighs any prejudicial effect[.]" Therefore, it is plain that "the trial court was aware of the potential danger of unfair prejudice to [D]efendant[.]" *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (citation omitted). "The trial judge first heard the testimony of the 404(b) witness outside the presence of the jury, then heard arguments from

the attorneys and ruled on its admissibility . . . ." *Id.* at 133, 726 S.E.2d at 160–61. Moreover, the court only admitted "a limited amount of testimony as it relates to the prior act[s,]" which indicates its "careful consideration of the evidence." *Id.* at 133, 726 S.E.2d at 161. Therefore, the trial court did not abuse its discretion in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

Defendant has failed to demonstrate that the trial court erred by admitting the challenged testimony concerning his uncharged sexual abuse of S.M. Accordingly, Defendant's argument is overruled.

II. Motion to Dismiss

[2] Next, Defendant argues that "[t]he trial court erred in denying [his] motion to dismiss the indictments regarding D.M. because the State failed to produce substantial evidence to prove the dates of the alleged offenses" or, in the alternative, "because there was a fatal variance between the indictment[s] and the proof at trial" with regard to the dates of the alleged offenses.

A. Standard of Review

This Court has held that "any fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence." *State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020), *disc. review denied*, 377 N.C. 557, 858 S.E.2d 286 (2021). Accordingly, "we employ de novo review." *State v. Tarlton*, 279 N.C. App. 249, 253, 864 S.E.2d 810, 813 (citation omitted), *appeal dismissed and disc. review denied*, 379 N.C. 684, 865 S.E.2d 846 (2021).

B. Analysis

Defendant contends that the trial court erred by denying his motion to dismiss because the State failed to present evidence that the offenses occurred within the time period alleged in the indictments, that is, during the period from 1 January 2016 to 31 December 2016. Defendant notes that "[i]t is undisputed that D.M. was born [in] 2005[,]" and that D.M. testified that the offenses "occurred during a period when she was nine years old." Defendant then argues that "D.M. would have been nine years old in 2014–2015, not 2016," and consequently, "the State failed to prove that the offenses occurred during the date range specified in the indictment[s][.]" Accordingly, he maintains that the trial court erred by denying Defendant's motion to dismiss.

A variance between an indictment and the evidence produced at trial "is not material, and is therefore not fatal, if it does not involve

an essential element of the crime charged." *Id.* (citation omitted). "Generally, the time listed in the indictment is not an essential element of the crime charged[,]" *State v. Stewart*, 353 N.C. 516, 517–18, 546 S.E.2d 568, 569 (2001), and "the State may prove that it was in fact committed on some other date[,]" *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961). "Statutory and case law both reflect the policy of this jurisdiction that an inaccurate statement of the date of the offense charged in an indictment is of negligible importance except under certain circumstances." *State v. Hicks*, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987). Nonetheless, "a variance as to time becomes material and of the essence when it deprives [the] defendant of an opportunity to adequately present his defense." *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 (cleaned up).

In cases involving sexual assaults of children, our Supreme Court has explicitly relaxed the temporal specificity requirements that the State must allege. *State v. Burton*, 114 N.C. App. 610, 613, 442 S.E.2d 384, 386 (1994). "Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where . . . the allegations concern instances of child sex abuse occurring years before." *Id.* (emphasis omitted). Thus, "a child's uncertainty as to the time . . . the offense charged was committed shall not be grounds for [dismissal] where there is sufficient evidence that the defendant committed each essential act of the offense." *Hicks*, 319 N.C. at 91, 352 S.E.2d at 428 (cleaned up). Because "some leniency surrounding the child's memory of specific dates is allowed[,]" "[u]nless the defendant demonstrates that he was deprived of his defense because of lack of specificity, th[e] policy of leniency governs." *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 (citation omitted).

This policy of leniency is supported by our statutes. N.C. Gen. Stat. § 15-155 provides that "[n]o judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed . . . for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly[.]" N.C. Gen. Stat. § 15-155. Additionally, "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." *State v. Blackmon*, 130 N.C. App. 692, 696, 507 S.E.2d 42, 45 (citation omitted), *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998).

In the instant case, Defendant does not demonstrate any prejudice to his defense arising from the variance in the dates of the alleged

offenses. Although Defendant argues that his relationship with the girls' mother was volatile and that he frequently left the home, "Defendant did not assert an alibi defense regarding the dates of the [charged] offenses or rely in any other manner upon the dates in the indictments in preparing his defense." *State v. Poston*, 162 N.C. App. 642, 648, 591 S.E.2d 898, 902 (2004). "Under the general rule, any variance between the dates in the indictments and the evidence would, therefore, not be material." *Id.*

Accordingly, the trial court did not err in denying Defendant's motion to dismiss the indictments, and his arguments on this ground are overruled. *See id.*

CONCLUSION

For the reasons stated herein, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges COLLINS and FLOOD concur.

STATE OF NORTH CAROLINA
v.
LEON MAYE A.K.A. DANNY BROWN, DEFENDANT

KENYA L. RODGERS, BAIL AGENT
AND
1ST ATLANTIC SURETY COMPANY, SURETY

No. COA24-77

Filed 6 August 2024

Bail and Pretrial Release—motion to set aside bond forfeiture—mandatory reason to set aside per statute—denial erroneous

The trial court erred in denying a surety's motion to set aside a bond forfeiture where the court's order did not explain the denial but the circumstances suggested that the reason was the surety's failure to appear at the motion hearing. Pursuant to N.C.G.S. § 15A-544.5, the surety was not required to appear at the hearing, and, moreover, its motion cited a valid reason to set aside the the bond forfeiture under subsection (b)(4) of the statute—"defendant has been served with an Order for Arrest for the Failure to Appear on the criminal

charge in the case in question as evidenced by a copy of an official court record"—and no evidence to the contrary was presented.

Appeal by Surety from order entered 28 September 2023 by Judge Imelda J. Pate in Lenoir County Superior Court. Heard in the Court of Appeals 29 May 2024.

Practus, LLP, by M. Brad Hill, for Other-Appellant 1st Atlantic Surety Company.

Mintz Law Firm, PLLC, by Rudolph I. Mintz, III, for Other-Appellee Lenoir County Board of Education.

Tharrington Smith LLP, by Stephen G. Rawson, for Other-Appellee Lenoir County Board of Education.

CARPENTER, Judge.

1st Atlantic Surety Company ("ASC") appeals from the trial court's order denying ASC's motion to set aside its bond forfeiture. After careful review, we agree with ASC: The trial court erred by denying ASC's motion to set aside. We reverse and remand.

I. Factual & Procedural Background

On 17 October 2018 in Lenoir County Superior Court, ASC posted a $35,000 bail bond for Leon Maye ("Defendant"). On 30 January 2023, Defendant failed to appear for court, so the trial court entered a bond-forfeiture notice.

On 13 July 2023, ASC filed a motion to set aside the bond forfeiture. The motion included several copies of orders for Defendant's arrest. On 2 August 2023, the Lenoir County School Board (the "Board")[1] filed an objection to ASC's motion. The objection included a notice of hearing, which incorrectly listed the hearing date as 2 August 2023; the hearing date was actually 30 August 2023. In an affidavit attached to its motion to dismiss this appeal, the Board asserts that it remedied its mistake by mailing ASC a corrected notice of hearing.

On 30 August 2023, the trial court heard this matter, but ASC did not appear. On 28 September 2023, the trial court entered an order (the

1. A local board of education is authorized to act in place of the State concerning objections to bond forfeitures. *See* N.C. Gen. Stat. § 15A-544.5(d)(3) (2023).

"Order") denying ASC's motion to set aside. In the Order, the trial court found that: the Board properly mailed copies of the objection and notice of hearing; all parties were properly served; and ASC did not appear at the hearing. The trial court concluded by denying ASC's motion to set aside. The Order does not state why the trial court denied the motion to set aside, but a narrative from the hearing states that the trial court "reviewed the court file, and in the absence of any representative of [ASC], denied the motion to set aside and asked [the Board] to prepare a written order to that effect."

On 27 October 2023, ASC filed notice of appeal. On 11 March 2024, the Board filed a motion to dismiss this appeal. That same day, the Board also filed a motion to amend the record.

In its motion to dismiss, the Board argues that ASC violated Rules 9 and 11 of our Rules of Appellate Procedure. Concerning Rule 11, the Board asserts that ASC never served it with a proposed record. Nonetheless, on 26 January 2024, ASC served and filed a purportedly settled record. ASC, however, argues that it did serve a proposed record on 11 December 2023, and thus, the record was necessarily settled on 13 January 2024.

Concerning Rule 9, the Board complains that the purportedly settled record lacks an amended notice of hearing that the Board mailed to ASC on 4 August 2023. The Board also complains that the record lacks a transcript or a narrative from the objection hearing.

In its motion to amend, the Board asks to amend the record to include: three letters containing the amended notice of hearing; an appearance bond for Defendant; documentation of a power of attorney concerning Defendant's bond; and a narrative from the objection hearing. In response, ASC says that it "does not object to [the Board] seeking to amend the Record on Appeal."

II. Jurisdiction

We have jurisdiction over this case under N.C. Gen. Stat. § 7A-27(b)(1) (2023). We may, however, sanction parties for failing to adhere to our Rules of Appellate Procedure, N.C. R. App. P. 25(b), and we may do so by dismissing their appeal, N.C. R. App. P. 34(b)(1). But "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). Rather, "only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." *Id.* at 200, 657 S.E.2d at 366.

Whether to dismiss an appeal because of non-jurisdictional violations is a case-by-case inquiry. *See N.C. ex rel. Expert Discovery, LLC v. AT&T Corp.*, 287 N.C. App. 75, 84, 882 S.E.2d 660, 668–69 (2022) (citing *Dogwood*, 362 N.C. at 199–200, 657 S.E.2d at 366). To determine whether a dismissal is warranted because of non-jurisdictional violations, we consider: (1) whether the violations impair our review of the case; (2) whether the violations "frustrate" the adversarial process; and (3) the number of violations. *Id.* at 84, 882 S.E.2d at 669 (citing *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366–67).

Rule 9 requires the record to contain what is "necessary for an understanding of all issues presented on appeal," N.C. R. App. P. 9(a)(1)(e), which may include either a transcript or narration of the relevant trial-court proceeding, N.C. R. App. P. 9(c)(1)–(2). Rule 9 is not jurisdictional. *See In re Foreclosure of a Deed of Tr. Executed by Moretz*, 287 N.C. App. 117, 124, 882 S.E.2d 572, 577 (2022).

Under Rule 11, "[i]f the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal . . . ." N.C. R. App. P. 11(b). Rule 11 is also not jurisdictional. *See Day v. Day*, 180 N.C. App. 685, 688, 637 S.E.2d 906, 908 (2006).

Here, the parties disagree concerning service of the proposed record and the record's necessary materials. But ASC "does not object to [the Board's motion] seeking to amend the Record on Appeal," so we grant the Board's motion to amend the record. Because we grant the Board's motion to amend the record, our review of this case is not impaired, and ASC's alleged rule violations do not frustrate the adversarial process. *See Expert Discovery*, 287 N.C. App. at 84, 882 S.E.2d at 668–69. Therefore, without resolving whether ASC indeed violated Rules 9 or 11, we deny the Board's motion to dismiss.

III. Issue

The issue on appeal is whether the trial court erred by denying ASC's motion to set aside its bond forfeiture.

IV. Analysis

A. Standard of Review

"On appeal from an order denying a motion to set aside a bond forfeiture, 'the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *State v. Cash*,

270 N.C. App. 433, 435, 841 S.E.2d 589, 590 (2020) (quoting *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009)). "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, (2016) (quoting *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013)).

B. Preservation

In order to preserve an argument for appellate review, the moving party must "clearly present[] the alleged error to the trial court." N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (2023); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Further, the "specific grounds for objection raised before the trial court must be the theory argued on appeal because 'the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].' " *State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

C. Motion to Set Aside a Bond Forfeiture

Bail is a "security such as cash, a bond, or property," which is "required by a court for the release of a criminal defendant who must appear in court at a future time." *Bail*, Black's Law Dictionary (11th ed. 2019). Bail is typically a sum certain. *See State v. Corl*, 58 N.C. App. 107, 111, 293 S.E.2d 264, 267 (1982).

A bail bond is a contract between a defendant, a bondsman, and the State. *See id.* at 111, 293 S.E.2d at 267. In this contract, the bondsman agrees to post bond, which is a portion of the bail; the defendant agrees to pay the bondsman a fee and to appear in court; and the State agrees to release the defendant until he is scheduled to appear in court. *See State v. Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804–05 (1987).

If the defendant fails to appear in court, the trial court enters a forfeiture of the bond. *State v. Escobar*, 187 N.C. App. 267, 270, 652 S.E.2d 694, 697 (2007). From there, the trial court mails a forfeiture notice to the bondsman. *Id.* at 270, 652 S.E.2d at 697. If the bondsman then fails to file a motion to set aside the forfeiture, the forfeiture order becomes a final judgment. *Id.* at 270, 652 S.E.2d at 697. Proceeds from bond forfeitures go to the local school board. *See* N.C. Const. art. IX, § 7.

If, however, the bondsman files a motion to set aside the forfeiture, the local school board may then file an objection to the motion to set aside. N.C. Gen. Stat. § 15A-544.5(d)(3) (2023). If the school board files an objection, the trial court must hold a hearing. *Id.* § 15A-544.5(d)(5).

When the bondsman files a motion to set aside, the "forfeiture *shall* be set aside for any" of the reasons enumerated in subsection 15A-544.5(b). *Id.* § 15A-544.5(b) (emphasis added). So when a "motion to set aside cites to at least one statutory reason, supported by evidence, the trial court must grant the motion." *State v. Isaacs*, 261 N.C. App. 696, 702, 821 S.E.2d 300, 305 (2018) (citing N.C. Gen. Stat. § 15A-544.5(b)). One enumerated reason for relief is if the "defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record . . . ." N.C. Gen. Stat. § 15A-544.5(b)(4).

D. Failure to Appear

A party's failure to appear at a motion hearing does not give the trial court absolute discretion to deny the absent party's motion. This is because, as stated by the North Carolina Supreme Court, there is no "statute, rule of court or decision which mandates the presence of a party to a civil action or proceeding at the trial of, or a hearing in connection with, the action or proceeding unless the party is specifically ordered to appear." *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 385 (1981).

E. Application

Here, ASC argues that the trial court erred by denying its motion to set aside because ASC complied with subsection 15A-544.5(b)(4). *See* N.C. Gen. Stat. § 15A-544.5(b)(4). On the other hand, the Board argues that the trial court correctly denied ASC's motion to set aside because ASC failed to appear at the motion hearing, and alternatively, the Board argues that the trial court correctly denied ASC's motion to set aside because the motion was improperly signed. We agree with ASC.

First, nothing in the record—including the Board's additional narrative of the motion hearing—shows that the Board contested the validity of ASC's motion signature. Therefore, any arguments concerning ASC's motion signature are unpreserved, *see* N.C. Gen. Stat. § 8C-1, Rule 103(a)(1), and we will not consider them, *see Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

Second, the Order does not specify why the trial court denied ASC's motion. We can reasonably infer, however, that the trial court denied

ASC's motion because ASC failed to appear at the motion hearing. Although it was in ASC's best interests to appear at the hearing—nothing compelled ASC to do so. *See Hamlin*, 302 N.C. at 482, 276 S.E.2d at 385; N.C. Gen. Stat. § 15A-544.5. Moreover, ASC's motion cited a valid reason to set aside the forfeiture, *see* N.C. Gen. Stat. § 15A-544.5(b)(4), and ASC attached copies of Defendant's arrest orders to its motion. Therefore, without any contradictory evidence from the Board, the trial court should have set aside the forfeiture. *See Isaacs*, 261 N.C. App. at 702, 821 S.E.2d at 305.

V. Conclusion

We conclude that the trial court erred by denying ASC's motion to set aside the forfeiture, despite ASC's absence from the motion hearing. Therefore, we reverse the Order and remand.

REVERSED AND REMANDED.

Judges TYSON and MURPHY concur.

STATE OF NORTH CAROLINA
v.
HABIMANA LISIMBA McLEAN

No. COA23-1100

Filed 6 August 2024

1. Appeal and Error—oral notice of appeal—Appellate Rule 4 "at trial" interpreted—next day during same session of court sufficient

Defendant's oral notice of appeal from a criminal judgment was timely made pursuant to Appellate Rule 4(a) (requiring that a party seeking appeal may give oral notice "at trial") even though it was given the day after his trial, because it was made, through counsel, during the same session of court and before the same judge who entered the judgment. Therefore, the appellate court had jurisdiction over the matter, and defendant's petition for writ of certiorari was dismissed as moot.

2. Assault—inflicting physical injury on employee of state detention facility—jury instructions—lesser included offense not warranted

In a trial for assault inflicting physical injury on an employee of a state detention facility, defendant was not entitled to a jury instruction on the lesser included offense of assault on an officer or employee of the state (which does not include a physical injury element), where the State presented sufficient evidence of each essential element of the greater offense—including that the officer assaulted by defendant was struck multiple times and sustained bruising and swelling on his face and scrapes and bruises on his arm as a result—and where defendant did not introduce any conflicting evidence.

Appeal by Defendant from judgment entered 7 June 2023 by Judge Michael S. Adkins in Rowan County Superior Court. Heard in the Court of Appeals 30 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Samuel R. Gray, for the State.

Irons & Irons, PA, by Ben G. Irons, II, for the Defendant.

WOOD, Judge.

Habimana Lisimba McLean ("Defendant") appeals from a jury verdict finding him guilty of assault inflicting physical injury on an employee of a state detention facility. Defendant pleaded guilty to attaining habitual felon status and thereafter was sentenced to 42 to 63 months of imprisonment. On appeal, Defendant argues the jury should have been instructed on the lesser included offense of assault on an officer or employee of the State. For the reasons stated below, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

During the time relevant to this appeal, Defendant was incarcerated at Piedmont Correctional Center, and the officers at the Correctional Center are State employees. On 1 March 2021, Defendant spoke with Officer Lynch about certain events that occurred over the prior weekend. Defendant expressed his belief that he was treated unfairly because he did not receive his "personal hygiene stuff." Officer Lynch told Defendant she would assist him after completing a count of the prisoners. Officer Lynch then went to the control booth to report the count. While there, Officer Lynch noticed on the surveillance cameras that Defendant had taken off his shirt, was pacing in a circle around his cell, and appeared to be visibly upset.

Officer Lynch felt that she had built a good relationship with Defendant, so she went to his cell to speak with him about what transpired over the weekend. During their conversation, Defendant complained that he did not receive his hygiene items or his medication. Officer Logan, who is also a correctional officer, then entered Defendant's cell to assist Officer Lynch. As Officer Logan approached, Defendant stood up, stepped toward Officer Lynch, but then backed away. Officer Logan told Defendant that she did not appreciate Defendant stepping towards Officer Lynch, to which Defendant stated, "I wouldn't dare hit [Officer Lynch], she's trying to help me." He then stated that he was "done talking" and shut his door. Following this encounter, Sergeant Lackey and Captain Harris were summoned to the cell block and briefed about Defendant's situation by Officer Lynch. Officer Lynch recommended that Sergeant Lackey speak with Defendant alone to try to calm him down.

Sergeant Lackey went to Defendant's cell and asked him to come out, but Defendant refused. He asked again and Defendant exited. Defendant walked down the hall with Sergeant Lackey following behind him. As they were walking to a more private area to speak, Defendant turned around and struck Sergeant Lackey in the face above his left eye with his fist. Sergeant Lackey and Defendant then tussled back and forth as Sergeant Lackey attempted to restrain Defendant onto a picnic table. Officer Logan witnessed the incident and stepped in to pepper spray Defendant. Sergeant Lackey was also sprayed during the incident. After subduing and handcuffing Defendant, Sergeant Lackey left to wash off the pepper spray. During the altercation, Sergeant Lackey sustained bruising and swelling on his forehead and scrapes and bruises on his arm. Officer Lynch testified that Sergeant Lackey's face appeared red immediately following the incident and that he had a "knot" on his head the following day. At trial, video footage from the prison cameras was shown to the jury. The video footage confirmed that Defendant instigated the altercation by hitting Sergeant Lackey in the face. Sergeant Lackey testified that he was hit multiple times in the face, around six to ten times, and was also struck in the body.

Defendant was indicted for assault inflicting physical injury on an employee of a state detention facility and attaining habitual felon status on 13 June 2022. At the charge conference, Defense counsel requested a jury instruction on a lesser included offense on the assault charge, which excluded the infliction of physical injury element. The trial court denied the request. On 7 June 2023, the jury found Defendant guilty of assault on an employee of a state detention facility inflicting physical injury. Defendant ultimately pleaded guilty to attaining habitual felon status. The trial court sentenced Defendant to an active term of 42 to 63

months of imprisonment. The following day, Defendant gave oral notice of appeal in open court.

II. Discussion

A. Appellate Jurisdiction

[1] Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, a party seeking to appeal a superior court or district court judgment or order in a criminal action is required to either (1) provide oral notice of appeal at trial, or (2) file a written notice of appeal within fourteen days following the entry of judgment. N.C. R. App. P. 4(a). "The Rule permits oral notice of appeal, but *only if given at the time of trial*." *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) (citation omitted) (emphasis added).

Concurrent with his appeal, Defendant has filed a petition for writ of *certiorari* seeking to preserve his appeal should this Court hold Defendant has lost his right to appeal due to a "failure to take timely action" if the Court finds notice of appeal was not given *at trial*. N.C. R. App. P. 21(a)(1). Defendant's trial concluded on 7 June 2023, and he gave oral notice of appeal, through counsel, on the morning of 8 June 2023 during the same session of court and before the same judge who entered the judgments. Neither Defendant nor his counsel filed a written notice of appeal.

The relevancy and unsettledness as to what constitutes "*at the time of trial*," is clearly demonstrated by the numerous petitions for writ of *certiorari* filed in this Court "out of an abundance of caution" in case this Court deems an appeal untimely for "failure to take timely action" by not giving oral notice of appeal "at trial" in the minutes following sentencing. N.C. R. App. P. 21(a)(1). For example, in *Holanek*, this Court granted certiorari when oral notice of appeal was given six days after the conclusion of trial, in open court, and before the same judge that presided over the trial. *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231-32 (2015). In *Smith*, this Court granted certiorari where the trial concluded at 12:30 p.m. and oral notice of appeal was given at 3:25 p.m. that same day. *State v. Smith*, 267 N.C. App. 364, 366-67, 832 S.E.2d 921, 924-25 (2019). These few cases, of the many before this Court, illustrate this Court's rationale for granting certiorari, despite an "untimely" notice, was because "petitioners demonstrated good faith efforts in making a timely appeal and because the appeal had merit." *State v. Myrick*, 277 N.C. App. 112, 114, 857 S.E.2d 545, 547 (2021) (cleaned up). Accordingly, we are compelled to interpret what is considered a notice of appeal *at trial*.

To analyze this question, it is necessary to expound the parameters between "the span of a trial" and "a session of the court." In *Sammartino*, this Court analyzed an argument set forth by the defendants, that the trial court was without the authority to modify the judgments two days after a sentencing hearing. *State v. Sammartino*, 120 N.C. App. 597, 599, 463 S.E.2d 307, 309 (1995). In that case, the defendants conceded the trial court could modify the judgments *during the same session of court* but argued that the session ended "with the completion of the cases on the docket" on the day of the sentencing hearing. *Id.* There, this Court explained, "[D]uring a session of the court a judgment is *in fieri* and the court has authority in its sound discretion, prior to expiration of the session, to modify, amend or set aside the judgment." *Id.* (citations omitted). *In fieri* denotes a legal proceeding that "is pending or in the course of being completed." *In fieri*, Black's Law Dictionary (11th ed. 2019). Further, the term "session" denotes "the time during which a court sits for business and refers to a typical one-week assignment of court." *Sammartino*, 120 N.C. App. at 599, 463 S.E.2d at 309 (citation omitted). The Court in *Sammartino* held that because the judgments were entered during the week of court assigned to the judge, the trial court properly modified its prior judgments entered earlier that week. *Id.* at 600, 463 S.E.2d at 309.

Similarly, in *Edmonds*, the trial court entered a judgment against the defendant imposing a suspended prison sentence; however, two days later, it modified the judgment to include an active term instead. *State v. Edmonds*, 19 N.C. App. 105, 107, 198 S.E.2d 27 (1973). In that case, this Court held that the trial court acted within its discretion when it modified the first judgment and explained that the modification was proper because it was "during the same session." *Id.* at 107, 198 S.E.2d at 27-28. This Court, too, found no error in a trial court's ruling when it resentenced the defendant the day after his initial sentencing, thereby modifying the first judgment. *State v. Quick*, 106 N.C. App. 548, 561, 418 S.E.2d 291, 299 (1992). In *Quick*, this Court reasoned, "[u]ntil the expiration of the term, the orders and judgment of a court are *in fieri*, and the judge has the discretion to make modifications in them as he may deem to be appropriate for the administration of justice." *Id.* (citation omitted); *see also State v. Dorton*, 182 N.C. App. 34, 42, 641 S.E.2d 357, 362 (2007) ("It is uncontested . . . that both [of] defendant's . . . resentencing hearings occurred during the same term of criminal court. The trial court did not, therefore, err by modifying its resentencing judgment during that session."). In *In re Tuttle*, this Court held the trial court did not err when it made an additional, material finding following the entry of a judgment and the defendant's notice of appeal, holding, "[t]he term of

court had not expired, the judgment remained *in fieri* despite the notice of appeal." *In re Tuttle*, 36 N.C. App. 222, 225, 243 S.E.2d 434, 436 (1978).

To the contrary, "[a] trial court loses jurisdiction to modify or amend a judgment after the adjournment of the trial session." *State v. Jones*, 27 N.C. App. 636, 638, 219 S.E.2d 793, 795 (1975) (citations omitted). "[A] trial session shall terminate or adjourn upon the announcement in open court that the court is adjourned *sine die*" meaning, "without assigning a day for a further meeting or hearing." *Id.* at 639, 219 S.E.2d at 795 (citation omitted). Accordingly, since a trial court has the authority to modify, amend, or set aside a judgment during a *session* of court, when a judgment is *in fieri*, the *time of trial* should also logically extend to the end of the respective session, or when court adjourns *sine die*.

We hold Defendant entered a timely oral notice of appeal because Defendant, through counsel, provided notice of appeal in open court while the judgment was *in fieri* and the trial court possessed the authority to modify, amend, or set aside judgments entered during that session. Defendant gave notice of appeal the following morning, before the same judge, and during the same *session* of court, prior to the trial court adjourning *sine die*. Thus, the period of time for Defendant to provide timely notice of appeal *at trial* commenced following sentencing and ended when the court session adjourned *sine die*. *Sammartino*, 120 N.C. App. at 599-600, 463 S.E.2d at 309. Therefore, we conclude Defendant's oral notice of appeal was timely, not defective, and we have jurisdiction to hear the merits of his appeal. As a result, Defendant's petition for writ of *certiorari* is unnecessary and dismissed as moot.

B. Jury Instruction

[2] On appeal, Defendant argues the trial court erred in failing to give his requested jury instruction on the lesser included offense of assault on an officer or employee of the State. We disagree.

"Whether evidence is sufficient to warrant an instruction is a question of law." *State v. Palmer*, 273 N.C. App. 169, 171, 847 S.E.2d 449, 451 (2020) (citation omitted). "[W]here the request for a specific instruction raises a question of law, the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (cleaned up). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *State v. Guerrero*, 279 N.C. App. 236, 241, 864 S.E.2d 793, 798 (2021) (citation omitted). During the charge conference, Defendant requested the instruction be given, and thus, properly preserved the issue for review on appeal. N.C. R. App. P. 10(a)(2).

To determine whether an instruction on a lesser included offense is appropriate, "[t]he test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (cleaned up). "Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Id.* (cleaned up). Our Supreme Court has cautioned trial courts from "indiscriminately or automatically instructing on lesser included offenses." *State v. Taylor*, 362 N.C. 514, 530, 669 S.E.2d 239, 256 (2008) (cleaned up). "Such restraint ensures that the jury's discretion is channeled so that it may convict a defendant of only those crimes fairly supported by the evidence." *Id.* (cleaned up).

Here, Defendant was found guilty of assault inflicting physical injury on an employee of a state detention facility pursuant to N.C. Gen. Stat. § 14-34.7. Under this offense, the elements are: (1) an assault; (2) on a person who is employed at a detention facility operated under the jurisdiction of the State or a local government; (3) while the employee is in the performance of the employee's duties; (4) inflicts physical injury on the employee. N.C. Gen. Stat. § 14-34.7(c)(2). "For purposes of this subsection, 'physical injury' includes cuts, scrapes, bruises, or other physical injury which does not constitute serious injury." N.C. Gen. Stat. § 14-34.7(c). Whereas, under the requested instruction on the lesser included offense of assault on an officer or employee of the State, the elements are: (1) an assault; (2) on an officer or employee of the State; (3) when the officer or employee is discharging or attempting to discharge his official duties. N.C. Gen. Stat. § 14-33(c)(4).

When distinguishing between these offenses, Defendant argues an instruction on the lesser included offense would have been appropriate because the "physical injury" element was disputed and should have been decided by the jury. In support, Defendant offers the testimony of Officer Logan and Officer Lynch, attesting that they saw Defendant hit Sergeant Lackey only once. Further, Defendant contends the video of the incident confirms their testimony. He concedes that a hit to the face *can* cause physical injury; however, Defendant urges this Court to conclude that the question of whether Sergeant Lackey had been *actually* physically injured by Defendant should have been left to the jury.

At trial, it was established unequivocally that Defendant struck Sergeant Lackey in the face at least once. Sergeant Lackey further testified that he had bruising and swelling on his face and scrapes and bruises on his arm following his altercation with Defendant. Officer

Lynch testified to seeing a knot on his forehead the next day. Further, the State introduced three exhibits of photographs depicting Sergeant Lackey's injuries.

On appeal, Defendant does not dispute this evidence. Instead, Defendant disputes the number of times Sergeant Lackey was hit and whether the evidence supported the severity of the injury. Given that "physical injury" includes "cuts, scrapes, bruises, or other physical injury which does not constitute serious injury," we are unpersuaded by Defendant's argument. N.C. Gen. Stat. § 14-34.7(c). The "physical injury" element was sufficiently satisfied when Defendant struck Sergeant Lackey in the face, despite the number of times or the severity of the injuries sustained. Moreover, Defendant presented no conflicting evidence with respect to this evidence. Therefore, we hold that the State presented sufficient evidence of every element of the offense of assault inflicting physical injury on an employee of a state detention facility, and that the trial court did not err in omitting the lesser included offense in the jury instructions.

III. Conclusion

The evidence presented at trial was sufficient as to each element of the crime charged, assault inflicting physical injury on an employee of a state detention facility, and there was no conflicting evidence as to any of the elements. Thus, the trial court did not err by omitting the lesser included offense in the jury instructions. We hold Defendant received a fair trial free from error.

NO ERROR.

Judges STROUD and COLLINS concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
DOUGLAS CLEMON SILER, DEFENDANT

No. COA23-474

Filed 6 August 2024

1. Search and Seizure—unlabeled pill bottle—probable cause—officer's observations and prior knowledge

In a drug prosecution, the trial court properly denied defendant's motion to suppress opioids found in an unlabeled orange pill bottle in defendant's car despite improperly basing its decision on a reasonable suspicion standard because the officer who encountered defendant at a gas station had probable cause to believe that the bottle containing white pills (which defendant hid from view inside his car upon seeing the officer) contained illegal drugs, justifying a search of defendant's vehicle. Although the officer did not know that defendant was then on supervised probation (and subject to searches based on a lower standard—reasonable suspicion), the officer recognized defendant from previous encounters, knew that defendant had been involved with illegal drugs in the past, and remembered defendant trying to hide drugs from an officer who served him with an indictment on a prior occasion. Further, when the officer asked defendant about the unlabeled orange pill bottle, defendant repeatedly lied about its existence.

2. Probation and Parole—probation revocation—after end of probationary period—lack of finding of "good cause"—remand required

Where the trial court revoked defendant's probation after the term of his probation expired without finding that "good cause" existed to do so, but where sufficient evidence existed from which the trial court could have made such a finding, the judgment revoking probation was vacated and the matter was remanded to the trial court for re-consideration.

Appeal by defendant from two judgments entered 4 August 2022 by Judge R. Allen Baddour, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 2 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert T. Broughton, for the State.

Office of the Appellate Defender, *Glenn Gerding*, *by Assistant Appellate Defender Michele Goldman for defendant-appellant.*

DILLON, Chief Judge.

Douglas Clemon Siler, Defendant, was charged with five drug offenses arising from an encounter with a law enforcement officer on 23 July 2021. On the day of the encounter, Defendant was on supervised probation, though that fact was unknown to the arresting officer. During the encounter, the officer discovered Defendant to be in the possession of illegal drugs on his person and in his car. Prior to trial, Defendant filed a motion to suppress "all evidence obtained by the State pursuant to the invalid and illegal search, seizure and arrest" of Defendant, as well as the fruits of any "illegal and invalid search and arrest." Thereafter, Defendant pleaded guilty to one count of trafficking in opium or heroin by possession, which officers found in his car during the encounter. He entered this plea, pursuant to a plea agreement, which included dismissal of the four other charges and preservation of the right to appeal the denial of the motion to suppress.

The trial court entered a judgment sentencing Defendant to a term of imprisonment based on the plea agreement. The trial court entered a second judgment revoking Defendant's probation. Defendant appeals both judgments.

I. Analysis

Defendant makes arguments concerning the validity of the officer's search and concerning the revocation of his probation. We consider each in turn.

A. Validity of the Search

[1] Defendant argues that the trial court erred in denying his motion to suppress the drugs found by the officer during the 23 July 2021 encounter. We review a trial court's ruling on a motion to suppress to determine whether competent evidence supports any challenged finding of fact and whether the valid findings support the trial court's conclusions of law, which are reviewed *de novo*. *See State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994).

Defendant specifically contends that the trial court erred by using a "reasonable suspicion" standard, as opposed to a "probable cause" standard in evaluating the officer's search.

Generally, the Fourth Amendment and the North Carolina Constitution permit searches if the officer has probable cause to believe that the search will reveal evidence of a crime. *See, e.g.*, *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016).

However, our Supreme Court has held that the government may constitutionally impose *as a condition of probation* that the probationer be subject to searches on a lesser standard than probable cause. *See United States v. Knights*, 534 U.S. 112 (2001). And our General Statutes allow a trial court to impose as a condition of probation that the probationer allow searches based on reasonable suspicion, rather than probable cause, specifically that the probationer:

> [s]ubmit to warrantless searches by a law enforcement officer of the probationer's person and of the probationer's vehicle, upon a reasonable suspicion that the probationer is engaged in criminal activity . . . .

N.C. Gen. Stat. § 15A-1343(b)(14) (2024). In the present case, on the day of his encounter with the officer, Defendant was on probation and subject to this condition.

Defendant raises an issue of first impression for a North Carolina appellate court: Is a search based on a standard less than probable cause (as authorized by the terms and conditions of probation) valid, where the officer performing the search is *not aware* that the target of his search is on probation?

On this issue, we note that the Supreme Court of the United States has instructed "it is imperative" for a judge evaluating the reasonableness of an officer's actions under the Fourth Amendment to judge the facts under "an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). *See also Scott v. United States*, 436 U.S. 128, 137 (1978); *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Likewise, our Supreme Court has instructed the determination of Fourth Amendment reasonableness is based on facts *known to the officer* at the time of the challenged search or seizure. *See State v. Nicholson*, 371 N.C. 284, 293, 813 S.E.2d 840, 845–46 (2018); *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641–42 (1982).

The Supreme Court of the United States also sustained a California law allowing a suspicionless search of a parolee, in part, because the officer conducting the search had knowledge the target of the search was a

parolee. *See Samson v. California*, 547 U.S. 843 (2006). Specifically, in response to the dissent's concern the holding would grant law enforcement untethered discretion, Justice Thomas, writing for the majority, responded that "[u]nder California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee." *Id.* at 856, n.5.

Other federal courts have held that an officer must know about the target's probationary status in order for that status to serve as the *constitutional* justification for a warrantless search. *See, e.g., United States v. Job*, 871 F.3d 852, 859 (9th Cir. 2017); *Muse v. Harper*, 2017 U.S. Dist. LEXIS 135107, *11–13 (M.D. Tenn.); *United States v. Taylor*, 2021 U.S. Dist. LEXIS 258200, 2021 WL 8875706, *31–32 (Tenn. E.D. 2021). Other states have held a warrantless search, based on less than probable cause, cannot be retroactively rendered reasonable by search conditions discovered later. The actions are only reasonable if the officer knows of the search conditions *at the time* the search or seizure occurs. *See, e.g.*, *State v. Maxim*, 454 P.3d 543, 550 (Idaho 2019); *State v. Hamm*, 589 S.W.3d 765, 779 (Tenn. 2019); *Cantrell v. State*, 673 S.E.2d 32, 35–36 (Ga. App. 2009); *State v. Donaldson*, 108 A.3d 500, 506 (Md. App. 2015); *People v. Sanders*, 73 P.3d 496, 507–08 (Cal. 2003).

Some federal courts have inferred it may be a violation of the rights of one subject to an outstanding arrest warrant, if he is arrested by an officer, who is not aware of the warrant, and who has no other justification to make the arrest. *See, e.g.*, *Fulson v. Columbus*, 801 F. Supp. 1, 7 (S.D. Ohio 1992); *Bruce v. Perkins*, 701 F. Supp. 163, 164–65 (N.D. Ill. 1988); *Torres v. Ball*, 2021 U.S. Dist. LEXIS 47280, 2021 WL 965314 (W.D.N.C. 2021); *Burtch v. Dodson*, 2019 U.S. Dist. LEXIS 236275 *10 (M.D. Ga. 2019).

The State argues the search was consensual when he agreed to the condition of probation. Defendant, however, responds that he withdrew any such consent during the encounter, which he is allowed to do. *See, e.g.*, *State v. Stone*, 362 N.C. 50, 59, 653 S.E.2d 414, 420 (2007) (noting that a search subject "had opportunities to limit or withdraw his consent," but failed to do so); *State v. Medina*, 205 N.C. App. 683, 688, 697 S.E.2d 401, 405 (2010) (noting that a search subject is "free to withdraw his consent at any[]time").

We do not resolve this question. We conclude the uncontradicted evidence at the suppression hearing shows the officer had probable cause to search Defendant's vehicle, where he discovered the opioids, for which Defendant was convicted.

At the suppression hearing, the arresting officer testified about his encounter with Defendant on 23 July 2021. Defendant did not testify.

The trial court did not make any written findings in its order denying Defendant's suppression motion. The better practice would have been for the trial court to have made written and more detailed findings. However, where no "material conflict" in the evidence exists, a defendant is not prejudiced if the trial court fails to make written findings. *See*, *e.g.*, *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980).

The uncontradicted evidence regarding the encounter at the gas station offered by the State tended to show: An officer pulled up to a gas pump opposite a car in which Defendant occupied the passenger seat. He was in uniform, driving a marked law enforcement vehicle. While the officer stood at the rear quarter of his patrol car pumping gas, he looked through the driver's side window of the car, in which Defendant was seated. He observed Defendant move an unlabeled *orange* pill bottle, containing white pills, from the center console area to under his seat out of view.

The officer recognized Defendant from previous encounters. He knew Defendant had been involved in illicit drug activities in the past. He remembered one occasion in the recent past Defendant had tried to hide illicit drugs he was carrying when the officer was serving an indictment on Defendant for another drug charge.

In any event, after placing the orange pill bottle under his seat, Defendant exited the car and started pumping gas. Having suspicion about the unlabeled orange pill bottle, the officer approached Defendant, though he did not know that Defendant was on probation. He asked Defendant about the location of the pills in the orange bottle. Defendant lied, denying he possessed any pills. After the officer persisted in his questioning, Defendant produced a *white* pill bottle from his pocket that he claimed contained his own medicine. The officer recognized that bottle as one commonly sold over the counter, which contained "possibly Ibuprofen or something along those lines."

As Defendant started to put the white pill bottle back into his pocket, the officer demanded to see it. He took it from Defendant's possession and placed it on the trunk of one of the vehicles. At this time, Defendant again lied about an orange pill bottle inside the car. Defendant did, however, admit that the white pill bottle contained Vicodin, a scheduled narcotic, which he said he got from a friend.

It is illegal in North Carolina for a prescription to be dispensed or distributed without a label. N.C. Gen. Stat. § 90-106(f) (2024). The white

pill bottle the officer observed did not have a label indicating a prescription for Vicodin. The orange pill bottle containing white pills the officer had observed did not contain any label.

The officer opened the white pill bottle; believed the pills therein to be Vicodin, a scheduled narcotic to which the Defendant admitted; and he confirmed they were not in an original prescription container. Defendant claimed he had gotten the pills "from a friend," but denied having other pills in his vehicle.

The officer subsequently searched the vehicle. During the search, the officer found the unlabeled orange pill bottle he had seen Defendant possessing earlier. Defendant admitted the orange pill bottle and the 73 pills inside were his. He was arrested. Lab testing confirmed the pills inside the unlabeled orange pill bottle were opioids.

Defendant was convicted only for a crime associated with the opioids found inside the unlabeled orange pill bottle recovered from inside the vehicle. He was not convicted of any crime associated with the Vicodin found on his person inside the white pill bottle.

We conclude that the evidence of the encounter up to just prior to the search of the vehicle was sufficient to give the officer probable cause to search the vehicle. In so holding, we note that probable cause does not require certainty, as explained by our Supreme Court:

> Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required.
>
> * * *
>
> Thus, while a reviewing court must, of necessity view the action of the law enforcement officer in retrospect, our role is not to import to the officer what our judgment, as legal technicians, might have been a prudent course of action; but rather our role is to determine whether the officer has acted as a man of reasonable caution who, in good faith and based upon practical consideration of everyday life, believed the suspect committed the crime for which he was later charged.

State v. Zuniga, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984) (citing *Texas v. Brown*, 460 U.S. 730 (1983) and *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

We conclude that the information known to the officer created a practical probability that there was an orange pill bottle containing illicit drugs inside Defendant's vehicle. For instance, the officer had knowledge of Defendant being involved with illicit drugs based on past encounters. He observed Defendant hiding an unlabeled, orange pill bottle containing white pills only after the officer came into Defendant's view. Defendant repeatedly lied to the officer about the existence of the orange pill bottle.

We did not include in our analysis of determining whether probable cause existed the evidence that, prior to searching the vehicle, the officer found Vicodin after opening the white pill without Defendant's consent. Even without that discovery, the officer had probable cause to search the vehicle. And, again, Defendant was not convicted of any crime associated with the Vicodin found in the white pill bottle.

B. Probation Revocation

[2] Defendant challenges the trial court's judgment revoking his probation *after* Defendant's probationary period had expired, contending that the trial court failed to find that "good cause" justified revoking probation. The State concedes this error.

We agree with the State that there was sufficient evidence before the trial court from which that court *could* make the required finding. Accordingly, we vacate that judgment and remand for the trial court to re-consider the matter.

II. Conclusion

Even if the trial court erred by basing its order on Defendant's suppression motion on a reasonable suspicion standard, we conclude the error was harmless. The uncontradicted evidence introduced at the hearing shows the officer had probable cause to search Defendant's vehicle. We affirm the judgment entered upon Defendant's plea of guilty to trafficking in opioids.

We vacate the judgment revoking Defendant's probation. The trial court failed to make the "good cause" findings required to revoke probation after the probationary period has expired. We remand to the trial court to reconsider the matter. The trial court may, in its discretion, consider new evidence on remand.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and GRIFFIN concur.

STATE v. THOMAS

[295 N.C. App. 269 (2024)]

STATE OF NORTH CAROLINA
v.
QUANTEZ LASHAY THOMAS

No. COA23-774

Filed 6 August 2024

1. Burglary and Unlawful Breaking or Entering—breaking or entering a motor vehicle—larceny—lack of consent—evidence sufficient

In a prosecution on charges including breaking and entering a motor vehicle and larceny arising from the theft of items from a van, the trial court did not err in denying defendant's motion to dismiss for insufficient evidence that defendant acted without the consent of the victim—an essential element of both offenses—where, despite the absence of testimony from the victim or evidence of forced entry, circumstantial evidence in the form of video surveillance footage showing defendant's demeanor (including turning off his headlights when parking near the van; constantly looking around as he checked the van's door, rifled through its contents, and placed items in his pockets and car; and keeping his headlights off as he drove away from the van), taken in the light most favorable to the State, was sufficient to permit a reasonable inference by the jurors that defendant both entered the van and took the items without the victim's consent.

2. Evidence—lay opinion testimony—identification of defendant in videos and photographs—plain error—prejudice not shown

In a prosecution on charges arising from the theft of a purse containing a credit card from a car and the use of the card at a Walmart, the trial court did not commit plain error in allowing lay opinion testimony from a law enforcement officer who identified defendant as the person depicted in surveillance video footage from the store and in photographs derived from the footage. Even assuming, without deciding, that admission of the testimony was error—in that it was not "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony or the determination of a fact in issue" (Evidence Rule 701)—defendant failed to demonstrate that the testimony had a probable impact on the jury's verdicts given the overwhelming evidence, both direct and circumstantial, of his guilt.

3. Sentencing—new trial following appellate review—more severe sentence imposed—no lesser sentence statutorily authorized

The statutory prohibition in N.C.G.S. § 15A-1335 on imposing a sentence, following appellate review, "for the same offense . . . which is more severe than the prior sentence" was not implicated where, in defendant's new trial, the trial court added an additional prior record level point pursuant to N.C.G.S. § 15A-1340.14(b)(6) (one point assigned "[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted"), with the result that defendant's prior record level was raised from III to IV. The trial court sentenced defendant at the bottom of the presumptive range applicable to a prior record level IV offender with habitual felon status in the absence of any mitigating factors for the convictions consolidated in the judgment and was not statutorily authorized to impose any lesser sentence—the sole exception to the provisions of N.C.G.S. § 15A-1335.

Appeal by defendant from judgments entered 19 August 2022 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 15 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin T. Spangler, for the State.

Gilda C. Rodriguez for defendant-appellant.

ZACHARY, Judge.

Defendant Quantez Lashay Thomas appeals from judgments entered upon a jury's verdicts finding him guilty of possession of a stolen motor vehicle, misdemeanor operation of a motor vehicle to elude arrest, two counts of breaking or entering a motor vehicle, two counts of misdemeanor larceny, two counts of financial transaction card theft, and attaining the status of a habitual felon. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

I. Background

This case returns to this Court after Defendant received a new trial upon his first appeal. *See State v. Thomas* (*Thomas I*), 281 N.C. App. 722, 868 S.E.2d 176, 2022 WL 453450 (unpublished). The full procedural history of Defendant's first trial can be found in this Court's prior opinion in

this matter. *See id.* at *1–*3. We recite here only those background and procedural facts relevant to the issues presented in this appeal.

The charges for which Defendant was tried arose from a series of vehicle-related crimes in and around High Point. On 17 January 2019, Kari Rhodes noticed that her Nissan Altima was missing from the parking lot of her apartment complex. On 21 January 2019, Angela Marion was leaving a gym with her husband when she noticed that the window on the passenger's side of their car had been broken, and her purse had been taken from the vehicle. Ms. Marion kept two credit cards in her wallet within her purse. When she called to cancel those credit cards, she learned that they had already been used, with hundreds of dollars of purchases having been charged to each card.

Officer Kaylyn Stewart[1] of the High Point Police Department ("HPPD") investigated the use of Ms. Marion's credit cards at several businesses. Among them was a Walmart on South Main Street in High Point. A Walmart loss-prevention associate retrieved surveillance video footage from the evening of 21 January 2019—when Ms. Marion's card was used—and captured some still photographs from the footage. Officer Stewart later testified about the appearance of the suspect in the surveillance video footage, including, among other details, that the suspect was wearing a camouflage jacket.

On 25 January 2019, Alondra McGill was cleaning an office with her aunt, Teresa Perez. In her van, Ms. Perez had a pair of Nike sneakers that had been delivered to her home for Ms. McGill. After the women finished cleaning, they went to Ms. Perez's van and noticed several items missing, including the Nike sneakers, Ms. Perez's purse, and some cleaning supplies. Ms. McGill would later testify that she never saw the Nike sneakers, that she never gave anyone else permission to take the shoes, and that Ms. Perez had never given anyone permission to enter her van.

HPPD officers investigating the breaking or entering and larceny from Ms. Perez's van obtained surveillance video footage showing Ms. Perez's van in the adjacent parking lot. After reviewing the footage, which showed a man entering Ms. Perez's van and removing items from it, the officers identified Defendant as a suspect.

On 6 February 2019, an HPPD officer recognized Defendant driving a Nissan Altima. The officer initiated a traffic stop by activating the

1. By the time Officer Stewart testified at the trial from which appeal is taken, she had been promoted to the rank of Detective. For ease of reading and consistent with her rank at all times relevant to this appeal, we refer to her as "Officer Stewart" in this opinion.

lights and siren, but Defendant sped away in excess of the speed limit, and the officer did not pursue him. The officer found the Altima later that night, apparently abandoned. Upon further investigation, he confirmed by the VIN number that the Altima had been reported stolen by Ms. Rhodes's husband. Officer Stewart responded to the scene of the abandoned Altima and discovered, *inter alia*, a pair of Nike shoes and a camouflage jacket inside the car. Once her car was recovered, Ms. Rhodes did not recall if anything was missing from it, but she noticed several items inside that had not previously been present in the car, including the coat and the shoes.

On 22 July 2019, a Guilford County grand jury returned true bills of indictment, charging Defendant with the following offenses: three counts of obtaining property by false pretenses; three counts of financial transaction card theft; two counts of breaking or entering a motor vehicle; felony larceny; possession of a stolen motor vehicle; felonious fleeing to elude arrest with a motor vehicle; three counts of misdemeanor larceny; and attaining the status of habitual felon. On 11 February 2020, the matter came on for trial. *Id.* at *3. The jury found Defendant guilty of 13 of the charged offenses, and the trial court consolidated the convictions into two judgments.

In the first judgment, the trial court consolidated the felony larceny with convictions for breaking or entering a motor vehicle, possession of a stolen motor vehicle, and two counts of obtaining property by false pretenses; in this judgment, the trial court sentenced Defendant as a prior record level III offender with habitual felon status to a term of 67 to 93 months' imprisonment in the custody of the North Carolina Division of Adult Correction. In the second judgment, the court consolidated the second breaking or entering a motor vehicle conviction with the third conviction of breaking or entering a motor vehicle, three counts of financial transaction card theft, two counts of misdemeanor larceny, and misdemeanor fleeing to elude arrest with a motor vehicle; in this judgment, the trial court sentenced Defendant as a prior record level III offender with habitual felon status to a consecutive term of 26 to 44 months.[2] Defendant appealed, and on 15 February 2022 this Court filed its opinion in *Thomas I*, in which we ordered a new trial. *Id.* at *5.

On remand, the matter came on for a new trial on 15 August 2022. The State's evidence included, *inter alia*, surveillance video footage of

2. The trial court made a clerical error in its judgments after the first trial, but in light of our disposition, we did not reach that issue in *Thomas I*. *Id.* at *3 n.1.

Ms. Perez's van during the incident in question and testimony by Officer Stewart, in which she identified Defendant as the individual in that footage. At the close of the State's evidence, the State took a voluntary dismissal of one count of misdemeanor larceny and two counts of obtaining property by false pretenses. The trial court then granted Defendant's motion to dismiss in part, as to one count of financial transaction card theft, and further ruled that the State could not proceed with the felony larceny charge but could prosecute the offense as an additional count of misdemeanor larceny.

The jury generally found Defendant guilty as charged, except for finding him guilty of misdemeanor rather than felony operation of a motor vehicle to elude arrest and finding him not guilty of the count of misdemeanor larceny that had been initially charged as a felony. The jury also found that Defendant had attained the status of a habitual felon.

On 19 August 2022, the trial court again consolidated the various convictions into two judgments. In the first judgment, the trial court consolidated the possession of a stolen motor vehicle conviction with one conviction for breaking or entering a motor vehicle, and attaining habitual felon status, and sentenced Defendant as a prior record level III offender to a term of 67 to 93 months' imprisonment. In the second judgment, which included the other conviction for breaking or entering a motor vehicle among the remaining convictions, the trial court accepted the State's argument that all of the elements of the breaking or entering conviction were included in one of Defendant's prior offenses and added an additional point to Defendant's prior record level, raising him to a prior record level IV offender. Accordingly, the trial court sentenced Defendant as a prior record level IV offender with habitual felon status to a term of 30 to 48 months' imprisonment.

Defendant gave notice of appeal in open court.

II. Discussion

Defendant contends that the trial court: (1) "erred when it denied [Defendant's] motion to dismiss the breaking [or] entering a motor vehicle and misdemeanor larceny charges" relating to Ms. Perez "because the State presented insufficient evidence of lack of consent"; (2) "committed plain error . . . when it allowed the lay witness opinions of Officer Stewart as to what and whom surveillance videos and photographs depicted"; and (3) "erred when it sentenced [Defendant] to a sentence more severe than the prior vacated sentence in violation of N.C. Gen. Stat. § 15A-1335."

A. Motion to Dismiss

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charges in 19 CRS 67750: one count each of breaking or entering a motor vehicle and misdemeanor larceny, both relating to Ms. Perez's vehicle. Defendant alleges that the State "failed to present sufficient evidence of an essential element of the charges"—namely, "lack of consent"—because Ms. Perez did not testify at trial. We disagree.

1. Standard of Review

"We review de novo a trial court's denial of a motion to dismiss a criminal charge for insufficient evidence." *State v. Gibson*, 277 N.C. App. 623, 624, 859 S.E.2d 253, 254 (2021). When conducting de novo review, this Court "consider[s] the matter anew and freely substitut[es] our own judgment for that of the trial court." *State v. Edgerton*, 266 N.C. App. 521, 532, 832 S.E.2d 249, 257 (2019), *disc. review denied*, 375 N.C. 496, 847 S.E.2d 886 (2020).

"In reviewing a motion to dismiss based on insufficiency of the evidence, our inquiry is whether there is substantial evidence (1) of each essential element of the offense charged, and (2) of defendant's being the perpetrator of such offense." *Id.* at 532, 832 S.E.2d at 257–58 (cleaned up). "On review of the denial of a motion to dismiss, this Court is concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Baskin*, 190 N.C. App. 102, 108, 660 S.E.2d 566, 571 (cleaned up), *disc. review denied*, 362 N.C. 475 (2008).

The trial court reviews a defendant's motion to dismiss "to determine whether there is substantial evidence of each element of the charged offense. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Gibson*, 277 N.C. App. at 624, 859 S.E.2d at 254 (cleaned up). "The evidence must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* at 624, 859 S.E.2d at 255 (cleaned up). Additionally, "where there is substantial evidence of each element of the offense charged, the fact that there is only a modicum of physical evidence, or inconsistencies in the evidence, is for the jury's consideration." *State v. Jackson*, 162 N.C. App. 695, 697, 592 S.E.2d 575, 577 (2004).

"The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State*

v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (cleaned up), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

> If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Id. (emphasis omitted) (cleaned up).

2. Analysis

Regarding the denial his motion to dismiss the charges of breaking or entering a motor vehicle and larceny, Defendant's sole argument of error by the trial court is that the State failed to present any evidence regarding the lack of Ms. Perez's consent.

The lack of consent of the owner is an essential element of both offenses. The elements of the offense of breaking or entering a motor vehicle are: "(1) . . . a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein." *Jackson*, 162 N.C. App. at 698, 592 S.E.2d at 577 (emphasis omitted); *see also* N.C. Gen. Stat. § 14-56 (2023). "The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (cleaned up).

The crux of Defendant's argument is that "there was no testimony from the alleged owner of the vehicle regarding lack of consent." As to the breaking or entering charge, Defendant further asserts that "there was no evidence of locked doors, broken windows, or any physical evidence of a forced entry that indicated a lack of consent to entry into the van." As to the larceny charge, Defendant contends that "the State failed to present sufficient evidence that the cleaning products were taken without the owner's consent." Rather, Defendant alleges that the testimony of Ms. McGill was "insufficient to establish the lack of consent element required for the larceny charge" because she "was not the owner of the cleaning products and she was not in possession of the cleaning products when they were alleged to have been taken."

The State responds that there was sufficient circumstantial evidence from which the jury could infer that Defendant lacked Ms. Perez's consent to break or enter into her car or to take her property. As stated above, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted). Indeed, this Court has previously recognized that in some cases, the "very nature" of the circumstances "gives rise to an inference that the owner of the vehicle did not consent to [the] defendant's conduct" in breaking or entering it. *State v. Jacobs*, 202 N.C. App. 350, 352, 688 S.E.2d 112, 113–14, *disc. review denied*, 364 N.C. 328, 701 S.E.2d 243 (2010).

The State suggests that "Defendant's knowledge that he lack[ed] consent to enter [Ms. Perez's] vehicle can be inferred by his demeanor[,]" as exhibited in the parking lot surveillance video footage of the incident. In the recording, Defendant drives up to Ms. Perez's van and turns off his headlights before he parks his vehicle next to hers. Defendant exits his vehicle and walks in front of Ms. Perez's van, looking into the nearby storefront, then casually walks back to the van. With his back to the storefront, obscuring the view of his hand, Defendant surreptitiously tries to open the van's side door. Upon discovering that the van is unlocked, he takes another glance toward the storefront as he opens the van door and leans inside the van. Defendant quickly removes a box with the Nike logo from the van, again looking toward the storefront and around the parking lot as he closes the van door and puts the Nike box in the back seat of his own car. Defendant then returns to the van and, while continually checking the storefront, opens the front passenger door, gets in the seat, and closes the door. As Defendant rifles through the contents of the van, occasionally putting things in his pockets, he rarely goes more than a second without looking up at the storefront or around the parking lot. He exits the van, keeping his eyes on the storefront as he checks that the passenger door is closed by pressing on it with his hip. He then walks around to the trunk, which he opens, and makes several trips removing items—including cleaning supplies—from the trunk and putting them into the back seat of his vehicle. Finally, Defendant reenters his vehicle, backs out of the parking spot, and only turns on his car's headlights as he drives away.

Even though the State did not present direct evidence of lack of consent in the form of testimony by Ms. Perez, this video, which was published to the jury several times, constituted sufficient circumstantial evidence to survive Defendant's motion to dismiss. Specifically, when viewed in the light most favorable to the State, the surveillance footage would permit "a reasonable inference of [D]efendant's guilt [to] be

drawn from the circumstances, [and] it [was thus] for the jury to decide whether the facts, taken singly or in combination, satisf[ied] it beyond a reasonable doubt that . . . [D]efendant is actually guilty." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (cleaned up). Accordingly, Defendant's argument is overruled.

B. Lay Opinion Testimony

[2] Defendant next argues that the trial court committed plain error by "allow[ing] the lay witness opinions of Officer Stewart as to what and whom surveillance videos and photographs depicted." Again, we disagree.

1. Standard of Review

Defendant acknowledges that he did not object at trial to the admission of the testimony that he now challenges on appeal, and so he specifically and distinctly contends that the admission of this testimony amounted to plain error. *See* N.C. R. App. P. 10(a)(4). 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) (cleaned up). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings . . . ." *Id.* (cleaned up).

2. Analysis

Defendant asserts that the admission of testimony by Officer Stewart, identifying Defendant as the individual in the Walmart surveillance video footage and in still photographs derived from the footage, amounts to plain error. Under Rule 701 of the North Carolina Rules of Evidence, a non-expert witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701.

This Court has recognized that lay opinion testimony identifying a criminal defendant in a photograph or videotape may be admissible "where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony." *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (citation omitted), *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135

(2009). Defendant cites *Buie* and *State v. Belk* as examples of a trial court admitting testimony that oversteps this guidance. *See id.* at 732, 671 S.E.2d at 355 (the trial court abused its discretion in admitting testimony by a law enforcement officer who "offered his opinion, at length, about the events depicted in . . . surveillance tapes, concluding that the video corroborated the [witness]'s testimony."); *see also State v. Belk*, 201 N.C. App. 412, 418, 689 S.E.2d 439, 443 (2009) ("[T]here was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify [the d]efendant as the individual in the surveillance footage."), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010).

However, Defendant's reliance upon *Buie* and *Belk* is misplaced, as neither case involved plain-error review. Indeed, the *Buie* Court even concluded that the error was harmless because there was "sufficient evidence to support the jury's decision, independent from the testimony" of the law enforcement officer. 194 N.C. App. at 734, 671 S.E.2d at 357. So too, here.

Even assuming, *arguendo*, that the trial court erred, "after examination of the entire record," Defendant has not shown that "the error had a probable impact on the jury's finding that . . . [D]efendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up). In light of the "overwhelming" evidence—direct and circumstantial—in this case, "[D]efendant cannot show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Moreover, Defendant has not shown that this is "the exceptional case" in which the alleged error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334 (cleaned up). Therefore, Defendant's argument is overruled.

C. Sentencing

[3] Lastly, Defendant argues that the trial court erred by sentencing him in violation of N.C. Gen. Stat. § 15A-1335 to a sentence more severe than the prior vacated sentence. We disagree.

1. Standard of Review

This Court reviews de novo alleged statutory errors regarding sentencing issues, as such errors "are questions of law[.]" *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (citation omitted).

2. Analysis

In its second consolidated judgment, the trial court sentenced Defendant—a prior record level IV offender with habitual felon status

—to a term of 30 to 48 months' imprisonment. Because this sentence is more severe than the sentence in the second consolidated judgment from *Thomas I*, Defendant alleges that the trial court violated N.C. Gen. Stat. § 15A-1335. Defendant thus requests that this Court vacate the second consolidated judgment and remand for resentencing.

Section 15A-1335 provides, in pertinent part:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335.

Defendant contends that "[t]he sole exception to N.C. Gen. Stat. § 15A-1335, and the only circumstance in which a higher sentence will be allowed on resentencing, is when a statutorily mandated sentence is required by the General Assembly." *State v. Cook*, 225 N.C. App. 745, 747, 738 S.E.2d 773, 775 (citation omitted), *disc. review denied*, 367 N.C. 212, 747 S.E.2d 249 (2013). In support of this proposition, Defendant emphasizes that this Court has stated that "[a] trial court *may* add one point if all the elements of the present offense are included in any prior offense." *State v. Posner*, 277 N.C. App. 117, 122, 857 S.E.2d 870, 874 (2021) (emphasis added) (cleaned up); *accord* N.C. Gen. Stat. § 15A-1340.14(b)(6). Defendant argues that the additional point, which raised his prior record level to IV, was not "statutorily mandated" and therefore his sentence does not fall within the "sole exception" to § 15A-1335. *Cook*, 225 N.C. App. at 747, 738 S.E.2d at 775 (citation omitted).

First, Defendant bases his argument solely on the proposition that the trial court's decision to add a point under § 15A-1340.14(b)(6) is discretionary. In his reply brief, Defendant asserts that the State has failed to cite "a statute or case that states the additional point is mandatory when applicable. In fact, the language of N.C. Gen. Stat. § 15A-1340.14(b)(6), does not include 'shall' or 'must.' " True though that assertion may be, the statute likewise does not include any discretionary terms, such as "may." Rather, § 15A-1340.14(b)(6) merely states: "Points are assigned as follows: . . . . If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point." N.C. Gen. Stat. § 15A-1340.14(b)(6).

Contrary to Defendant's assertion, a close reading of *Posner* reveals that this Court used the word "may" in a discussion of whether the trial court erred when it used the same felony prior record level worksheet to determine the defendant's prior record level for five separate judgments, when only two of the judgments involved offenses that shared elements with his prior offenses. *Posner*, 277 N.C. App. at 122, 857 S.E.2d at 874. In light of the plain language of the statute that provides a straightforward directive regarding the addition of the "extra" point in question, the passing use of the term "may" in *Posner* cannot reasonably read as Defendant suggests. Indeed, nothing in the plain text of § 15A-1340.14(b)(6) suggests that the assignment of an additional point is not mandatory if the trial court determines that its conditions are satisfied. It would strain credulity to suggest that any of the other subsections of § 15A-1340.14(b) providing for the assignment of points would be discretionary, and Defendant cites no authority to suggest why subsection (6) would be an exception.

Here, the trial court assessed an additional point to Defendant's prior record level, which raised his prior record level from III to IV. Notably, Defendant does not challenge the merits of the addition of this point on appeal; he merely challenges whether the point was "statutorily required" as part of his challenge to his sentence under § 15A-1335. Yet, "where the trial court is required by statute to impose a particular sentence . . . § 15A-1335 does not apply to prevent the imposition of a more severe sentence." *State v. Powell*, 231 N.C. App. 129, 133, 750 S.E.2d 899, 902 (2013) (citation omitted).

The trial court sentenced Defendant to a term of 30 to 48 months' incarceration, at the bottom of the presumptive range under our sentencing guidelines. *See* N.C. Gen. Stat. § 15A-1340.17(c)(4). In the absence of any mitigating factors, the trial court was not statutorily authorized to impose any lesser sentence than the sentence entered. Accordingly, N.C. Gen. Stat. § 15A-1335 "does not apply to prevent the imposition of a more severe sentence." *Powell*, 231 N.C. App. at 133, 750 S.E.2d at 902 (citation omitted). Defendant's argument is overruled.

III. Conclusion

For the foregoing reasons, we conclude that Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Chief Judge DILLON and Judge ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 AUGUST 2024)

ADVENTURE TRAIL OF CHEROKEE, INC. v. OWENS No. 23-1043	Jackson (18CVS775)	Affirmed
BILBRO v. ECU HEALTH No. 23-1172	Pitt (23CVS1789)	Affirmed
CITY OF ASHEVILLE v. MR ENT., LLC No. 23-1110	Buncombe (18CVS3771)	Vacated and Remanded
IN RE K.C. No. 23-1136	New Hanover (20JT240)	Affirmed
J.Z. v. CCR MOORESVILLE WELLNESS, LLC No. 23-789	Iredell (21CVS2216)	Affirmed
McDOUGALD v. WHITE OAK PLANTATION HOMEOWNERS ASS'N, INC. No. 23-756	Buncombe (20CVS4519)	Affirmed
PUB. SERV. CO. OF N.C., INC. v. SEN-ASHEVILLE I, LLC No. 23-1116	Henderson (20CVS1721)	Dismissed
STATE v. FOGELMAN No. 23-1124	Duplin (18CRS50060-61)	Dismissed
STATE v. GATLING No. 23-746	Hertford (20CRS275-278)	No error and remanded in part
STATE v. LEMLEY No. 23-1135	Wake (20CRS216031-910)	New Trial
STATE v. PRICE No. 23-361	Johnston (16CRS2558) (16CRS56417) (18CRS577)	No Error
STATE v. RAPE No. 23-1023	Union (21CRS53085)	No Error
STATE v. REY No. 23-847	Lee (20CRS51340)	Affirmed

STATE v. SACKMAN No. 23-872	Macon (22CRS294917)	Dismissed
STATE v. ST. ONGE No. 23-1047	Mecklenburg (20CRS215389-90)	No Error
STATE v. STIDHAM No. 23-823	Cleveland (21CRS54361)	Dismissed and no plain error

AMINAT O. AJAYI, PLAINTIFF
v.
THEODORE MICHAEL SEAMAN, DEFENDANT

No. COA23-1084

Filed 20 August 2024

1. Discovery—sanctions—dismissal with prejudice—consideration of lesser sanctions

In plaintiff's suit against defendant for battery and assault, the trial court properly exercised its discretion when imposing sanctions on plaintiff for discovery violations, pursuant to Civil Procedure Rule 37(d), by dismissing plaintiff's claims with prejudice and ordering her to pay defendant's attorney fees. Although the trial court did not include explicit language in its order stating that it considered lesser sanctions before imposing more severe sanctions, such consideration could be inferred from the record, including statements by the court warning that plaintiff's pattern of noncompliance and willfulness could lead to dismissal and the court's initial attempt to induce compliance by giving plaintiff an additional thirty days to comply, to no avail.

2. Attorney Fees—discovery violations—award proper—lack of comparable fee information—remand for re-determination of amount

In plaintiff's suit against defendant for battery and assault, the trial court did not err by, after determining that plaintiff repeatedly failed to comply with defendant's discovery and deposition requests and the court's order compelling discovery, ordering plaintiff to pay defendant's attorney fees associated with obtaining the discovery order. However, where the record evidence did not support the amount awarded, because it did not contain specific comparable rates from similarly skilled attorneys, the matter was remanded for a re-determination of the amount to be paid by plaintiff.

3. Judges—duty of impartiality—questioning of pro se litigant—no abuse of discretion

In plaintiff's suit against defendant for battery and assault, where the trial court served as the fact finder in a discovery hearing in which plaintiff appeared pro se on a motion to show cause regarding her noncompliance with a prior order to compel, the trial court did not abuse its discretion by interrupting plaintiff and questioning her about her level of understanding of the legal proceedings. The

court acted in pursuit of its duty to supervise and control the proceedings and, particularly in light of plaintiff's repeated failure to follow court rules and lack of focus in presenting her evidence and arguments, the court's actions were appropriate attempts to expediently resolve the ultimate question of why plaintiff had not complied with ordered discovery.

Appeal by Plaintiff from order entered 9 June 2023 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2024.

Arnold & Smith, PLLC, by Ashley A. Crowder, for the Plaintiff-Appellant.

McAngus, Goudelock & Courie, PLLC, by Meredith Cushing and Jeffrey B. Kuykendal, for the Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Aminat O. Ajayi appeals from the trial court's order granting Defendant Theodore Michael Seaman's motions for sanctions of dismissal with prejudice and award of attorney's fees due to Plaintiff's failure to comply with discovery requests. Plaintiff argues the court erred by failing to consider sanctions less severe than dismissal, by awarding attorney's fees, and by interrupting her presentation of evidence. We affirm the trial court's dismissal of Plaintiff's case and award of attorney's fees to Defendant, but remand for re-determination of the amount of attorney's fees awarded.

I. Factual and Procedural Background

Plaintiff filed this lawsuit against Defendant for alleged battery and assault on 21 June 2022. On 16 August 2022, Defendant served interrogatories and requests for production of documents ("Written Discovery") on Plaintiff with an incorrect case number. On 26 August 2022, Plaintiff's counsel moved to withdraw from further representation due to Plaintiff's lack of communication. The court found Plaintiff had not responded to counsel's communications for approximately three months and granted the motion. Plaintiff proceeded *pro se* throughout the remainder of the case.

In October 2022, Defendant's counsel attempted to schedule Plaintiff's deposition date in December 2022. Plaintiff responded that she was unavailable in December. This prompted Defendant's counsel to offer

potential dates in November. Plaintiff did not respond. On 10 November 2022, Defendant filed and served Notice of Video Deposition on Plaintiff to occur on 23 November 2022.

Plaintiff objected to Notice of Video Deposition, noting she was unavailable for the rest of the year and requested that the deposition be scheduled in 2023. Plaintiff did not appear at the 23 November deposition. Defendant provided four dates in January 2023 and Plaintiff responded that she was unavailable until 17 January 2023. Defendant then set the deposition for 18 January 2023.

On 7 November 2022, Defendant filed a Motion to Compel Plaintiff to provide responses to the Written Discovery, requesting sanctions in the forms of costs, including attorney's fees, for Plaintiff's failure to respond.

On 2 December 2022, Plaintiff filed a Motion to Dismiss Defendant's request for Written Discovery because the caption was incorrect. On 12 December 2022, the court heard Defendant's Motion to Compel responses to the Written Discovery. The court told Defendant to reissue the Written Discovery request with the correct case number and instructed Plaintiff to respond. That same day, Defendant re-issued the Written Discovery request with the correct case number. The Written Discovery requested information regarding the assault/battery incident, injuries that arose from it, Plaintiff's medical and provider history, medical expenses, and insurance information.

On 12 January 2023, Plaintiff served Defendant with incomplete responses to the Written Discovery requested. Plaintiff then failed to appear at the 18 January 2023 deposition date. On 20 January 2023, Defendant filed a Motion to Show Cause and to Compel Deposition. On 24 January 2023, Defendant's counsel provided Plaintiff a letter detailing deficiencies in her responses to the Written Discovery she had served on 12 January 2023. On 28 February 2023, Plaintiff responded to Defendant's letter with medical records, but no further responses or documents.

On 6 March 2023, the parties appeared before the trial court, who ordered that Plaintiff's deposition would be conducted on 27 March 2023. The trial court also ordered that Plaintiff should provide full responses to the Written Discovery request by 10 March 2023 and pay $97.00 in costs of Defendant's counsel fees for her failure to appear at the 18 January 2023 deposition. Plaintiff failed to produce the documents by 10 March 2023, as ordered.

On 23 March 2023, Defendant filed a Motion to Show Cause, Motion to Dismiss, and Motion for Additional Sanctions. That same day, Defendant's counsel emailed Plaintiff the Notice of Hearing for the

Motion to Show Cause scheduled for 12 April 2023. Plaintiff responded she would be unavailable. On 24 March 2023, Plaintiff filed a Motion to Reschedule Hearing on Order to Show Cause. This Motion was denied.

Plaintiff appeared at the 27 March 2023 deposition, but refused to answer questions about her current employer, how long she worked for her current employer, whether she reported to anyone at work when she missed work due to the alleged assault, and how many days she missed from work following the alleged assault. Plaintiff claimed these factual inquiries were immaterial to the case.

On 10 April 2023, Defendant submitted supporting documents for his Motion to Show Cause including the deposition transcript and an affidavit noting legal fees incurred due to the Plaintiff's alleged discovery violations.

On 12 April 2023, the trial court heard Defendant's Motion to Show Cause. Defendant's counsel asked the court to dismiss Plaintiff's complaint due to her discovery violations. The court noted the repeated violations and decided to take the Motion to Show Cause under advisement, explicitly warning Plaintiff that if there was not full compliance by a re-hearing date of 12 May 2023, the case would be dismissed, and Defendant's motion for attorney's fees would be granted.

On 12 May 2023, Defendant's Motion to Show Cause was reheard. The trial court entered a written order on 9 June 2023 granting Defendant's Motion to Show Cause, Motion to Dismiss, and Motion for Additional Sanctions (the "Dismissal Order"). In the Dismissal Order, the trial court found that Plaintiff's responses to the Written Discovery were incomplete. Additionally, the court found Plaintiff had refused to answer numerous questions in her ordered deposition and had willfully violated the court's Order to Compel twice. The court entered an award of sanctions in the amount of $6,081.00 for attorney's fees incurred by Defendant. Additionally, the court dismissed Plaintiff's complaint with prejudice. On 16 June 2023, Plaintiff appealed the Dismissal Order.

II. Analysis

Plaintiff raises three arguments on appeal. First, Plaintiff argues the trial court should not have granted Defendant's Motion to Dismiss with prejudice because the court did not consider lesser sanctions first. Second, Plaintiff argues the trial court erred in awarding Defendant's attorney's fees. Lastly, Plaintiff argues the trial court erred by interrupting and questioning Plaintiff during the 12 May 2023 rehearing.

This Court reviews a trial court's award of sanctions and attorney's fees, as well as a trial court's broad discretionary power to control

the trial and question witnesses, for an abuse of discretion. *See Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564 (1996); *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996); *see also State v. Rios*, 169 N.C. App. 270, 281, 610 S.E.2d 764, 772 (2005) (citing *State v. Mack*, 161 N.C. App. 595, 598, 602, 589 S.E.2d 168, 171, 173 (2003)). A trial court abuses its discretion when "its decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 603, 821 S.E.2d 711, 728 (2018) (citations omitted) (internal quotations omitted).

A. Awarding Sanctions

Trial courts have broad discretion over sanctions. *See Rose v. Isenhour Brick & Tile Co.*, 120 N.C. App. 235, 240, 461 S.E.2d 782, 786 (1995). Trial courts do not abuse their discretion by imposing severe sanctions if the sanction is enumerated "and there is no specific evidence of injustice." *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (citations omitted) (internal quotations omitted).

When a party fails to comply with a properly noticed deposition or interrogatory, the trial court can make orders "in regard to the failure as are just," and require the failing party to pay reasonable expenses caused by the failure, including attorney's fees. N.C. R. Civ. P. 37(d). Dismissal of an action and awarding attorney's fees are listed sanctions for failures to comply with orders compelling discovery. N.C. R. Civ. P. 37(b)(2)(c).

1. Sanction of Dismissal

[1] Plaintiff asserts dismissing her case as a sanction for noncompliance with discovery requests was an abuse of discretion by the trial court because the court did not consider lesser sanctions prior to dismissing with prejudice. Sanctions that determine the outcome of a case, such as dismissals, are reviewed for an abuse of discretion. *American Imports, Inc. v. G.E. Emps. W. Region Fed. Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978). But dismissals are also "examined in the light of the general purpose of the rules to encourage trial on the merits." *Id.* We thereby review Plaintiff's argument "utilizing an abuse of discretion standard while remaining sensitive to the general preference for dispositions on the merits that lies at the base of our rules of civil procedure." *See Batlle*, 198 N.C. App. at 419, 681 S.E.2d at 797.

Before dismissing an action with prejudice, a trial court must first consider less severe sanctions. *See Goss v. Battle*, 111 N.C. App. 173, 176–77, 432 S.E.2d 156, 158–59 (1993). When the record supports that the trial court considered less severe sanctions, the decision will not be

overturned unless it is "so arbitrary that it could not be the result of a reasoned decision." *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 911 (citing *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 506 (1995)). Trial courts are not required to list and reject every possible lesser sanction. *Id.* at 735, 629 S.E.2d at 911.

A sanction of dismissal is warranted for noncompliance with a court order. *See Ray v. Greer*, 212 N.C. App. 358, 363, 713 S.E.2d 93, 96–97 (2011). "The power of the trial court to sanction parties for failure to comply with court orders is essential to the prompt and efficient administration of justice." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987) (citing N.C. R. Civ. P. 41(b)). In *Daniels*, the plaintiff's case was dismissed due to the "plaintiff's previous refusal to comply with a lesser sanction." *Id.* at 681, 360 S.E.2d at 780. In *Baker v. Charlotte Motor Speedway, Inc.*, the plaintiff's case was dismissed with prejudice due to noncompliance with discovery, specifically the failure to produce medical records relating to injuries alleged in the claim. 180 N.C. App. 296, 298, 636 S.E.2d 829, 831 (2006). The plaintiff appealed and this Court upheld the decision, finding that the trial court's sanction of dismissal was supported by valid findings of fact and that the noncompliance " 'frustrated the purpose of discovery[,] . . . denied [the] defendants the opportunity to prepare properly for trial[,] . . . [and] unfairly prejudiced [the d]efendants in their defense of his claims,' and caused [the] defendants to incur additional costs." *Id.* at 300–01, 636 S.E.2d at 832.

The clearest way a trial court can show that it considered lesser sanctions is through explicit language in its order imposing sanctions. *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828–29 (2005). For example, the order in *In re Pedestrian Walkway Failure* stated:

> [T]he court has carefully considered each of [the plaintiff's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct[.]

Id.

While such written language in orders is sufficient for a finding, it is not necessary to show that a trial court considered lesser sanctions before dismissing the case. *See Hursey*, 121 N.C. App. at 179, 464 S.E.2d

at 507. "[T]his Court will affirm an order for sanctions where 'it may be inferred from the record that the trial court considered all available sanctions.' " *In re Pedestrian Walkway Failure*, 173 N.C. App. at 251, 618 S.E.2d at 828 (citing *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507).

Here, Plaintiff argues the trial court abused its discretion and did not consider lesser sanctions because its Dismissal Order did not contain explicit language like the language present in *In re Pedestrian Walkway Failure*. While explicit language is not present in the Dismissal Order, the record in this case demonstrates the trial court considered lesser sanctions. The Dismissal Order's findings implicitly show the trial court considered—and initially employed—less severe methods. The Dismissal Order includes incidents of Plaintiff's noncompliance and their cumulative effect on the proceedings:

> 5. On January 13, 2023 Plaintiff served Defendant with drastically incomplete responses to Defendant's First Set of Interrogatories and Requests for Production of Documents wherein she objected to responding to a majority of the requests and failed to provide any medical records or bills in support of her allegations.
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> . . .
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> 7. Plaintiff failed to contact the undersigned and failed to serve supplemental responses.
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> 8. A hearing on Defendant's Motion to Compel was held on March 6, 2023 and the Honorable Judge Reginald McKnight ordered Plaintiff "shall fully and completely supplement..." the responses and "Plaintiff's supplemental written responses shall be delivered to defense counsel by 5:00pm on March 10, 2023." Judge McKnight also ordered Plaintiff to sit for her deposition, at which she refused to answer numerous questions.
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> 9. Plaintiff failed to produce the complete supplemental discovery responses to Defense Counsel by March 10, 2023.
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> 10. Thereafter, Plaintiff counsel served some incomplete responses to the Interrogatories and provided some medical records.
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> . . .
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> 13. As of the date of the instant hearing, Plaintiff still had not provided complete Responses pursuant to the Order

> to Compel and it was determined Plaintiff willfully violated the Court's Order.
>
> 14. At the hearing on April 12, 2023, Judge Eady-Williams provided Plaintiff with an additional thirty (30) days to provide complete responses and set a follow-up hearing for May 12, 2023.
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> 15. On May 12, 2023, the follow-up hearing on Defendant's Motion to Show Cause was heard by the Honorable Judge Eady-Williams.
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> 16. As of the date of the hearing, Plaintiff still had not complied with the [c]ourt's Order to Compel and it was determined Plaintiff willfully violated the [c]ourt's Orders.
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> . . .
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> 20. Pursuant to Rule 37(b)(2) of the North Carolina Rules of Civil Procedure, if a party fails to obey an order entered pursuant to Rule 37(a) of the North Carolina Rules of Civil Procedure, a judge of the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to, dismissing the action, and/or requiring the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure to comply.

The Dismissal Order acknowledges the court had previously provided an additional thirty days for compliance and set a rehearing date. Instead of ruling at the outset on Defendant's Motion to Show Cause, the court provided Plaintiff an additional thirty days to comply. Finding of fact 20 also shows the trial court was, at a minimum, aware dismissal was but one of the sanctions that Rule 37(b)(2) allowed it to impose; the trial court nonetheless chose dismissal.

The remainder of the record further shows the trial court considered lesser sanctions. During the 12 April 2023 hearing on Defendant's Motion to Show Cause, the trial court noted Plaintiff's "pattern of noncompliance" and issued a warning that, if Plaintiff did not comply by the rehearing date within thirty days, the sanctions of fees and dismissal would be imposed. The judge stated:

> What [defense counsel] has requested is, in my estimation, an extreme yet valid request. *Extreme to the extent that it's rare that [c]ourts will dismiss cases, disposit*

> – *matters*, *just dispose it*, *get rid of it for discovery issues*. . . . But what [defense counsel] has also presented is what she deems a pattern of noncompliance, a pattern of behavior, and she's also provided cases where it's not unheard of for a [c]ourt to dismiss a case when there's, A, a pattern; or B, willful non-compliance."
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> . . .
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> I'm taking the motion for contempt under advisement for a period of 30 days. At the end of 30 days, I want this matter to come back on to see if there's been compliance – full compliance. If not, I'm dismissing the case, period. I'm granting the sanctions [defense counsel] requested and I'm granting the attorney's fees she's requested.
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> . . .
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> And so, [Plaintiff], I think I'm bending over backwards, and [defense counsel] knows that, and so I'm giving you 30 days, otherwise, I'm dismissing the case. I want to know in 30 days whether that information has been received, and if not, it will be dismissed with prejudice, which means you cannot refile the claim.

(Emphasis added).

The judge noted her understanding that while dismissing a case is rare, the evidence presented by Defendant supported her doing so. But instead of dismissing the case at the initial hearing on Defendant's Motion to Show Cause, the judge provided Plaintiff another chance to comply with the discovery requests. The judge declined to require that interim attorney's fees be paid in the thirty-day period, and instead wanted to wait to see if there had been compliance to grant attorney's fees.

Plaintiff also argues that, under Rule 26, she was entitled to respond to discovery by objections. However, Rule 37(d) provides "the failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Rule 26(c)." N.C. R. Civ. P. 37(d). The record does not reflect Plaintiff ever applied for a protective order. The court found in its Dismissal Order the record did not show Plaintiff was substantially justified in her failure to comply with discovery requests, and Plaintiff was without justification for the failure to comply with the Order to Compel. Thus, Plaintiff's argument that she was entitled to respond to discovery by objections is unfounded.

2. Sanction of Awarding Attorney's Fees

[2] Plaintiff asserts that the trial court (1) erred in awarding attorney's fees as a sanction and (2) that the trial court awarded an unreasonable amount of attorney's fees. We disagree that awarding attorney's fees was error, but we agree that the amount awarded is unsupported.

When there is no justification for a non-moving party's failure to comply with an order to compel discovery, the court is required to award attorney's fees to the moving party. *Kent v. Humphries*, 50 N.C. App. 580, 590, 275 S.E.2d 176, 183 (1981) (citing N.C. R. Civ. P. 37(a)(4)). An award of expenses should be a reimbursement to the successful movant and not a punishment to the non-complying party. *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988) (citing 4A J. Moore, J. Lucas & D. Epstein, *Moore's Federal Practice* Par. 37.02 [10-1] at 37–47 (2d ed. 1987)). To determine the reasonableness of attorney's fees, "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989) (citation omitted). An affidavit may attest fees incurred, but an affidavit that contains only a conclusory statement and does "not state a comparable rate by other attorneys in the area with similar skills for like work" is insufficient evidence to establish the awarded amount was reasonable. *Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 105, 855 S.E.2d 819, 828 (2021).

Here, Plaintiff repeatedly failed to comply with Defendant's discovery and deposition requests, and the trial court properly awarded attorney fees to Defendant for expenses incurred in obtaining the Order to Compel. *See Kent*, 50 N.C. App. at 590, 275 S.E.2d at 183. However, the record evidence is insufficient to support the amount of attorney's fees awarded to Defendant. The record is not completely void of findings the fees were reasonable; it contains defense counsel's affidavit, a bill for the video deposition, and a bill for the transcript report. These materials were part of the record, and proper for the trial court to rely upon them to determine the amount of attorney's fees to award. *See Benfield*, 89 N.C. App. at 422, 366 S.E.2d at 504.

Nonetheless, the record is insufficient to support the amount of attorney's fees awarded. Defense counsel's affidavit attests:

> 9. Accordingly, the total amount of attorneys' fees sought to be recovered in defense of this lawsuit is $4,675.00 and the total amount of paralegal fees to be recovered is $1,136.00.

> 10. I believe that these hourly rate amounts are reasonable based on my experience and training during the relevant time period handling this type of case, the location where the matter is pending and the work necessary based on Plaintiff's failure to prosecute her claim. It is my opinion that the total fee of $4,675.00 representing 27.5 hours of attorney time and 14.2 hours of paralegal time spent on the matter is reasonable.
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> 11. The time and tasks taken in defense of the claim were reasonable and necessary for the defense of the action on behalf of Defendants.
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> 12. The total sum of legal fees incurred in this matter is $5,811.00.

The affidavit includes the attorney's billable rate and the number of hours expended. However, the affidavit does not contain any specific comparable rates from other similarly skilled attorneys. The record lacks evidence from which the trial court could make a finding of fact regarding comparable fees. Without such comparisons, we may not uphold the amount awarded. *See Porters Neck*, 276 N.C. App. at 105, 855 S.E.2d at 828.

We affirm the trial court's award of attorney's fees for Defendant, but remand the Dismissal Order for the trial court to reconsider the amount of attorney's fees. The court should consider the reasonableness of defense counsel's fees as compared to similarly situated attorneys in the area.

B. Exercising and Controlling Trials

[3] Plaintiff argues that the trial court abused its discretion by questioning her during her evidentiary presentation and argument. Plaintiff further contends that the court abused its discretion by making comments and inferences on the record regarding her education and level of understanding of the legal process.

"The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C. R. Evid. 611(a). A trial court's questions should be viewed "in the light of all the facts and attendant circumstances disclosed by the record." *Andrews v. Andrews*, 243 N.C. 779, 781, 92 S.E.2d 180, 181 (1956). Trial judges are

not prohibited from expressing their opinions and making comments in trials where they serve as the fact finder. *See Hancock v. Hancock*, 122 N.C. App. 518, 528, 471 S.E.2d 415, 421 (1996).

Trial judges have "the duty to supervise and control [proceedings], including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties." *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (1999) (citing *State v. Agnew*, 249 N.C. 382, 395, 241 S.E.2d 684, 692 (1978)). Trial judges also have a duty to question witnesses "to clarify testimony or to elicit overlooked pertinent facts." *Id.* (citation and quotation marks omitted); *see State v. Quick*, 329 N.C. 1, 25, 405 S.E.2d 179, 193 (1991) (holding court properly used its questioning authority to "to clarify ambiguous testimony and to enable the court to rule on the admissibility of certain evidence").

In *Angarita v. Edwards*, this Court held that a trial court did not abuse its discretion when questioning and interrupting a defendant. 278 N.C. App. 621, 628, 863 S.E.2d 796, 802 (2021). Considering the trial judge's interruptions, the Court found "it [was] apparent that the trial judge interrupted only in the interests of expediency and to bring a pro se [d]efendant into compliance with the rules of evidence." *Id.* Additionally, in the absence of evidence of the trial judge's personal bias, the Court found the judge's apparent bias against or attitude toward the defendant arose "from a disapproval of [the d]efendant's disorganized arguments and mode of presenting evidence." *Id.* at 629, 863 S.E.2d at 803. Further, the Court in *Angarita* held the trial court's interruption of defendant was, if anything, helpful to the defendant's ability to express their case. *Id.* at 629, 863 S.E.2d at 802.

Here, the trial court acted as fact finder and asked Plaintiff questions, made comments, and expressed inferences in pursuit of that duty. The purpose of the 12 May rehearing was to assess Plaintiff's compliance with the prior Order to Compel. Similar to the facts in *Angarita*, the record and hearing transcript in this case tend to show the trial court's efforts to expediently reach the important matters before the court, particularly in light of Plaintiff's repeat failure to adhere to court rules and unfocused presentation of evidence. The trial court steered Plaintiff toward the legal matter that needed discussion—why she had not complied with ordered discovery. The judge also interrupted Defendant's attorney to focus the proceeding.

Plaintiff contends the trial judge's conduct prevented her ability to properly present her case *pro se*. Plaintiff's choice to represent herself does not alter the court's duties and abilities during trial. *See Brown v. Kindred Nursing Ctrs. E., L.L.C.*, 364 N.C. 76, 84, 692 S.E.2d 87, 92

(2010) (explaining that the rules apply equally to all parties, notwithstanding representation status); *Bledsoe v. Cnty. of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999). Further, the court allowed Plaintiff ample opportunity to explain why she had failed to comply with the Order to Compel, which the court considered pivotal to its ultimate decision. The record here does not support Plaintiff's contention that the trial abused its discretion.

III. Conclusion

We hold the trial court did not abuse its discretion when presiding over the 12 May 2023 hearing. The trial court also did not err in sanctioning Plaintiff by dismissing her case and by awarding Defendant attorney's fees. However, we hold the trial court's determination of the amount awarded was based on insufficient evidence. We affirm the trial court's Dismissal Order, but remand to the trial court for a redetermination of the amount of attorney's fees to be awarded. The court is free to hear additional evidence as needed to reach its determination.

AFFIRMED AND REMANDED.

Judges TYSON and ZACHARY concur.

JOSEPH ASKEW; CHARLIE GORDON WADE III; AND CURTIS WASHINGTON, PLAINTIFFS
v.
CITY OF KINSTON, A MUNICIPAL CORPORATION, DEFENDANT

No. COA22-407-2

Filed 20 August 2024

Eminent Domain—condemnation—Corum claims—adequate state law remedy available—dismissal proper

In a case brought by property owners (plaintiffs) alleging that a municipality (defendant) violated plaintiffs' substantive due process and equal protection rights under the North Carolina Constitution by condemning three properties as dangerous and marking them for demolition, on remand from the North Carolina Supreme Court for de novo review of the trial court's dismissal of plaintiffs' claims on summary judgment, the Court of Appeals affirmed the trial court after holding that an adequate state law remedy existed for each of plaintiffs' *Corum* claims pursuant to Chapter 160A (since repealed) of the North Carolina General Statutes. Chapter 160A

provided remedies—such as rights of appeal and to petition for certiorari review—that meaningfully addressed plaintiffs' claims of violation of their constitutional rights due to defendant's allegedly arbitrary actions.

On remand by opinion of the Supreme Court of North Carolina in *Askew v. City of Kinston*, No. 55A23 (N.C. June 28, 2024), vacating and remanding a 29 December 2022 opinion of this Court vacating and remanding an order entered 29 September 2021 by Judge Joshua Willey in Lenoir County Superior Court. Originally heard in the Court of Appeals 30 November 2022.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for Plaintiffs-Appellants.

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

COLLINS, Judge.

Direct claims against the State arising under the North Carolina Constitution are permitted only "in the absence of an adequate state remedy," and where an adequate state remedy exists, those direct constitutional claims must be dismissed. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Here, Plaintiffs filed direct claims alleging that Defendant violated their State constitutional rights to substantive due process and equal protection by condemning and marking for demolition three properties in Kinston, North Carolina: 110 North Trianon Street and 607 East Gordon Street, owned by Joseph Askew,[1] and 610 North Independence Street, owned by Curtis Washington.

The trial court dismissed those claims on summary judgment.[2] This Court vacated the summary judgment order for lack of subject-matter jurisdiction. *See Askew v. City of Kinston*, 287 N.C. App. 222, 883 S.E.2d 85 (2022). The North Carolina Supreme Court vacated this Court's opinion, opining that "[t]he prospect of agency relief goes to an element

1. Askew's son was the record owner of these properties when they were first condemned. Ownership was transferred to Askew by deed recorded 24 January 2019.

2. Plaintiff Charlie Gordon Wade III voluntarily dismissed his complaint without prejudice prior to the order granting summary judgment to Defendant and did not participate in this appeal.

of a *Corum* cause of action" rather than the court's jurisdiction, and remanded the case for "a standard de novo review of the merits of the trial court's summary judgment order." *Askew*, No. 55A23, slip op. at 2, 30. On remand, we hold that an adequate state law remedy exists for each of Plaintiffs' distinct *Corum* claims, and we therefore affirm the trial court's summary judgment order dismissing the claims.

I. The Statutory Condemnation Process and Administrative Relief

At the time Plaintiffs initiated this action, Chapter 160A of the North Carolina General Statutes provided a comprehensive scheme governing the procedures by which a town may condemn buildings and outlining the administrative relief available to individuals whose properties have been condemned.[3]

Under N.C. Gen. Stat. § 160A-426, a building inspector has the authority to declare a building unsafe upon determining that the building is "especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes." N.C. Gen. Stat. § 160A-426(a). If the owner of a building that has been condemned as unsafe fails to take prompt corrective action, the inspector must notify the owner:

> (1) That the building or structure is in a condition that appears to meet one or more of the following conditions:
>
> a. Constitutes a fire or safety hazard.
>
> b. Is dangerous to life, health, or other property.
>
> c. Is likely to cause or contribute to blight, disease, vagrancy, or danger to children.
>
> d. Has a tendency to attract persons intent on criminal activities or other activities which would constitute a public nuisance.

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3. Citing the need for "a coherent organization of statutes that authorize local government planning and development regulation," the General Assembly repealed Article 19 of Chapter 160A of the General Statutes and added Chapter 160D in 2019. An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, §§ 2.1.(a), 2.3, 2019 N.C. Sess. Laws 424, 439 (effective 1 Jan 2021). Chapter 160D "collect[s] and organize[s] existing statutes," and is not intended to "eliminate, diminish, enlarge, [or] expand the authority of local governments . . . ." *Id.* § 2.1.(e)-(f). Article 19 of Chapter 160A remained in effect at all relevant times in this case. *Id.* at 547, § 3.2.

> (2) That a hearing will be held before the inspector at a designated place and time, not later than 10 days after the date of the notice, at which time the owner shall be entitled to be heard in person or by counsel and to present arguments and evidence pertaining to the matter; and
>
> (3) That following the hearing, the inspector may issue such order to repair, close, vacate, or demolish the building or structure as appears appropriate.

Id. § 160A-428.

> If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall make an order in writing, directed to the owner of such building or structure, requiring the owner to remedy the defective conditions by repairing, closing, vacating, or demolishing the building or structure or taking other necessary steps [within a time period] as the inspector may prescribe.

Id. § 160A-429.

"Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order." *Id.* § 160A-430. "The city council shall hear and render a decision in an appeal within a reasonable time. The city council may affirm, modify and affirm, or revoke the order." *Id.* "In the absence of an appeal, the order of the inspector shall be final." *Id.*

N.C. Gen. Stat. § 160A-393, provides for review in the nature of certiorari by the superior court of the quasi-judicial decisions of decision-making boards under Chapter 160A, Article 19, which includes the condemnation process and the city council's consideration of orders issued pursuant to N.C. Gen. Stat. § 160A-429. *See id.* § 160A-393(a)-(b).

On certiorari review, "the court shall ensure that the rights of petitioners have not been prejudiced" because the decision being appealed was, inter alia, "[i]n violation of constitutional provisions," "[a]rbitrary or capricious," or "[a]ffected by other error of law." *Id.* § 160A-393(k)(1). The court decides "all issues raised by the petition by reviewing the record," which may be "supplemented with affidavits, testimony of

witnesses, or documentary or other evidence if, and to the extent that, the [statutorily prescribed] record is not adequate to allow an appropriate determination" of these issues. *Id.* § 160A-393(j).

If the court concludes that the decision was "based upon an error of law" then it may "remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error." *Id.* § 160A-393(l)(3). The court may also "issue an injunctive order requiring any other party to th[e] proceeding to take certain action or refrain from taking action that is consistent with the court's decision on the merits of the appeal." *Id.* § 160A-393(m).

II. Factual Background

In 2017, Defendant's city inspectors generated a list of over 150 properties that were unoccupied and would be subject to condemnation under North Carolina law. Inspectors then narrowed the list to 50 properties to prioritize for the condemnation and demolition process based on the following criteria:

a. Dilapidated, blighted, and/or burned properties;

b. Residential (noncommercial) properties;

c. Vacant/unoccupied properties;

d. Properties in proximity to a public use, such as a school or a park;

e. Properties fronting on or in close proximity to a heavily travelled road;

f. Properties in proximity to other qualifying properties (ie, forming part of a "cluster" of dilapidated properties); and

g. Properties in an area of police concern.

In September 2017, the city council reviewed and approved the inspectors' criteria and finalized the list of properties to prioritize for condemnation, which included Askew's properties, 110 North Trianon Street and 607 East Gordon Street. Washington's property, 610 North Independence Street, was not included on the original list of 50 properties but was later prioritized for condemnation when inspectors noticed the building was near collapse. The condemnation process advanced for each property as detailed below.

A. 110 North Trianon Street

110 North Trianon Street was condemned as dangerous to life on 28 November 2017 because of liability to fire, bad condition of the walls, decay, and unsafe wiring. After a hearing on 9 April 2018, the building inspector issued an order to abate, directing Askew to "remedy the defective conditions within 120 days from the date of this Order, by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Askew of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Askew did not appeal this order.

The building inspector re-inspected 110 North Trianon Street on 6 November 2018 and recommended "[m]oving forward with the condemnation process," noting that "[t]here has not been an observable improvement to the condition of the property." On 20 November 2018, Askew requested to be heard by the city council. The city council treated Askew's request as an appeal and, after hearing from Askew at the city council meeting on 7 January 2019, the city council decided to proceed with the condemnation process. Askew announced that he intended to appeal and that he would sue in federal court. There is no evidence in the record that Askew petitioned the superior court for certiorari.

B. 607 East Gordon Street

607 East Gordon Street was condemned as dangerous to life because of liability to fire, bad condition of the walls, decay, unsafe wiring, and house damage from fire on 28 November 2017. After a hearing on 9 April 2018, the building inspector issued an order to abate, directing Askew to "remedy the defective conditions [in three phases] within 60 days from the date of this Order, for the first phase, 120 days for the second phase and 120 days for the third phase by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Askew of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Askew did not appeal this order.

The building inspector re-inspected 607 East Gordon Street on 16 July and 20 November 2018 and noted that "[p]lans have been provided for the repair," that "[p]ermits have been issued for the repair or demolition," and that "[t]here has been an observable improvement to the condition of the property." On both occasions, the building inspector recommended "[g]ranting the owner [additional time] to obtain the necessary permits and begin repair or demolition." On 5 April 2019, the building inspector re-inspected 607 East Gordon Street and concluded

that "Askew has failed to stabilize the structure or protect the building from water damage that continues to cause rot and decay [and] the dangerous conditions listed on the original condemnation order still exist."

C. 610 North Independence Street

610 North Independence Street was condemned as dangerous to life because of liability to fire, bad condition of the walls, decay, and roof collapsing on 15 November 2018. After a hearing on 21 June 2019, the building inspector issued an order to abate, directing Washington to "remedy the defective conditions within 120 days from the date of this Order, by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Washington of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Washington did not appeal this order.

The condemnation process is now complete with respect to all three properties.

III. Procedural History

Plaintiffs initially filed a complaint against Defendant in federal court in January 2019, alleging "violations of their [Fourteenth] amendment, substantial due process, equal protection rights, discrimination, disparity and condemnation of a historical home." *Askew v. City of Kinston*, No. 4:19-CV-13-D, 2019 WL 2126690, at *1 (E.D.N.C. May 15, 2019). Plaintiffs' federal complaint was dismissed in May 2019 for lack of subject-matter jurisdiction. *Id.* at *4.

Plaintiffs then commenced this action by filing a complaint in Lenoir County Superior Court in June 2019, alleging violations of their rights to equal protection and due process under the North Carolina Constitution and seeking a declaratory judgment, injunctive relief, and damages in excess of $25,000. Defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the rules of civil procedure, which the trial court denied. Defendant then filed an answer to the complaint, generally denying the material allegations and asserting twelve affirmative defenses, including that "Plaintiffs' claims under the North Carolina Constitution are barred because an adequate state remedy is available" to compensate Plaintiffs for their alleged injuries. Defendant moved for summary judgment in July 2021, reiterating that "Plaintiffs have failed to establish any evidence that . . . [they] have no adequate alternative remedies." After a hearing, the trial court entered a written order on 29 September 2021 finding "that there is no genuine issue as to any material fact" and

granting Defendant judgment as a matter of law on all claims. Plaintiffs timely appealed to this Court.

By opinion filed 29 December 2022, this Court vacated the summary judgment order and remanded the case to the trial court with instructions to dismiss Plaintiffs' claims without prejudice for lack of subject-matter jurisdiction. *Askew*, 287 N.C. App. at 230, 883 S.E.2d at 91. Plaintiffs appealed to the North Carolina Supreme Court, which vacated this Court's opinion and remanded for this Court to "first ask whether the administrative process provides an adequate state law remedy for plaintiffs' discrete constitutional challenges," and, if not, to "examine whether a genuine factual dispute exists on the merits of the surviving *Corum* claims." *Askew*, No. 55A23, slip op. at 30.

IV. Discussion

Plaintiffs argue that the trial court erred by granting summary judgment to Defendants and dismissing their direct constitutional claims.

A. Standard of Review

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) (citations omitted).

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." *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 909 (2008) (citation omitted). "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." *Id.* (citation omitted). "Once the moving party has met its burden, the non-moving party must forecast evidence demonstrating the existence of a prima facie case." *Id.* (italics and citation omitted).

B. *Corum* Claims

The North Carolina Constitution guarantees that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18. To protect this guarantee, North Carolina courts recognize that, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. However, courts must "bow to established claims and remedies" where those vehicles are adequate. *Id.* at 784, 413 S.E.2d at 291. Thus, an essential element of a *Corum* claim is that "there must be no adequate state remedy." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 413, 858 S.E.2d 788, 794 (2021) (quotation marks and citation omitted).

An adequate remedy need not necessarily provide the relief that a plaintiff seeks. *Washington v. Cline*, 385 N.C. 824, 829, 898 S.E.2d 667, 671 (2024) (citation omitted). Rather, "an adequate remedy is one that meaningfully addresses the constitutional violation[.]" *Id.* (citation omitted). "[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009). Additionally, "an adequate remedy must provide the possibility of relief under the circumstances." *Id.* at 340, 678 S.E.2d at 355.

C. Plaintiffs' Claims

Plaintiffs argue that Defendant's condemnation practices violated their State constitutional rights to substantive due process and equal protection. Each of these rights is granted by Article I, Section 19 of the North Carolina Constitution, which states:

> 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.

N.C. Const., art. I, § 19. "Despite their shared constitutional origins, plaintiffs' *Corum* claims assert different rights, raise different injuries, and envision different modes of relief." *Askew*, No. 55A23, slip op. at 14. Accordingly, we address each claim independently.

1. Substantive due process

Plaintiffs assert that Defendant's actions in condemning and scheduling for demolition their properties were arbitrary and therefore violated their right to substantive due process.

"Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary[,] or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323 (1975) (citations omitted).

In their complaint, Plaintiffs allege:

> 94. The City of Kinston has acted arbitrarily with regards to, but not limited to: the decision to condemn each plaintiff's property, the decision to place on the list for demolition each plaintiff's property, the decision to order the demolition of each plaintiff's property, the decision to not remove plaintiff's property from the list for demolition, the decision to not rescind the order of demolition, and the decision to schedule plaintiff's property for imminent demolition.
>
> . . . .
>
> 97. Each plaintiff has been injured by the City of Kinston's action of condemning their property, and/or placing their property on the list for demolition, and/or ordering the demolition of their property, and/or placing their property on a schedule for imminent demolition, because of their race and/or because their property is located in a predominately African American community.

The administrative process articulated by Chapter 160A provides Plaintiffs "the opportunity to enter the courthouse doors and present [their] claim[s]" and "the possibility of relief under the circumstances." *Craig*, 363 N.C. at 339-40, 678 S.E.2d at 355. A party may appeal a condemnation decision to the city council. N.C. Gen. Stat. § 160A-430. If that appeal is unsuccessful, the party may challenge the council's decision by petitioning the superior court for writ of certiorari. *Id.* § 160A-393(f). On certiorari review, the superior court examines whether the challenged order is "[i]n violation of constitutional provisions," "[a]rbitrary or capricious," or "[a]ffected by other error of law." *Id.* § 160A-393(k)(1). If the court concludes that the city council's decision was "based upon an error of law," it may "remand the case with an order that directs the decision-making board to take whatever action should have been taken

had the error not been committed or to take such other action as is necessary to correct the error." *Id.* § 160A-393(l)(3). The court may also "issue an injunctive order requiring any other party to th[e] proceeding to take certain action or refrain from taking action that is consistent with the court's decision on the merits of the appeal." *Id.* § 160A-393(m).

Here, neither plaintiff appealed the orders to abate issued for 607 East Gordon Street or 610 North Independence Street to the city council. Askew appealed the order to abate issued for 110 North Trianon Street to the city council. That appeal was unsuccessful, and there is no record evidence that he petitioned the superior court for writ of certiorari. Had Plaintiffs petitioned the superior court for writ of certiorari and presented sufficient evidence to demonstrate that Defendant's actions were arbitrary, the superior court could have enjoined Defendant from demolishing Plaintiffs' properties and remanded the case to the city council with instructions to remove Plaintiffs' properties from the list for demolition. *See id.* § 160A-393(l)(3), (m). Thus, the administrative process provides Plaintiffs the possibility of relief under their circumstances and is therefore adequate. *See Craig*, 363 N.C. at 340, 678 S.E.2d at 355.

Because the administrative process provides an adequate remedy for Plaintiffs' substantive due process claim, Plaintiffs cannot establish an essential element of their corresponding *Corum* claim. *See Deminski*, 377 N.C. at 413, 858 S.E.2d at 794. Accordingly, the trial court properly granted summary judgment to Defendant on Plaintiffs' substantive due process claim.

2. Equal protection

Plaintiffs assert that Defendant selected their properties for demolition based on race and therefore violated their right to equal protection of the laws.

The Equal Protection Clause "guarantees equal treatment of those who are similarly situated." *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 447, 358 S.E.2d 372, 377 (1987) (quotation marks and citation omitted). "When the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment." *Askew*, No. 55A23, slip op. at 15-16 (quotation marks, emphasis, and citations omitted).

The administrative process articulated by Chapter 160A provides Plaintiffs "the opportunity to enter the courthouse doors and present [their] claim[s]" and "the possibility of relief under the circumstances." *Craig*, 363 N.C. at 339-40, 678 S.E.2d at 355. A party may appeal a condemnation decision to the city council. N.C. Gen. Stat. § 160A-430. If that

appeal is unsuccessful, the party may challenge the council's decision by petitioning the superior court for writ of certiorari. *Id.* § 160A-393(f). On certiorari review, the superior court examines whether the challenged order is "[i]n violation of constitutional provisions," "[a]rbitrary or capricious," or "[a]ffected by other error of law." *Id.* § 160A-393(k)(1). If the court concludes that the city council's decision was "based upon an error of law," it may "remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error." *Id.* § 160A-393(l)(3).

Here, neither plaintiff appealed the orders to abate issued for 607 East Gordon Street or 610 North Independence Street to the city council. Askew appealed the order to abate issued for 110 North Trianon Street to the city council. That appeal was unsuccessful, and there is no record evidence that he petitioned the superior court for writ of certiorari. Had Plaintiffs petitioned the superior court for writ of certiorari and presented sufficient evidence to demonstrate that Defendant's decisions were impermissibly discriminatory, the superior court could have remanded the case with an order to direct the council to implement a nondiscriminatory process for selecting properties for condemnation. *See id*. Thus, the administrative process provides Plaintiffs the possibility of relief under their circumstances and is therefore adequate. *See Craig*, 363 N.C. at 340, 678 S.E.2d at 355.

Because the administrative process provides an adequate remedy for Plaintiffs' equal protection claim, Plaintiffs cannot establish an essential element of their corresponding *Corum* claim. *See Deminski*, 377 N.C. at 413, 858 S.E.2d at 794. Accordingly, the trial court properly granted Defendant summary judgment on Plaintiffs' equal protection claim.

V. Conclusion

Because an adequate state law remedy exists for each of Plaintiffs' distinct *Corum* claims, the trial court properly granted summary judgment to Defendant.

AFFIRMED.

Judges ARROWOOD and STADING concur.

EST. OF LONG v. FOWLER

[295 N.C. App. 307 (2024)]

ESTATE OF MELVIN JOSEPH LONG, BY AND THROUGH MARLA HUDSON LONG, ADMINISTRATRIX, PLAINTIFF
v.
JAMES D. FOWLER, INDIVIDUALLY, DAVID A. MATTHEWS, INDIVIDUALLY, AND DENNIS F. KINSLER, INDIVIDUALLY, DEFENDANTS

No. COA23-629

Filed 20 August 2024

1. Negligence—wrongful death suit—summary judgment—proximate cause—foreseeability of injury—mobile chiller—unexpected pressurization

In a wrongful death case, where maintenance workers (defendants) at a university campus failed to put antifreeze into a mobile chiller when shutting it down for winter, after which the chiller became pressurized because residual water inside the chiller's pipes expanded and burst the pipes, and where a pipefitter (decedent)—who helped to move the chiller as part of a construction project—suffered fatal injuries upon removing a heavy metal cap securing the pipes, which flew off from the pressure and struck him, the trial court properly granted summary judgment to defendants because no genuine issue of material fact existed as to proximate cause. Specifically, the evidence showed that, even without antifreeze, "it should have been impossible" for the chiller to pressurize because it was "deenergized" (meaning not connected to electricity or water) for many weeks, and therefore decedent's injury was not a reasonably foreseeable consequence of defendants' conduct. Further, the chiller's manual and warning labels only warned of damage to the chiller itself if it became pressurized, not of danger to those working on it; thus, even if defendants had read the manual, they would not have known that failing to add antifreeze to the chiller could potentially cause bodily harm to somebody working on it.

2. Negligence—contributory—wrongful death suit—summary judgment—failure to take precautions despite extensive safety training

In a wrongful death case, where maintenance workers (defendants) at a university campus failed to put antifreeze into a mobile chiller when shutting it down for winter, after which the chiller became pressurized because residual water inside the chiller's pipes expanded and burst the pipes, and where a pipefitter (decedent)—who helped to move the chiller as part of a construction project—suffered fatal injuries upon removing a heavy metal cap securing

the pipes, which flew off from the pressure and struck him, the trial court properly granted summary judgment to defendants because no genuine issue of material fact existed as to decedent's contributory negligence. Although decedent did check the chiller's pressure gauges before removing the metal cap, he failed to check the bleed valve, which would have alerted him to the chiller's pressurization. This failure came in spite of decedent's extensive safety training, in which his employer instructed him to check for pressurization via valve even when the pressure gauges read zero and not to rely on others' work when verifying the safety of pressurized systems.

Judge HAMPSON dissenting.

Appeal by Plaintiff from order entered 25 January 2023 by Judge John M. Dunlow in Person County Superior Court. Heard in the Court of Appeals 29 November 2023.

Sanford Thompson, PLLC, by Sanford W. Thompson IV, and Hardison & Cochran, PLLC, by Timothy M. Lyons and John Paul Godwin, for Plaintiff-Appellant.

Parker Poe Adams & Bernstein, LLP, by Jonathan E. Hall and Patrick M. Meacham, for Defendants-Appellees.

GRIFFIN, Judge.

Plaintiff appeals from an order granting Defendants' Motion for Summary Judgment. Plaintiff contends the trial court erred by entering summary judgment because there are genuine issues of material fact as to whether the accident underlying the cause of action was foreseeable and as to whether the decedent was contributorily negligent. We affirm the trial court's order granting summary judgment.

I. Factual and Procedural Background

Defendants are North Carolina State University employees who are responsible for performing a variety of maintenance tasks on N.C. State's campus. Plaintiff is the Administratrix of her deceased husband's estate. Prior to his death, Decedent was an OSHA-certified pipefitter employed by Quate Industrial Services, an industrial equipment contractor that worked on piping, boilers, chillers, and pressure vessels.

Decedent worked at QSI intermittently for twenty years. Decedent was QSI's site supervisor for the project and was responsible for

day-to-day safety on site. Decedent's safety training while employed by QSI included a thirty-hour OSHA class as well as extensive third-party training provided through his employer. This training included instructions to double-check pressures valves, to not stand in front of caps while removing them, and to independently verify mechanisms and safeguards prior to beginning work on equipment that others have performed work on.

Defendant Dennis Kinsler was an "HVAC Advanced Technician" and employed by NCSU from 2012 to 2017. Kinsler worked on the water side of HVAC machines for NCSU in December 2016 and January 2017. Defendant James Fowler took HVAC courses at a community college in 1990 and 2000 and worked with several companies doing HVAC service and repair after 1990. Fowler began work as an "HVAC Mechanic" at NCSU in 2014. Defendant David Matthews was a "Field Maintenance Technician" who worked on HVAC equipment and supporting HVAC technicians.

In 2016, NCSU began a construction project at the Monteith Research Center on its Centennial Campus. NCSU contracted with Thalle Construction Company to provide related services. Thalle, in turn, subcontracted with QSI, Decedent's employer. As part of the project, QSI was responsible for moving a large mobile chiller attached to a tractor-trailer located outside of the MRC a few feet. The chiller has two cooling circuits, each of which has a chiller barrel containing water cooler tubes and high-pressure refrigerant. Water passes through the chiller barrels inside copper tubes, and the water is cooled by refrigerant outside the tubes. Several warning labels related to the use and maintenance of the chiller are attached to its exterior. One of the labels represented it was not possible to completely drain all the water from the chiller and directed that workers put five gallons of antifreeze into the chiller when shutting it down for winter. NCSU kept the manual to the chiller in one of its workshops on Centennial Campus.

On 19 December 2016, an NCSU supervisor, pursuant to a service request placed by QSI, issued a work order instructing employees to "PLEASE DRAIN AND SECURE CARRIER CHILLER FOR RELOCATION." Defendants Fowler and Matthews were assigned to drain the water from the chiller. Defendant Kinsler instructed them to undertake several specific steps, including performing a "nitrogen purge" to blow nitrogen through the water piping. Defendant Kinsler admittedly did not read the chiller's manual prior to entering the assignment. On 21 December 2016, Defendants Fowler and Matthews drained the chiller until the flow of water became a trickle. They then performed the nitrogen purge.

On 3 January 2017, Defendants Fowler and Matthews secured the chiller by attaching metal caps and flanges over the inlet and outlet pipes. Between 3 January 2017 and 20 January 2017, temperatures in Raleigh fell below freezing causing water in the chiller's pipes to freeze and expand. The expanding water burst the pipes, allowing high-pressure refrigerant to escape into the water system causing the chiller to become pressurized.

On 20 January 2017, Decedent and another QSI employee, Nate Weston, were assigned to remove the caps and flanges from the chiller. Prior to beginning their work, Decedent and Weston checked the chiller's pressure gauges located at various points on the exterior of the chiller, all of which read zero. However, they did not check the bleed valve on top of the chiller. The chiller was not connected to water or electricity at this point and, because the pressure gauges also read zero, they assumed the system was not pressurized. Decedent and Weston began removing one of the thirteen-pound caps from the chiller's suction line by loosening a nut on the side of the flange. There was no indication, such as the smell or sound of gas escaping from the cap, that the chiller was pressurized. Decedent proceeded to use a socket wrench on the flange when the cap flew off and struck him in the face and head. Emergency Medical Technicians transported Decedent to WakeMed where he was treated for his injuries. While at WakeMed, Decedent's blood tested positive for marijuana. Five days later, Decedent passed away from his injuries.

On 13 November 2018, Plaintiff filed a wrongful death lawsuit in Person County Superior Court. On 3 May 2019, the trial court entered an order granting Defendants' Motion to Dismiss because sovereign immunity barred claims against public employees sued in their individual capacities. Plaintiff appealed to this Court from that order. On appeal, we reversed the trial court's order holding Plaintiff's complaint sufficiently alleged claims for negligence and punitive damages and that sovereign immunity did not bar Plaintiff's claim. *Long v. Fowler*, 270 N.C. App. 241, 245–53, 841 S.E.2d 290, 293–300 (2020). Defendants then appealed to the North Carolina Supreme Court, which affirmed this Court's decision and remanded the case to Person County Superior Court. *Long v. Fowler*, 378 N.C. 138, 142–55, 861 S.E.2d 686, 691–98 (2021).

On remand, the parties conducted discovery over the course of sixteen months. During discovery, depositions were taken of each Defendant, Rusty Quate, Nate Weston, and experts from both sides, and documentation related to warning labels on the chiller and provisions of the chiller manual were produced.

On 26 December 2022, Defendants filed a Motion for Summary Judgment under Rule 56 of the North Carolina Rules of Civil Procedure. On 5 January 2023, the Motion came on for hearing. On 25 January 2023, the trial court entered an order granting Defendants' Motion for Summary Judgment. Plaintiff timely appealed.

II. Analysis

Plaintiff argues the trial court erred in granting Defendant's Motion for Summary Judgment because there are genuine issues of material fact as to whether Defendants proximately caused Decedent's death and as to whether Decedent was contributorily negligent.

An order granting summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 401, 858 S.E.2d 581, 588 (2021) (citation and internal marks omitted); *see also* N.C. R. Civ. P. 56(c).

> While summary judgment is rarely appropriate in cases involving negligence and contributory negligence, summary judgment is appropriate in such cases when the moving party carries his initial burden of showing the nonexistence of an element essential to the other party's case and the non-moving party then fails to produce or forecast at hearing any ability to produce at trial evidence of such essential element of his claims.

Terry v. Pub. Serv. Co. of N.C., 385 N.C. 797, 801, 898 S.E.2d 648, 651 (2024) (citations and internal marks omitted). To this point, summary judgment should be granted in cases where "only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Estate of Graham v. Lambert*, 385 N.C. 644, 650–51, 898 S.E.2d 888, 895 (2024) (citation and internal marks omitted). Moreover, where a party "presents an argument or defense supported by facts which would entitle him to judgment as a matter of law, the party opposing the motion must present a forecast of the evidence which will be available for presentation at trial and which will tend to support his claim for relief." *Cone v. Cone*, 50 N.C. App. 343, 347, 274 S.E.2d 341, 343–44 (1981) (citation and internal marks omitted).

We review an order granting summary judgment de novo. *Bryan v. Kittinger*, 282 N.C. App. 435, 437, 871 S.E.2d 560, 562 (2022) (citation

omitted). Under de novo review, we "consider[] the matter anew and freely substitutes [our] own judgment for that of the lower court[]." *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422, 894 S.E.2d 709, 712 (2023) (citation and internal marks omitted).

A. Proximate Cause

[1] Plaintiff argues the trial court erred by granting Defendants' Motion for Summary Judgment because there exists genuine issues of material fact about whether the accident resulting in Decedent's death was proximately caused by Defendants' conduct. Specifically, Plaintiff contends that because the chiller's manual specifically warned of system pressures that could result from failing to use antifreeze, and the accident resulted from system pressure, Defendants were negligent by failing to read the manual and by failing to use antifreeze when shutting the chiller down. Because the manual only warns of potential damage to the chiller itself, and not of injury to persons resulting from system pressures, we disagree that the injury caused was reasonably foreseeable.

To prevail on a claim of negligence, a "plaintiff must show that: (1) the defendant [or defendants] failed to exercise due care in the performance of some legal duty owed to the plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health and Hum. Servs.*, 383 N.C. 31, 61, 881 S.E.2d 558, 580 (2022) (quoting *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988)) (cleaned up). Proximate cause is defined as

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from *which a person of ordinary prudence could have reasonably foreseen* that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Williamson v. Liptzin, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (citing *Hairston v. Alexander Tank and Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)) (emphasis added).

"Foreseeability of injury is an essential question of proximate cause." *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E.2d 457, 461 (1972) (citation omitted). Thus, to establish proximate cause, "a plaintiff is required to prove that in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or

omission, or that consequences of a generally injurious nature might have been expected." *Williamson*, 141 N.C. App. at 10, 539 S.E.2d at 319 (citation and internal marks omitted). However, the law of negligence "requires only reasonable prevision. A defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (citing *Bennett v. Southern Ry. Co.*, 245 N.C. 261, 270–71, 96 S.E.2d 31, 38 (1957)). To this end, "[t]he law does not charge a person with all the possible consequences of his negligence," but rather recognizes that "[a] man's responsibility for his negligence must end somewhere." *Phelps v. City of Winston-Salem*, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967). Specifically, a party's responsibility for their negligent acts ends where "the connection between negligence and the injury appears unnatural, unreasonable and improbable[.]" *Id.*

Here, the record contains uncontested facts showing that it was not reasonably foreseeable that Defendants failing to put antifreeze in the chiller would result in catastrophic injury to Decedent. Rather, the resulting injury came about from an improbable chain of events that industry veterans had never seen before.

At the outset, it is noteworthy that the chiller was not energized, meaning it was not connected to electricity or water, and, therefore, according to the accident report prepared the day of, "it should have been impossible for it to contain pressure[.]" However, the chiller became pressurized by a chemical reaction occurring while the chiller was deenergized. Nonetheless, Decedent's employer and coworkers, as well as Plaintiff's expert, testified an accident of this nature was completely unexpected.

At his deposition, Marshall Quate, Decedent's employer and twenty-four-year veteran of the HVAC industry, represented that QSI had never worked "on a jobsite where [] a chiller unit was drained and antifreeze was added to it." In fact, despite having knowledge of the freezing temperatures and caps on the chiller, Marshall Quate did not consider pressurization to be a possibility and had never heard of an accident like this happening before. He testified that he could "not understand how [the accident] could happen."

QSI's other employee present that day, Nathan Weston, drafted an accident report characterizing the accident as resulting from "unexpected pressure." This characterization was based upon twenty-eight years of experience in pipefitting where he had never "heard of a disconnected, deenergized cooler actually being pressurized after sitting three

to four weeks without a connection[.]" To that point, Nathan Weston had "no clue" what caused the chiller to become pressurized and testified,

> Q: . . . In all your experience, all your years working around chillers, have you ever heard of a situation where there was water left in a chiller unit, and it caused freezing of the pipes or freezing of the refrigerant tubes to the point that they cracked or leaked?
>
> A: I have not heard of it. No. But this is probably the only time I've ever heard of one even blowing up like this. I've never heard of it anywhere.

Another QSI pipefitter and Mr. Weston's brother, Danny Weston, had never heard of antifreeze leaking into a pipe.

Plaintiff cites the deposition testimony of Defendants Fowler and Matthews to show they understood the sequence of events leading to the accident, and this understanding therefore makes the accident foreseeable. However, Defendant Fowler initially explains his understanding of the sequence in terms of causing damage to the chiller, not in terms of causing a fatal injury. Specifically, Defendant Fowler represented that the purpose of adding antifreeze to the chiller was "to protect the machine," and intended "to prevent the tubes from freezing and being damaged," not to prevent an accident of the type which occurred. Defendant Matthews, on the other hand, stated he did not know whether the series of events led to the cap hitting Decedent in the head. Instead, he agreed only with bare assertions of fact reflecting the sequence of events; not whether the outcome was foreseeable. Moreover, Defendant Matthews stated he had "very limited knowledge" about how the chiller worked.

Defendant Fowler's testimony exemplifies and contradicts a point Plaintiff contends warrants the reversal of summary judgment. Specifically, Plaintiff contends Defendants' failure to read the chiller's manual and warning labels could constitute actionable negligence and therefore warrants submission of the case to a jury. This is incorrect. Even assuming Defendants read the manual prior to commencing their work, the manual and labels only warned of damage to the chiller if it became pressurized, not of danger to those working on it. Thus, even if Defendants read the manual, they would not have noticed that failing to add antifreeze to the chiller during winter shutdown could result in a condition hazardous to the safety of those working on it.

This is not to say the manual does not warn of *other* hazards created by the chiller. Rather, the chiller's manual frequently cites electrical

shock as a potential cause of injury. Of relevance here, there is a black box titled "CAUTION" that states: "Electrical shock can cause personal injury. Disconnect all electrical power before servicing." In contrast, the section immediately following the warning, entitled "Winter Shutdown Preparation," does not contain any sort of indication that failure to use refrigerant may cause personal injury. Rather, the section warns about possible injury occurring while *draining* the chiller. The manual also warns about various points in the maintenance process where there is a risk of injury but does not specify failure to use refrigerant as one of these instances.

Alongside the manual, the labels attached directly to the chiller did not warn of the potential for injury to persons. One such label stated "**FREEZE WARNING!** It is not possible to drain all water from this heat exchanger! For freeze protection during shutdown, exchanger must be drained and refilled with 5 gals Glycol min. **TRAPPED WATER!**" Neither the manual nor the attached labels provide notice to technicians working on the chiller that failure to use refrigerant could potentially cause bodily harm to technicians servicing the chiller; much less those moving it.

Plaintiff's expert deposition summarizes the foreseeability of this accident:

> Q: And nowhere in the manual does it state that a failure to properly winterize the machine or add antifreeze, properly drain it, fully drain it, nowhere does it say that may present a hazard to humans, true?
>
> A: It does not specify hazard to humans in that verbiage.
>
> Q: It never talks about it being a safety concern, does it?
>
> A: It discusses it as a damage to the unit, correct.
>
> Q: And, again, so it does not discuss it as being a safety concern - -
>
> A: Not as a safety concern.

Ultimately, the undisputed facts show the accident resulting in Decedent's death was, as the depositions, expert testimony, and after-accident report reflects, the result of *unexpected* pressure and therefore not foreseeable. Being so, the law cannot hold Defendants responsible where "the connection between negligence and the injury appears unnatural, unreasonable and improbable[.]" *Phelps*, 272 N.C. at 30, 157 S.E.2d at 723. Resultingly, the trial court properly granted

summary judgment for Defendants because the uncontested facts show the accident was an unforeseeable result of Defendants' failure to use antifreeze, and thus Defendants' conduct could not be the proximate cause of Decedent's death.

B. Contributory Negligence

[2] Even assuming arguendo that there is a genuine issue of material fact as to whether Decedent's injury was reasonably foreseeable, Decedent's contributory negligence is sufficient to warrant summary judgment and bar recovery.

Under North Carolina law, every person has a duty "to take reasonable care to not harm others and a corresponding duty . . . to take reasonable care to not harm oneself." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 480, 843 S.E.2d 72, 74 (2020). In recognition of the latter duty, "a plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to his injury." *Id.* at 483, 843 S.E.2d at 76 (citation and internal marks omitted). "To establish contributory negligence, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 424, 677 S.E.2d 485, 499 (2009) (citations and internal marks omitted). Whether a plaintiff was contributorily negligent "does not depend on [the] plaintiff's subjective appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective standard of behavior*, such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citation and internal marks omitted) (emphasis added). When a plaintiff "possesses the capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and is injured as a result, [they] are charged with contributory negligence." *Moseley v. Hendricks*, 292 N.C. App. 258, 264, 897 S.E.2d 680, 684 (2024) (citing *Proffitt v. Gosnell*, 257 N.C. App. 148, 152–53, 809 S.E.2d 200, 204 (2017)).

Here, Decedent, as a matter of law, failed to conform his conduct to that of a reasonably prudent person in the same circumstances. QSI required Decedent to attend extensive safety training that, if heeded, would have ensured his safety. One fact of initial importance is that Decedent and his coworker discussed the possibility that the chiller could be pressurized, thus showing Decedent "possesse[d] the capacity to understand . . . a known danger." *Hendricks*, 292 N.C. App. at 264, 897 S.E.2d at 684. Unlike Defendants, Decedent should have reasonably

foreseen the danger presented by the chiller's potential pressurization because of his extensive safety training and his employer's safety procedures which reinforced his training.

For example, Decedent's training included instruction to stand to the side of a cap when removing it from a pipe for the purpose of mitigating any unexpected risk presented by the cap. Rusty Quate stated that Decedent had received training to this effect on multiple occasions. Defendants' expert opined that a pre-task safety plan, which was within the scope of Decedent's responsibilities, would have included this measure as well. Thus, Decedent not only possessed the capacity to understand the possibility of an unforeseeable danger, but also the training on how to avoid potential unforeseen circumstances that could present danger.

In anticipation of unexpected hazards, OSHA and QSI safety training disavowed relying on others' work when verifying the safety of pressurized systems. However, Decedent and his coworker, on the day of the accident, "assumed [the chiller was] completely deenergized," as it was "locked out, [and] tagged out." So, they "figured [they were] good to go." This assumption was incorrect. Rather than incorrectly assuming the system was depressurized, Decedent could have checked the bleed off valve located next to one of the pressure gauges on top of the chiller. Doing so, according to Plaintiff's expert, would not only have alerted Decedent to the chiller's pressurization but also allowed the pressure to be relieved, thereby preventing the cap from flying off and injuring Decedent. QSI trained Decedent to check for pressurization via valve even when a system's pressure gauges read zero. In failing to do so, Decedent's actions contradicted his training which he was given for the purpose of preventing unexpected accidents.

As Plaintiff's expert summarized the unexpected nature of Decedent's injury, QSI's owner summarized Decedent's contributory negligence:

> Q: Okay. So by its very definition, even if you think a system is depressurized, you train people, "Don't trust it. Keep your head out of the way. Don't stand in front of a cap when you're taking it off." Is that true?
>
> A: That's true.
>
> Q And even if you think a system is depressurized, if you have something like a bleed valve that you can check to be sure, you should use it, true?
>
> A: True.

Decedent failed to take these measures to ensure his own safety, despite his training to do so, showing his contributory negligence. Plaintiff failed to forecast evidence to the contrary. Defendants have carried their burden of showing, based on the uncontested facts, Decedent's contributory negligence. As "a plaintiff cannot recover for injuries resulting from a defendant's negligence if the [decedent]'s own negligence contributed to his injury[,]" *Draughon*, 374 N.C. at 483, 843 S.E.2d at 76 (citation omitted), the trial court properly entered summary judgment for Defendants.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not err by granting Defendants' Motion for Summary Judgment.

AFFIRMED.

Judge ARROWOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

Factual and Procedural Background

The Estate of Marvin Joseph Long (Decedent), by and through Marla Hudson Long as Administratrix (Plaintiff), appeals from an Order on Summary Judgment entered 25 January 2023 which granted Summary Judgment in favor of James D. Fowler (Fowler), David A. Matthews (Matthews), and Dennis F. Kinsler (Kinsler) (collectively, Defendants). The Record before us tends to reflect the following:

Defendants in this case are all employees of North Carolina State University (NCSU). Kinsler was an "HVAC Advanced Technician" and at NCSU from 2012 to 2017. In December 2016 and January 2017, Kinsler worked for NCSU, including on the water side of HVAC machines. Fowler took HVAC courses at a community college in 1990 and 2000, and he worked with several companies doing HVAC service and repair after 1990. He began work as an "HVAC Mechanic" at NCSU in 2014. Matthews was a "Field Maintenance Technician" working on HVAC equipment and supporting HVAC technicians.

The Carrier Chiller (Chiller) is a mobile chiller unit, which was placed at the rear of the Monteith Research Center (MRC) at NCSU.

The Chiller has two cooling circuits, each of which has a chiller barrel inside of which are water cooler tubes and high-pressure refrigerant. Water passes through the chiller barrels inside copper tubes, and the water is cooled by refrigerant outside the tubes. When the Chiller was not operating, the refrigerant in the chiller barrels was under more pressure than the water tubes in the barrels; thus, the refrigerant would go into the water piping system if there were leaks or cracks in the walls of the water tubes.

As part of a construction project, contractors had to move the Chiller approximately ten feet from its original location. Quate Industrial Services (Quate) was a subcontractor on the NCSU construction project and employed Decedent. Quate placed a service request with NCSU's Facilities Maintenance Department to "drain and secure" the Chiller so it could be relocated. On 19 December 2016, an NCSU supervisor issued a work order, which instructed employees to "PLEASE DRAIN AND SECURE CARRIER CHILLER FOR RELOCATION." Fowler and Matthews were assigned to drain the water from the Chiller. Kinsler instructed them to undertake several specific steps, including performing a "nitrogen purge" to blow nitrogen through the water piping. Kinsler testified he had never looked at the Chiller manual. Matthews had done preventative maintenance on the Chiller prior to the incident in this case and had worked with an AC mechanic when refrigerant was installed.

On 21 December 2016, Fowler and Matthews drained the Chiller by opening a valve at its base and allowing the water to drain until the unit appeared empty. They then used a cannister of compressed nitrogen to attempt to "push [the water], get [the water] out of the machine and dry the tubes . . . [s]o it doesn't freeze up." Fowler testified he knew if there was water left in the Chiller, it could freeze and break the tubes. The Winter Shutdown Preparation section of the Chiller manual and warning labels on the Chiller instructed antifreeze be used when shutting down the machine in the winter. However, Defendants did not put any antifreeze in the Chiller. Fowler and Matthews then "secured" the Chiller by attaching metal caps and flanges over the Chiller's inlet and outlet pipes on 3 January 2017. The caps weighed approximately thirteen pounds each.

Between 3 January 2017, when the caps were installed, and 20 January 2017, the date of the underlying incident, the Chiller remained outside near the MRC. Decedent was an employee of Quate and a pipefitter. He had training on safety procedures and was reportedly familiar with piping around chiller units generally. Defendants did not tell any Quate employee they had not filled the cooler tubes with antifreeze.

Quate was not responsible for shutting down the Chiller, nor were its employees trained to operate the Chiller. On 20 January 2017, Decedent and another Quate employee, Nate Weston, began to take the caps off the inlet and outlet pipes. The Chiller was not attached to electricity or water and was not running. Decedent and Weston walked around the Chiller to inspect it. They examined the pressure gauges on the water lines and the gauges read "zero."

When they began to loosen the flange to take the cap off of one suction line, Decedent loosened a nut on the right side of the flange "a couple of turns[.]" When the nut was loosened, Weston did not hear any sound of air escaping or smell any odor. Rusty Quate, Decedent's supervisor, testified at his deposition this would indicate there was no pressure in the line, and it was safe to continue to remove the cap. Decedent and Weston continued to remove the cap. Decedent started to use a socket wrench when the cap exploded out suddenly and struck him. Decedent died as a result of his injuries five days later.

After this incident, an Eddy Current Tube Analysis performed on the water tubes in the two chiller barrels revealed water tubes in the lower path of each chiller barrel were broken due to freeze damage. Defendants' expert testified water left in the Chiller when it was drained would collect in the lower tubes, and it was "very likely" when the water froze, the resulting ice expanded and ruptured the tubes, causing the damage shown by the Eddy Current Test. Weather records showed sub-freezing temperatures between 7 and 10 January 2017—after the caps had been installed on the Chiller pipes. Defendants' expert testified if any refrigerant had gotten into the water system as a result of damage to the tubes, this would have resulted in system pressure.

On 13 November 2018, Plaintiff filed a wrongful death lawsuit in Person County Superior Court. The Complaint alleged Decedent's death was caused by the negligence of six NCSU maintenance employees, who were sued in their individual capacities. Defendants filed a motion to dismiss under Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Appellate Procedure. The trial court entered an order granting Defendants' motion to dismiss on 3 May 2019. Plaintiff appealed, and a panel of this Court reversed the dismissal, holding sovereign immunity did not bar claims against public employees sued in their individual capacities and the Complaint sufficiently alleged claims for negligence and punitive damages. *Long v. Fowler*, 270 N.C. App. 241, 245-53, 841 S.E.2d 290, 293-300 (2020). Defendants then appealed to the North Carolina Supreme Court, which affirmed this Court's decision and remanded the case to Person County Superior Court. *Long v. Fowler*, 378 N.C. 138, 142-55, 861 S.E.2d 686, 691-98 (2021).

On remand, the parties proceeded with discovery over the course of sixteen months. During discovery, depositions were taken of each Defendant, Rusty Quate, Weston, and experts from both sides, and documentation related to warning labels on the Chiller and provisions of the Chiller manual was produced.

On 26 December 2022, Defendants filed a Motion for Summary Judgment under Rule 56 of the North Carolina Rules of Civil Procedure. Prior to the summary judgment hearing, Plaintiff voluntarily dismissed without prejudice the punitive damage claim and the negligence claims against three defendants. The trial court heard arguments on the Motion for Summary Judgment on 5 January 2023. On 25 January 2023, the trial court entered an Order on Summary Judgment granting Defendants' Motion. Plaintiff timely filed Notice of Appeal on 21 February 2023.

Issues

The issues on appeal are whether the trial court erred by granting Defendant's Motion for Summary Judgment on the basis of (I) foreseeability of the injury to Decedent from Defendants' alleged negligence; and (II) contributory negligence on the part of Decedent.

Analysis

We review a trial court's summary judgment order de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Under de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021) (emphasis added). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party." *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citation and quotation marks omitted). "The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976). All inferences are resolved against the moving party. *Id.*

"[S]ummary judgment is proper where the evidence fails to establish negligence on the part of defendant[.]" *Gardner v. Gardner*, 334 N.C. 662, 665, 435 S.E.2d 324, 327 (1993) (alterations, citations, and quotation marks omitted). Further,

> To survive a motion for summary judgment, plaintiff must have established a prima facie case of negligence by showing: (1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances as they existed.

Finley Forest Condominium Ass'n v. Perry, 163 N.C. App. 735, 739, 594 S.E.2d 227, 230 (2004) (citation and quotation marks omitted).

Summary judgment generally is a "drastic remedy" that should be used with caution. *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). "This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972)). Thus, "[w]hile our Rule 56 . . . is available in all types of litigation to both plaintiff and defendant, 'we start with the general proposition that issues of negligence . . . are ordinarily not susceptible to summary adjudication . . . but should be resolved by trial in the ordinary manner.' " *Page*, 281 N.C. at 706, 190 S.E.2d at 194. Consequently, in *Wilson Brothers v. Mobil Oil*, this Court held there is a presumption against summary judgment in negligence cases. 63 N.C. App. 334, 338, 305 S.E.2d 40, 43 (1983), *cert. denied*, 309 N.C. 634, 308 S.E.2d 718 (1983).

The majority incorrectly characterizes Defendants' evidence as "uncontested." In my view, Plaintiff's evidence, as well as contradictory statements by Defendants themselves, clearly create a genuine issue of material fact. To be clear, the amount of evidence on each side is of no matter in evaluating a motion for summary judgment so long as there is *some* evidence on each side. If so, summary judgment is properly denied so that the case may be submitted to a jury to assess the evidence's weight and credibility. *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224, 513 S.E.2d 320, 327 (1999) ("Before summary judgment may be entered, it must be *clearly established* by the record before the trial court that there is a lack of *any* triable issue of fact." (quoting *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998))).

I. Foreseeability

Plaintiff first contends the trial court erred in granting Summary Judgment for Defendants on the basis Decedent's injury was not a

reasonably foreseeable result of Defendants' failure to put anti-freeze into the Chiller's barrels.

"Foreseeability of some injurious consequence of one's act is an essential element of proximate cause[.]" *Hastings for Pratt v. Seegars Fence Co.*, 128 N.C. App. 166, 170, 493 S.E.2d 782, 785 (1997) (citing *Sutton v. Duke*, 277 N.C. 94, 107, 176 S.E.2d 161, 169 (1970)). "Issues of proximate cause and foreseeability, involving application of standards of conduct, are ordinarily best left for resolution by a jury under appropriate instructions from the court." *Id.* Further, this Court has stated

> [I]t is *only in exceptional cases*, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. *[P]roximate cause is ordinarily a question of fact for the jury*, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.

Poage v. Cox, 265 N.C. App. 229, 245, 828 S.E.2d 536, 546 (2019) (quoting *Williams*, 296 N.C. at 403, 250 S.E.2d at 258) (emphasis in original). Defendants contend Plaintiff cannot establish any genuine issue of material fact to show foreseeability. Defendants argue first the warning labels and the Chiller's manual provisions mentioned only potential damage to the machine, but they did not mention the possibility of inadvertent pressurization nor the creation of a potential hazard. Thus, in Defendants' view, the labels and manual are irrelevant. *See Burns v. Forsyth Cnty. Hosp. Auth.*, 81 N.C. App. 556, 562-63, 344 S.E.2d 839, 844-45 (1986). In opposing Defendants' Motion for Summary Judgment, however, Plaintiff presented evidence showing the first page of the Carrier manual specifically warned: "Installing, starting up, and servicing this equipment can be hazardous due to system pressures[.]" The Manual also instructs all those working on the Chiller to "observe precautions in the literature, and on tags, stickers, and labels attached to the equipment, and *any other safety precautions* that apply." These warnings may reasonably be interpreted as relating to potential dangers to persons working on the machine and the potential for pressurization.

Additionally, contrary to Defendants' assertions, a jury could reasonably conclude the system pressure hazard was foreseeable even though the Manual does not state the exact means by which the system became pressurized in this case. "The test of proximate cause is whether the risk of injury, *not necessarily in the precise form in which it actually occurs*, is within the reasonable foresight of the defendant." *Williams*, 296 N.C. at 403, 250 S.E.2d at 258 (citations omitted) (emphasis

added). Thus, Plaintiff need not establish the exact chain of events was reasonably foreseeable in order to recover. Rather, "[i]t is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected." *Slaughter v. Slaughter*, 264 N.C. 732, 735, 142 S.E.2d 683, 686 (1965). Given the warnings above, a jury could conclude Defendants should have foreseen the risk of injury resulting from pressurization of the Chiller.

Defendants also contend their training and experience was insufficient to put them on notice of a reasonable likelihood of injury if they failed to add antifreeze to the system. Defendants point to portions of their depositions and affidavits stating none of them had ever heard of this occurrence happening, they were unaware the Chiller had any residual water after they had drained it, and they did not know failing to completely drain the Chiller and add antifreeze could lead to injury.

Plaintiff put forward evidence of Defendants performing a "nitrogen purge" to attempt to blow out remaining water from the tubes and contends this shows Defendants appreciated the danger of leaving water behind in the tubes.

> [Plaintiff's Counsel]: And what made you think that you should use nitrogen if you were going to drain the water out?
>
> [Fowler]: Just to help push it, get it out of the machine and dry the tubes.
>
> [Plaintiff's Counsel]: And why would you want to dry the tubes?
>
> [Fowler]: So there's no water there.
>
> [Plaintiff's Counsel]: And why would you want there to be no water in there?
>
> [Fowler]: So it doesn't freeze up.
>
> [Plaintiff's Counsel]: Why would you care whether the water froze up in the tubes?
>
> [Fowler]: Well, you don't want them—you don't want to bust them.

Fowler also stated in his deposition he was familiar with refrigerants and knew they could pressurize the machine if the tubes were damaged. He further testified to his comprehension of the chain of events leading to Decedent's injury:

[Plaintiff's Counsel]: Okay. And were there ever—did you ever have occasion where you were using refrigerant, and something wasn't screwed on tight, or the threads didn't get quite right, and it would pop the—pop something loose?

[Defendants' Counsel]: Objection to form.

[Fowler]: A couple times.

[Plaintiff's Counsel]: Yeah. So the pressurized gas would be pressurized, and it could expel through an opening with force; is that right?

[Fowler]: Right.

[Plaintiff's Counsel]: All right. I said that with a lot of vulgar words, but if you've got pressurized gas, and it gets out, it can blow a coupling loose or knock something out; right?

[Fowler]: It comes out with pretty good force.

[Plaintiff's Counsel]: It comes out with good force.

[Fowler]: Yeah.

[Plaintiff's Counsel]: And was it your understanding, after you learned about this, that what had happened is there was refrigerant inside the water system and that, when the cap—the end cap loosened out, that it blew it out with force? Is that—was that your understanding of what happened?

[Defendants' Counsel]: Object to the form. Do you have an understanding of what happened? Go ahead. You can answer.

[Fowler]: Nobody ever came right out and said it, but I kind of figured.

[Plaintiff's Counsel]: Figured what?

[Fowler]: That something had gave, and the gas had got over there on the water side.

[Plaintiff's Counsel]: Yes, sir. And that caused the end cap to blow off?

[Fowler]: Right.

. . . .

> [Plaintiff's Counsel]: Now, we covered before the break that, if water was in the tubes that were in the heat exchanger, that, if it froze, it could damage the tubes; is that right?
>
> [Fowler]: Right.
>
> [Plaintiff's Counsel]: And if there was refrigerant surrounding the tubes, and they broke, then the refrigerant could get into the water system that way, couldn't it?
>
> [Fowler]: Yes, it could.
>
> [Plaintiff's Counsel]: And then, if the water system had this refrigerant in it, that would be why there would be pressurized gas in the water system; is that right?
>
> [Defendants' Counsel]: Object to the form.
>
> [Fowler]: Right.
>
> [Plaintiff's Counsel]: And the gas would have been trapped if it got in there after you put the caps on; right?
>
> [Fowler]: Yes.
>
> [Plaintiff's Counsel]: And then, if the cap was loosened, the gas would be the cause for expelling the cap outward from the water pipe. Would you agree with that?
>
> [Defendants' Counsel]: Object to the form.
>
> [Fowler]: I agree.

Matthews similarly testified to his understanding of the process by which Decedent was injured in his deposition:

> [Plaintiff's Counsel]: And so if the tubes inside the coolant chamber broke, then the coolant that surrounded those tubes could get into the water system, couldn't it?
>
> [Defendants' Counsel]: Objection to form.
>
> [Matthews]: Yes.
>
> [Plaintiff's Counsel]: And these refrigerants were like the nitrogen? They were pressurized gas; is that right?
>
> [Defendants' Counsel]: Objection.

> [Matthews]: I believe so, yes.
>
> [Plaintiff's Counsel]: Okay. So if, on January 20th of 2017, when [Decedent] went to start loosening the nuts on the flanges, if there was pressurized gas in there, that could have caused the end cap to shoot out and hit him in the head, couldn't it?
>
> [Defendants' Counsel]: Objection to form.
>
> [Matthews]: I believe so.

The majority asserts Defendants' deposition testimony reflected only an understanding of "the sequence of events; not whether the outcome was foreseeable." The majority improperly infers that its interpretation of the Defendants' depositions is the only way to interpret that testimony. While that is one interpretation of the testimony, a reasonable juror could also infer that because Defendants understood the process of creating a closed, pressurized system, an injury to an individual opening that pressurized system was foreseeable. Moreover, "[i]t is not essential, . . . in order that the negligence of a party which causes an injury should become actionable, that the injury in the precise form in which it in fact resulted, should have been foreseen." *Drum v. Miller*, 135 N.C. 204, 215, 47 S.E. 421, 425 (1904). *See also Hall v. Coble Dairies*, 234 N.C. 206, 210, 67 S.E.2d 63, 66 (1951) ("[I]t is not necessary that the tort-feasor should have been able to foresee the injury in the precise form in which it occurred, nor to have been able to anticipate the particular consequences ultimately resulting from the negligent act or omission.").

This is not to say that the majority's assessment is unreasonable or less reasonable—the point is that it is not our role to draw those inferences. Indeed, Rule 56 "does not contemplate that the court will decide an issue of fact, but rather will determine whether a real issue of fact exists." *Kessing*, 278 N.C. at 534, 180 S.E.2d at 830 (citations omitted). Rather, our Courts have consistently affirmed that it is the role of the jury, in all but the exceptional case, to determine negligence. *See*, *e.g.*, *Jenrette Transp. Co. v. Atl. Fire Ins. Co.*, 236 N.C. 534, 540, 73 S.E.2d 481, 486 (1952); *Gladstein v. S. Squire Assocs.*, 39 N.C. App. 171, 173, 249 S.E.2d 827, 828 (1978), *rev. denied*, 296 N.C. 736, 254 S.E.2d 178 (1979); *Cullen v. Logan Devs., Inc.*, 289 N.C. App. 1, 5, 887 S.E.2d 455, 458 (2023). This is particularly true as to the issue of negligence, where "[t]he jury has generally been recognized as being uniquely competent to apply the reasonable man standard[.]" *Green v. Wellons, Inc.*, 52 N.C.

App. 529, 531-32, 279 S.E.2d 37, 39 (1981) (quoting *Gladstein*, 39 N.C. App. at 174, 249 S.E.2d at 829).

Additionally, Plaintiff presented evidence portions of Fowler's and Matthews' affidavits contradicted their deposition testimony. For example, in Fowler's affidavit accompanying Defendants' Motion for Summary Judgment, Fowler stated "it never occurred to [him] that the [C]hiller could become pressurized" when capping the pipes. Further, "[e]ven if [he] had known the [C]hiller pipes could not be completely drained of water, it would not have occurred to [him] that the system could become pressurized if [Defendants] put caps over the open pipes." Matthews' affidavit contains identical paragraphs, although his deposition testimony likewise demonstrated an understanding of how the Chiller became pressurized. These statements are in contrast to Fowler's and Matthews' deposition testimony, recounted in part above, showing their understanding of how the Chiller became pressurized in just such a manner. Such contradictions raise an issue of Fowler's and Matthews' credibility. *See Kidd*, 289 N.C. at 367-68, 222 S.E.2d at 408-09. "Clearly, if the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to proceed to trial, inasmuch as this situation presents the type of dispute over a genuine issue of material fact that should be left to the trier of fact." *Id.* at 367-68, 222 S.E.2d at 409.

Further, Defendants' own expert wrote in his report: "When the chillers are not operating, the refrigerant system is under higher pressure than the chilled water piping system. When not operating, any leaks in the evaporator tubes allow higher pressure refrigerant to enter the chilled water piping system." Defendants' own expert testified it was reasonable to expect someone would have to take the caps off because a person had put them on. Based on this evidence, a jury could find Defendants reasonably should have foreseen the risk of injury if they improperly shut down the Chiller. Moreover, the contradictions between Defendants' deposition testimony and affidavits clearly raise an issue of credibility which should be resolved by a jury. *See Kessing*, 278 N.C. at 535, 180 S.E.2d at 830 ("If there is *any question as to the credibility of witnesses* or the weight of evidence, a summary judgment should be denied." (emphasis added) (citation omitted)). Defendants make colorable arguments around foreseeability, but so too does Plaintiff. Accordingly, there is a triable issue of fact as to whether Decedent's injury was reasonably foreseeable. Consequently, the trial court erred by granting Defendants' Motion for Summary Judgment.

II. Contributory Negligence

"Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Proffitt v. Gosnell*, 257 N.C. App. 148, 152, 809 S.E.2d 200, 204 (2017) (citation and quotation marks omitted). "In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: '(1) [a] want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury.' " *Daisy v. Yost*, 250 N.C. App. 530, 532, 794 S.E.2d 364, 366 (2016) (quoting *W. Constr. Co. v. Atl. Coast Line R. Co.*, 184 N.C. 179, 180, 113 S.E.2d 672, 673 (1922)). "It is well established that a claim is barred by the doctrine of contributory negligence if the injured party fails to exercise ordinary care for her own safety and such failure contributes to the injury." *Williams v. Odell*, 90 N.C. App. 699, 702, 370 S.E.2d 62, 64 (1988). "As our appellate courts have long recognized, negligence claims and allegations of contributory negligence should rarely be disposed of by summary judgment." *Patterson v. Worley*, 265 N.C. App. 626, 628, 828 S.E.2d 744, 747 (2019) (quoting *Sims v. Graystone Ophthalmology Assocs., P.A.*, 234 N.C. App. 65, 68, 757 S.E.2d 925, 927 (2014)).

Defendants point to Decedent's experience, training, and knowledge in support of their contention there is no genuine issue of material fact as to his contributory negligence. They allege Decedent failed to check pressure relief valves or stand clear of the metal before loosening the bolts, and these failures constitute contributory negligence.

Plaintiff produced evidence showing Decedent looked at pressure gauges, which read "zero," indicating the Chiller was not pressurized. Plaintiff also produced evidence showing Decedent loosened the nut on the flange before removing the cap and checked for noise, smell, or other indications of pressure, and there were none. Lastly, Plaintiff's evidence showed Defendants did not warn Decedent they had not filled the Chiller's tubes with antifreeze. Based on this evidence, a jury could determine Decedent could not reasonably have anticipated the Chiller was improperly drained and thus pressurized, and therefore find Decedent was not contributorily negligent.

In support of their position, Defendants cite to cases which are distinguishable from the facts of this case. Defendants point first to an unpublished opinion of this Court in which we upheld a trial court's grant of summary judgment where the evidence showed the plaintiff, a service technician, fell off of a ladder he had "merely visually inspected

and touched . . . to make sure it was not wobbling." *Sealey v. Farmin' Brands, LLC*, 273 N.C. App. 710, *1, 847 S.E.2d 924 (2020) (unpublished). Unpublished opinions are not controlling legal authority. N.C. R. App. P. Rule 30(e)(3) (2023). Still, the present case is distinguishable because there is evidence Decedent took greater efforts to check whether the Chiller was pressurized, including reading the pressure gauge and looking for signs of pressurization when first loosening the nut on the flange. These efforts also distinguish this case from another which Defendants cite in passing where the plaintiff made no attempt at all to inspect a scaffold before climbing onto it. *Bullard v. Elon Dickens Constr. Co., Inc.*, 29 N.C. App. 483, 486, 224 S.E.2d 708, 710 (1976).

The majority's position on contributory negligence plainly contradicts its position on foreseeability. The majority asserts Decedent's injury was not foreseeable, even considering Decedent's supervisor's experience, as well as the Chiller's manual and warning labels. Yet, in the majority's view, Decedent failed to exercise objectively reasonable behavior to prevent his injury. If Decedent's injury was not foreseeable, what additional actions should Decedent have undertaken to prevent his injury? Indeed, Decedent's supervisor, whose testimony the majority cites approvingly throughout its opinion, expressly said "I would have done the same thing [Decedent] and Nate did." The majority effectively holds Decedent's injury was unforeseeable as to Defendants, but Decedent should have taken steps to prevent it. Both cannot be true.

In addition, the majority points to *Moseley v. Hendricks* to support its conclusion Decedent was contributorily negligent. 292 N.C. App. 258, 897 S.E.2d 680 (2024). There, a golfer was found contributorily negligent where he put himself in front of a driving range and took no precautions to determine whether his position was safe. *Id.* at 685. *Moseley*, too, is readily distinguishable from the case before us. Here, unlike the golfer in *Moseley* who took no precautions, Decedent took several precautions, including reading the pressure gauges on the Chiller and checking for signs of pressurization after initially loosening the nut on the flange. Further, this Court in *Moseley* stated "a prudent person in plaintiff's position would have noticed such a precarious position and moved out of harm's way." *Id.* In contrast, again, Decedent's supervisor in this case testified that had he been present after the initial loosening of the nut without any indication of pressure, "I would have done the same thing [Decedent] and Nate did." Although Defendants point to deposition testimony by Decedent's supervisor as to his experience and training in support of their argument, they cannot dismiss this portion of his testimony.

Thus, on the issue of contributory negligence, Defendants' evidence is not so conclusive as to render there no genuine issue of material fact on this point. Therefore, the trial court erred in granting summary judgment in favor of Defendants.

Conclusion

Accordingly, for the foregoing reasons, I respectfully dissent.

VIVIAN B. FEDEROWICZ, D.C., PETITIONER
v.
NORTH CAROLINA BOARD OF CHIROPRACTIC EXAMINERS, RESPONDENT

No. COA23-955

Filed 20 August 2024

1. Chiropractors—disciplinary proceeding—treatment of pregnant patient—suspension of license—evidentiary support

The trial court properly affirmed the decision of the Board of Chiropractic Examiners to suspend petitioner's Doctor of Chiropractic license for six months and to place her on two years of probation with conditions upon reinstatement, where the Board's unchallenged findings of fact and record evidence supported its conclusions that petitioner was negligent and failed to render acceptable chiropractic care in her treatment of a pregnant patient, who was under the impression that petitioner was her primary care doctor and who was encouraged by petitioner to have a home birth and not to go to the hospital when she began experiencing problems in delivering the baby. Petitioner's argument that the Board exceeded its jurisdiction and regulatory authority by disciplining petitioner for failure to render medical prenatal care was without merit where the Board's decision to discipline petitioner was based on the scope of acceptable chiropractic care.

2. Chiropractors—disciplinary proceeding—conditions after reinstatement of license—informed-consent requirement for pregnant patients

In a disciplinary matter in which the Board of Chiropractic Examiners suspended petitioner's Doctor of Chiropractic license for six months and required conditions of probation upon reinstatement for a further two years, including an informed-consent

requirement before petitioner could treat a patient known to be pregnant, the trial court properly upheld the conditions as being within the Board's discretion. Further, the informed-consent requirement was directly related to the grounds for discipline, which included petitioner having committed unethical conduct by publicly claiming a specialization in maternal and pediatric care without having the necessary qualifications, and did not place an improper burden on petitioner or violate a patient's freedom of choice in selecting a provider of chiropractic care.

3. Chiropractors—disciplinary hearing—costs imposed as condition of reinstatement—statutory authority

In a disciplinary matter in which the Board of Chiropractic Examiners suspended petitioner's Doctor of Chiropractic license for six months and required conditions of probation upon reinstatement for a further two years, the trial court properly upheld the Board's decision to impose costs of the proceedings (in the amount of $10,000) as a condition of petitioner's reinstatement as being within the Board's statutory authority pursuant to N.C.G.S. § 90-157.4(d). Further, petitioner failed to carry her burden on appeal of demonstrating that the award of costs was in error or unreasonable.

Appeal by petitioner from order entered 15 June 2023 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 2 April 2024.

Vinson Law PLLC, by Robin K. Vinson, for petitioner-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by A. Grant Simpkins and Anna Baird Choi, for respondent-appellee.

ZACHARY, Judge.

This case arises from two complaints submitted to the North Carolina Board of Chiropractic Examiners ("the Board") alleging that Petitioner Vivian B. Federowicz, D.C., violated the North Carolina General Statutes regulating chiropractic care. Petitioner appeals from the superior court's order affirming the Board's decision to suspend her Doctor of Chiropractic license for six months and, upon reinstatement, place her on two years of probation with conditions. After careful review, we affirm.

I. Background

At the time of the complaints, Greenway Chiropractic, PLLC, ("Greenway") employed Petitioner as a licensed chiropractor. Petitioner focused her practice on "pediatrics and pregnancy." Petitioner taught birthing classes at Greenway's office and maintained a podcast and social media accounts titled "Birthing Outside the Box," in which she emphasized the advantages of giving birth in one's home and other settings outside of a hospital. In a caption for her podcast, Petitioner described herself as "a chiropractor who specializes in maternal and pediatric care."

In December 2021, S.B.,[1] who was 33 years old and pregnant with no prior experience giving birth, heard Petitioner's podcast and sought her out for "holistic prenatal care." S.B. became a patient of Petitioner and began attending her birthing classes. Based on a conversation with Petitioner early in their relationship, S.B. was under the impression that Petitioner was her primary care provider and that visiting an OB-GYN was unnecessary.

S.B.'s chiropractic appointments consisted of Petitioner discussing her podcast with S.B., recommending books to her, and—although Petitioner did not document it in her records—treating S.B. with the "Webster Technique."[2] Additionally, Petitioner "measured the fundal height" of S.B.'s baby and told her that "it felt like [her] baby was head down and ready to be born."

Petitioner's medical records indicated that she was treating S.B. only "for routine chiropractic maintenance/wellness care"; none of Petitioner's 38 treatment records from December 2021 to August 2022 mention S.B.'s pregnancy or prenatal care. Petitioner never conducted an ultrasound or took S.B.'s vitals. At appointments and in birthing classes, Petitioner discussed what she perceived as the risks of the use of fetal ultrasounds. Additionally, despite knowing that S.B. suffered from mild scoliosis, Petitioner did not order an x-ray of S.B. until her last visit on 3 August 2022.

At an appointment close to her delivery date, S.B. voiced concern about not having a reliable midwife to assist with her home birth, and Petitioner suggested that S.B. and her baby's father could "just do

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1. We use the patient's initials to protect her identity.

2. In its amended final decision, the Board explains: "The Webster Technique is a chiropractic technique used to treat pregnant patients."

it"—deliver the baby on their own. After S.B. expressed doubt, Petitioner told S.B. that, for a fee, she could be present for the birth depending on her work schedule. On the afternoon of 9 July 2022, S.B.'s water broke, and early the following morning, Petitioner visited her home. When S.B. expressed alarm over her delivery not progressing, Petitioner encouraged her not to go to the hospital. Subsequently, Petitioner attempted to use a Doppler[3] that S.B.'s partner had borrowed from a midwife to measure the fetal heartbeat. Shortly thereafter, Petitioner left S.B. and the father alone in their home.

As S.B.'s labor progressed, serious complications arose, and a call was placed to 911. When EMS arrived, they discovered that the baby was partially delivered "in the breech position—delivering feet first." EMS transported S.B. to the emergency room at WakeMed Hospital. Petitioner arrived at the hospital shortly after. Hospital staff pronounced S.B.'s baby deceased. Thereafter, S.B. had three additional office visits with Petitioner; however, the Board would later note that even "[t]he medical records from those visits do not reflect [that S.B.] had previously attempted childbirth."

On 14 July 2022, Lindsay Lavin, M.D. ("Dr. Lavin"), an emergency room physician who treated S.B. at WakeMed, filed a complaint with the Board against Petitioner. In her complaint, Dr. Lavin alleged the existence of the following grounds for the professional discipline of Petitioner: (1) unethical conduct; (2) negligence, incompetence, or malpractice; and (3) "[n]ot rendering acceptable care in the practice of the profession." Dr. Lavin cited Petitioner leaving S.B.'s home before EMS arrived, and upon appearing at the hospital, merely "introduc[ing] herself as a 'friend' to medical staff and . . . not provid[ing] any [of S.B.'s] medical history." On 20 July 2022, the Board received an emailed complaint from Coryell Perez, M.D. ("Dr. Perez"), a labor and delivery physician who also treated S.B. at WakeMed, alleging that Petitioner "practiced outside of the scope of chiropractic by providing prenatal care and/or attending to a patient during a home birth" and asserting that "[t]his outcome was completely preventable."

After opening an investigation, the Board interviewed Dr. Lavin and Dr. Perez and reviewed Petitioner's social media posts and podcast, the 10 July EMS report, and S.B.'s medical records from WakeMed. The Board's investigation concluded that Petitioner could be in violation

3. A "Doppler ultrasound uses sound waves to measure [a] baby's heart rate." *Fetal Heart Rate Monitoring*, Cleveland Clinic, https://my.clevelandclinic.org/health/diagnostics/ 23464-fetal-heart-rate-monitoring (last updated July 13, 2022).

of the prohibitions against "[u]nethical conduct" and failure to render "acceptable care in the practice of the profession[.]"

On 13 October 2022, the Board issued an order for summary suspension of Petitioner's license pending a hearing. On 21 October 2022, Petitioner filed a motion to lift the summary suspension. After a hearing on 3 November 2022, the Board entered an order lifting the summary suspension. In its order, the Board noted that Greenway had adopted an informed-consent form for pregnant patients that included affirmations that patients understand that the chiropractic care they would receive "is not equivalent and does not replace medical prenatal care"; that Petitioner is a chiropractor and not a medical doctor; that the Webster Technique is not performed to "flip my baby" *in utero*; and that Petitioner is "unable to tell me the position of my baby."

On 16 December 2022, the Board held an administrative hearing, and on 21 December, it issued its amended final agency decision and order,[4] in which the Board made the following conclusions of law:

> 1. Disciplinary action is appropriate pursuant to [N.C. Gen. Stat. §] 90-154(b)(4). [Petitioner] violated 21 NCAC 10.0302(b)(3) and 21 NCAC 10.0304 and engaged in unethical conduct, as defined in [N.C. Gen. Stat. § 90-154.2(5)], by publicly describing herself as a chiropractor "who specializes in maternal and pediatric care", when she does not have the qualifications required by Rule 21 NCAC 10.0304.
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> The Board recognizes only those specialties listed in 21 NCAC 10.0304(b) or approved pursuant to 21 NCAC 10.0304(c), and licentiates desiring to use a specialty designation must first demonstrate that all requirements to do so have been met. Any published claim of specialization outside the recognized specialties or any published claim of specialization made by or at the behest of a licentiate who has not satisfied all applicable provisions of 21 NCAC 10.0304 constitutes false or misleading advertising. 21 NCAC 10.0304(e). [Petitioner] has not satisfied all applicable provisions of 21 NCAC 10.0304. Thus, [Petitioner]'s published description of herself as a chiropractor who specializes in maternal and pediatric care constitutes false

4. The Board amended its final decision to correct the effective date of its decretal portion; this amendment does not affect any of the issues on appeal.

> or misleading advertising, which constitutes unethical conduct pursuant to [N.C. Gen. Stat. § 90-154.2(5)].
>
> 2. Disciplinary action is appropriate pursuant to [N.C. Gen. Stat. §] 90-154(b)(5). [Petitioner] committed negligence in the practice of chiropractic by failing to secure appropriate care for a patient. [Petitioner] was aware that her 33-year-old patient had no prior experience in giving birth, had not had an ultrasound, and for at least some period had not been receiving medical pre-natal care. [Petitioner] was aware that her patient's water had broken more than 24 hours before the time she left the home of a laboring patient knowing that a mid-wife or other medical provider was not present and was not forthcoming. She failed to secure appropriate care for the patient.
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> 3. Disciplinary action is appropriate pursuant to [N.C. Gen. Stat. §] 90-154(b)(7). [Petitioner] failed to render acceptable care in the practice of the profession, as defined in [N.C. Gen. Stat. §] 90-154.3(a), by failing to properly examine, document and manage the care of a pregnant patient, including during such times that [Petitioner] knew no other provider was providing care.

Based upon these conclusions of law, the Board suspended Petitioner's license for six months and placed her on two years of probation with conditions for reinstatement. Among the conditions for reinstatement, the Board required Petitioner to complete courses in professional standards and documentation, as well as pay to the Board $10,000.00 for the costs of her disciplinary proceeding. Additionally, during her period of probation, Petitioner was prohibited from providing chiropractic care to "any patient known to be pregnant[,]" unless the patient had executed a revised version of Greenway's informed-consent form that included a statement that the patient is "under the care of a formally trained and certified provider (obstetrician or nurse midwife) who could provide standard-of-care prenatal monitoring and labor/delivery care."

On 12 January 2023, Petitioner filed a petition for judicial review of the amended final decision. Petitioner did not challenge the Board's conclusion of law 1, concerning the ground for discipline of unethical conduct based on false or misleading advertising. However, she did challenge the remaining two conclusions of law, as well as certain aspects of the discipline that the Board ordered in its amended final decision. On

23 May 2023, the matter came on for hearing in Wake County Superior Court, and on 15 June 2023, the court entered its order affirming the Board's amended final decision. In its order, the superior court concluded, *inter alia*:

> 2. [The Board's] Conclusion of Law 2 is supported by the evidence in the record, testimony at hearing, and the Board's statutes and rules governing the practice of chiropractic. The Board did not exceed statutory authority in finding [Petitioner] negligent in the practice of chiropractic.
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> 3. [The Board's] Conclusion of Law 3 is supported by the evidence in the record, testimony at hearing, and the Board's statutes and rules governing the practice of chiropractic. The Board properly determined [Petitioner] failed to render acceptable care in the practice of chiropractic.
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> 4. The Board did not abuse its discretion in imposing probationary terms in Order paragraph 6 based on the evidence presented at the contested case and in light of the entire record.
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> 5. The Board has statutory authority to impose payment of costs and/or attorney's fees to a licensee found to have violated Board statutes and rules.
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> 6. [Petitioner] has failed to meet her burden under N.C. Gen. Stat. § 150B-51(b) of showing that the Board prejudiced her substantial rights.

Petitioner filed timely notice of appeal.

II. Discussion

As she did before the superior court, Petitioner primarily raises issues of law on appeal, concerning the breadth of the Board's ordered discipline.

First, Petitioner asserts that "[t]he Board did not and does not have jurisdiction and regulatory authority over" her "private conduct[.]" Petitioner then argues that she "cannot be responsible for managing the medical prenatal and obstetrical care of a chiropractic patient whether or not [Petitioner] has knowledge that no other provider was providing prenatal and obstetrical care for the chiropractic patient[.]" She also contends that "the Board cannot require [her] to treat only pregnant patients who are undergoing medical prenatal care and to

ensure that such medical prenatal care is maintained at all times during the pregnancy[.]"

Additionally, Petitioner alleges that "there is no factual basis in [the] record, the Board's findings of fact or its conclusions of law that support an award of costs and/or attorneys' fees in this proceeding[.]" For the reasons explained below, Petitioner's arguments fail to persuade.

A. Standard of Review

The Board is an "occupational licensing agency" as defined by N.C. Gen. Stat. § 150B-2(4b) (2023). Accordingly, hearings conducted by the Board are governed by the North Carolina Administrative Procedure Act ("the APA"). *Hardee v. N.C. Bd. of Chiropractic Exam'rs*, 164 N.C. App. 628, 632, 596 S.E.2d 324, 327, *disc. review denied*, 359 N.C. 67, 604 S.E.2d 312 (2004). The Board's final decisions are appealable to "the superior court of the county where the person aggrieved by [a final decision] resides[.]" N.C. Gen. Stat. § 150B-45(b)(2).

The superior court may reverse or modify the Board's final decision "if the substantial rights of the petitioners may have been prejudiced because the [Board's] findings, inferences, conclusions, or decisions are":

> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

Id. § 150B-51(b). In reviewing questions of fact, the superior court applies "the 'whole record test' and is bound by the findings of the [Board] if they are supported by competent, material, and substantial evidence in view of the entire record as submitted." *Hardee*, 164 N.C. App. at 633, 596 S.E.2d at 328 (cleaned up). The superior court reviews errors of law de novo. *Id.*

The superior court's order is appealable to this Court, which applies the same scope of review as for other civil cases. *See* N.C. Gen. Stat. § 150B-52. "Thus, this Court examines the [superior] court's order for

errors of law; this twofold task involves: (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Hardee*, 164 N.C. App. at 633, 596 S.E.2d at 328 (cleaned up).

On appeal, the appellant bears the burden to show an error by the lower court. *Rittelmeyer v. Univ. of N.C. at Chapel Hill*, 252 N.C. App. 340, 349, 799 S.E.2d 378, 384, *disc. review denied*, 370 N.C. 67, 803 S.E.2d 385 (2017). "Unchallenged findings of fact are binding on appeal." *Sharpe-Johnson v. N.C. Dep't of Pub. Instruction*, 280 N.C. App. 74, 81, 867 S.E.2d 188, 192 (2021).

B. Analysis

In that we are reviewing an order of the superior court acting as a reviewing court, our first task under the APA is to determine "whether the [superior] court exercised the appropriate scope of review[,]" *Hardee*, 164 N.C. App. at 633, 596 S.E.2d at 328 (citation omitted), as governed by the type of error asserted by Petitioner, *see* N.C. Gen. Stat. § 150B-51(c). Here, the superior court determined that most of Petitioner's asserted errors raised questions of law and applied de novo review to those issues. The sole exception appears to be the issue of whether the Board could "require the language in the informed[-]consent form" found in the decretal portion of the amended final decision, which the trial court determined was "a fact-based challenge" and to which it applied whole-record review.

On appeal, Petitioner argues that the informed-consent issue, like her jurisdictional and regulatory authority arguments, reveals "that the Board does not have the lawful authority to impose an obligation upon a licensee[.]" Petitioner also argues that the issue of the imposition of costs as a condition of reinstatement "is not based on any evidence, finding of fact, or conclusion of law that concludes that the fees assessed in this case were 'reasonable,' as required by statute" and, therefore, deserves whole-record review.

Nevertheless, Petitioner does not contend that this discrepancy in the trial court's applied standards of review is a reversible error in and of itself, and nor would it necessarily be so. On appeal from an administrative tribunal, a reviewing court's "use of an incorrect standard of review does not automatically require remand. If the record enables the appellate court to decide whether grounds exist to justify reversal or modification of that decision under N.C. Gen. Stat. § 150B-51(b), the reviewing court may make that determination." *Vanderburg v. N.C. Dep't of Revenue*, 168 N.C. App. 598, 607, 608 S.E.2d 831, 838 (2005)

(citation omitted). Accordingly, we review Petitioner's legal issues de novo, while applying the whole-record test to the costs issue.

1. Scope of the Board's Review

[1] Petitioner first maintains that the superior court erred "when it failed to overturn the Board's decision" that she was negligent. Specifically, Petitioner directs her argument at the Board's conclusion of law 2, in which the Board determined that Petitioner "failed to secure appropriate care for" S.B. Petitioner alleges that the Board exceeded its "jurisdiction and regulatory authority" because this conclusion "does not relate to the practice of Chiropractic."

This challenge to the Board's conclusion of law 2 implicates the superior court's conclusion that "[t]he Board did not exceed statutory authority in finding [Petitioner] negligent in the practice of chiropractic." *See* N.C. Gen. Stat. § 90-154(b)(5) (authorizing the Board to take disciplinary action on the grounds of "[n]egligence, incompetence, or malpractice in the practice of chiropractic"). "Chiropractic" is defined in our General Statutes as "the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body." *Id.* § 90-143(a). Considering the scope of this definition, Petitioner contends that the Board's reasoning governs "[m]edical prenatal care and obstetrics"—topics that are not "subject to the Board's authority."

However, we need not consider the legal issue of whether the Board's jurisdiction extends to disciplining licensees for practice beyond the scope of chiropractic care—such as Petitioner's apparent practices here—because both the superior court and the Board also made unchallenged findings of fact and conclusions of law concerning Petitioner's negligence within the scope of the practice of chiropractic.

On judicial review of the Board's conclusion, the superior court found as fact that the Board's conclusion of law 2 was "supported by the findings that [Petitioner] failed to keep adequate clinical notes or records, and failed to perform proper examinations of the patient" and, therefore, "was supported by the evidence in the record, testimony at [the] hearing, findings of fact, and pertinent law." Moreover, in the underlying amended final decision, the Board found as fact that, *inter alia*, Petitioner did not document in any of her records her use of the "Webster Technique" that she used to treat S.B., which Petitioner conceded "should've been documented." Additionally, the Board found that—except for the initial visit—Petitioner's treatment

records for each of S.B.'s 38 office visits "is virtually identical to the others in all respects."

Petitioner does not challenge the superior court's findings of fact, which are thus binding on appeal. *Sharpe-Johnson*, 280 N.C. App. at 81, 867 S.E.2d at 192. Further, these findings of fact, as well as the Board's findings of fact in the underlying amended final decision, plainly relate to the practice of chiropractic. It is manifest that the superior court correctly concluded that the Board did not exceed its jurisdictional authority, as a matter of law, by disciplining Petitioner for her negligence in the practice of chiropractic. Petitioner's challenge is overruled.

Similarly, Petitioner contends that the superior court erred by concluding that "[t]he Board properly determined [Petitioner] failed to render acceptable care in the practice of chiropractic." The superior court also determined that the Board's conclusion of law 3 "was supported by the evidence in the record, testimony at [the] hearing, findings of fact, and pertinent law." And as before, Petitioner does not challenge these findings of fact, by which we are thus bound on appeal. *Id.*

Rather, Petitioner alleges that "the Board is holding [her] to a standard of care which is not within the practice of chiropractic and beyond the scope of the Board's power of regulation" and asserts that it is "outrageous that a chiropractor should be required to step in and take over for a medical prenatal provider when the chiropractor finds that the provider is no longer tending to the pregnant patient." However, as with her challenge to the negligence issue, Petitioner overreads the Board's conclusion.

The Board did not discipline Petitioner because she failed to provide "medical prenatal" care; rather, as the superior court noted, the Board disciplined Petitioner because she failed to render acceptable *chiropractic* care. As the superior court astutely explained, it was "within the province of the Board to determine whether [Petitioner] committed negligence in the practice or failed to render acceptable care in the profession." Consequently, Petitioner's contention that the superior court erred by failing to overturn the Board's conclusion of law 3 also fails.

2. Informed Consent

[2] Petitioner next challenges the superior court's conclusion that "[t]he Board did not abuse its discretion in imposing probationary terms in . . . paragraph 6 [of the decretal section of the amended final decision] based on the evidence presented at the contested case and in light of the entire record."

Paragraph 6 of the amended final decision's decretal section states:

> During probation, [Petitioner] shall not provide chiropractic care to any patient known to be pregnant unless such patient has executed an Informed Consent in substantially the same form as the Informed Consent attached to the Order Lifting Summary Suspension; provided that the Informed Consent form shall be edited to include a statement that such pregnant patient must be under the care of a formally trained and certified provider (obstetrician or nurse midwife) who could provide standard-of-care prenatal monitoring and labor/delivery care.

Petitioner contends that this informed-consent condition "is beyond the proper regulation and supervision of the practice of chiropractic[.]" However, we have previously recognized that "[t]he discipline imposed upon chiropractors is consigned to the discretion of the Board. In exercising this discretion, the Board may consider evidence concerning a chiropractor's truthfulness and character. Indeed, honesty and good moral character are prevalent themes in the North Carolina Chiropractic Act." *Hardee*, 164 N.C. App. at 635, 596 S.E.2d at 329. Here, as detailed above, the Board found that Petitioner had committed unethical conduct "by publicly describing herself as a chiropractor 'who specializes in maternal and pediatric care[,'] when she does not have the qualifications" for such specialization. The challenged informed-consent requirement relates directly to the grounds for discipline and is properly within "the discretion of the Board." *Id.*

Petitioner also claims that "the Board appears to require [Petitioner] . . . to, in effect, assure that the chiropractic patient is at all times under the medical prenatal care of a 'formally trained and certified provider (obstetrician or nurse midwife) who can provide standard-of-care prenatal monitoring and labor/delivery care.' " Our review of the informed-consent form reveals no such appearance, however. The challenged portion of the informed-consent form cited by Petitioner places the burden of assurance on the prospective patient, not Petitioner; that is, read in concert with the rest of the informed-consent form, it is plain that the patient signing the form must assure Greenway that the patient is "under the care of a formally trained and certified provider (obstetrician or nurse midwife) who could provide standard-of-care prenatal monitoring and labor/delivery care." When read in its proper context, the informed-consent requirement places no improper burden on Petitioner.

Petitioner further argues that the informed-consent requirement "violates the patient's freedom of choice in selecting chiropractic care" as guaranteed by N.C. Gen. Stat. § 90-157.1, which provides:

> No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed chiropractor as the provider of care or services which are within the scope of practice of the profession of chiropractic as defined in this Chapter.

N.C. Gen. Stat. § 90-157.1.

However, the Board persuasively observes that it is not a "board administering relief" under § 90-157.1, and it does not "deny [to any] recipients or beneficiaries of [its] aid or services the freedom to choose a [duly] licensed chiropractor" when it imposes a condition of reinstatement upon Petitioner's license. Nothing about the required informed-consent language denies any "patient's freedom of choice"—either as initially provided by Greenway or as revised by the Board. Petitioner's argument is thus overruled.

3. Reasonable Costs

[3] Finally, Petitioner challenges the superior court's determination that the Board properly imposed costs of the disciplinary proceedings as a condition of reinstatement. On this issue, the superior court held that "the Board has sufficient statutory authority to impose costs and attorney's fees for a licensee found to have violated Board statutes and rules pursuant to N.C. Gen. Stat. § 90-157.4(d)" and that, accordingly, Petitioner "failed to show that the Board erred with respect to awarding costs and/or attorney's fees."

Petitioner contends that the Board impermissibly imposed costs without making findings of fact or conclusions of law as to the reasonableness of the $10,000.00 award of costs. "If a licensee is found to have violated any provisions of this Article or any rule adopted by the Board, the Board may charge the costs of a disciplinary proceeding, including reasonable attorneys' fees, to that licensee." N.C. Gen. Stat. § 90-157.4(d). Petitioner homes in on the word "reasonable" and argues that the Board's imposition of costs, "without any factual foundation and analysis, . . . cannot stand."

Petitioner cites *Early v. County of Durham, Department of Social Services*, in which this Court addressed the reasonableness of attorney's fees under N.C. Gen. Stat. § 6-19.1. 193 N.C. App. 334, 346–47, 667 S.E.2d 512, 521–22 (2008), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 237 (2009). However, that case is inapposite, as a court may award attorney's fees pursuant to § 6-19.1 "only upon a finding that the agency acted without substantial justification and that there are no special circumstances that would make the award of attorney's fees unjust." *Winkler v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contr'rs*, 374 N.C. 726, 734, 843 S.E.2d 207, 213 (2020). "The purpose of [N.C. Gen. Stat.] § 6-19.1 is to curb unwarranted, ill supported suits initiated by State agencies, by requiring that the State's action be substantially justified." *Id.* at 735, 843 S.E.2d at 213 (cleaned up). Not only was Petitioner not the prevailing party in this case, but it is evident that the Board's initiation of this disciplinary proceeding was neither "unwarranted" nor "ill supported[.]" *Id.* (citation omitted).

Here, as noted above, the superior court correctly found that "[t]he Board has sufficient statutory authority to impose costs and attorney's fees for a licensee found to have violated Board statutes and rules pursuant to N.C. Gen. Stat. § 90-157.4(d)." The court also found that Petitioner "failed to show that the Board erred with respect to awarding costs and/or attorney's fees." So too on appeal. Petitioner primarily asserts that "[t]here is no factual or legal basis upon which to determine whether the award of costs" was "reasonable." By grounding her argument in the requirement that the Board make explicit findings and conclusions regarding reasonableness, however, Petitioner has essentially forgone any attempt to argue that the amount of the award was *un*reasonable. Petitioner merely alleges—without support—that "[t]he assessment of $10,000.00 against [her] is punitive in nature."

It is axiomatic that the burden is on the appellant to show an error by the lower court. As the superior court concluded, the Board indisputably has the statutory authority to impose an award of reasonable costs. N.C. Gen. Stat. § 90-157.4(d). Because Petitioner does not demonstrate on appeal how the award of costs was unreasonable, Petitioner has not carried her burden. Therefore, this argument is overruled.

III. Conclusion

Accordingly, we affirm the superior court's order affirming the Board's amended final decision.

AFFIRMED.

Judges HAMPSON and THOMPSON concur.

HILL v. EWING

[295 N.C. App. 345 (2024)]

MARY A. HILL, PLAINTIFF
v.
RENEE P. EWING, CURTIS E. EWING, HERMAN T. EWING, NATHANIEL V. EWING, AND MONICA Y. EWING, THE HEIRS OF ANNIE MARIE EWING, AND CORA LEE BRANHAM, HERMAN BRANHAM, ROSLYN BRANHAM PAULING, LARUE BRANHAM, AND LEROY BRANHAM, THE HEIRS OF ANNIE BRANHAM, BRIGHT & NEAT INVESTMENT LLC, THOMAS RAY, CLARISSA JUDIT VERDUGO GAXIOLA (AKA CLARISSA J. VERDUGO) AND GEOFFREY HEMENWAY, DEFENDANTS

No. COA23-982

Filed 20 August 2024

1. Aiding and Abetting—action against attorney—aiding conduct involving champerty and maintenance—sufficiency of pleading

The trial court erred by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint against an attorney for aiding and abetting another defendant's conduct involving champerty and maintenance with regard to plaintiff's property. The other defendant had contacted multiple parties about potential claims they had to plaintiff's property, promised to bring a suit on their behalf in exchange for 25% of any money recovered from the prosecution of those claims, and then hired defendant attorney. Plaintiff sufficiently stated a claim upon which relief could be granted by alleging that defendant attorney engaged in legal work in pursuit of the claims put forth by the other defendant, including by preparing a non-warranty deed, with no title examination, purporting to grant rights to plaintiff's property without plaintiff's involvement.

2. Aiding and Abetting—action against attorney—aiding slander of title—failure to allege special damages

The trial court properly dismissed, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint against an attorney for aiding and abetting another defendant in his alleged slander of title because plaintiff failed to allege the essential element of slander of title that she suffered special damages as a result of false statements contained in a deed that was recorded by defendant attorney and that purported to transfer title to plaintiff's property. Generalized assertions that plaintiff suffered damages, including that she incurred expenses in hiring an attorney to defend title, were insufficient to demonstrate special damages.

Appeal by plaintiff from order entered 3 April 2023 by Judge David H. Strickland in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2024.

The Odom Firm, PLLC, by Thomas L. Odom, Jr., and Martha C. Odom, for plaintiff-appellant.

Alexander Ricks, PLLC, by Amy P. Hunt, for defendant-appellee Geoffrey Hemenway.

DILLON, Chief Judge.

This case arises from a dispute over a parcel of land located in the Berryhill Township area of Mecklenburg County (the "Property"). Plaintiff Mary A. Hill purportedly owns a one-half interest in the Property. Until recently, the other half interest was owned by the defendants with "Branham" as their last name, who are the heirs of Annie Branham (the "Branham Defendants").

This present appeal does not concern Plaintiff's claim regarding the true ownership in the Property. Rather, this appeal concerns her claims against an attorney, Defendant Geoffrey Hemenway (the "Defendant Attorney"), who was hired to represent the interests of the Branham Defendants. Specifically, Plaintiff brought claims against Defendant Attorney for the aiding and abetting of slander of title, champerty, and maintenance. The trial court dismissed these claims against Defendant Attorney pursuant to Rule 12(b)(6) of our Rules of Civil Procedure. Plaintiff appeals that interlocutory order. We affirm in part and reverse in part.

I. Background

As this is an appeal from a Rule 12(b)(6) dismissal, we must assume the factual allegations of the complaint are true, but not the conclusions of law. *See Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). The factual allegations in Plaintiff's complaint show as follows:

In 1945, Pearlie Ellison purchased the Property. In 1970, Ms. Ellison died intestate. Her two daughters, Cora Washington and Annie Branham, each inherited a one-half interest in the Property.

In 2008, Ms. Branham died, and her heirs (the "Branham Defendants") acquired her one-half interest in the Property.

In 1973, Ms. Washington died, leaving her one-half interest to her husband Herman Washington, in accordance with her will. She did not leave any interest in the Property to her daughter Annie Marie Ewing. And neither Ms. Ewing nor *her* heirs (the "Ewing Defendants") ever acquired any interest in the Property, as Mr. Washington eventually left this half-interest to *his* daughter Plaintiff Mary Hill upon his death in 2011. During his lifetime, Mr. Washington did, however, grant an easement in the Property to Piedmont Natural Gas Company, Inc., ("Piedmont") for $95,000.00.

Accordingly, as of 2011, Mary Hill has owned a one-half interest in the Property, subject to Piedmont's easement interest; and the Branham Defendants owned the other one-half interest in the Property.

For a number of years, up through 2020, Mr. Washington—and then his daughter (Plaintiff) after his death—paid the ad valorem taxes on the Property.

In early 2020, Defendant Thomas Ray, the owner of Defendant Bright & Neat Investment LLC, contacted the Branham Defendants and Ewing Defendants, "advising them that they had claims against [Plaintiff and Piedmont] and he would assist them with money and pay for an attorney to prosecute alleged claims against [Plaintiff and Piedmont] and they would divide the recovery of any money, with Defendant Ray receiving 25%."

Defendant Ray hired the Defendant Attorney to assist him in his efforts to help the Branham Defendants and the Ewing Defendants. The Defendant Attorney prepared a non-warranty deed, with no title examination, wherein the Ewing Defendants and the Branham Defendants granted to themselves and each other the Property, making no mention in the deed to Plaintiff's interest in the Property. Plaintiff alleges that Defendant Attorney prepared the deed in this way, even though he was well aware of Plaintiff's interest in the Property.

In any event, the Ewing defendants and Branham Defendants executed the deed, and Defendant Attorney recorded the deed.

Shortly thereafter, Defendant Attorney prepared multiple letters that were sent to Plaintiff and Piedmont in which he claimed to be representing the Branham Defendants and the Ewing Defendants.

In November 2020, the Ewing Defendants and the Branham Defendants executed a document purportedly granting Piedmont an easement on the Property in exchange for $12,000. This money was split

among the Branham Defendants and Ewing Defendants, with $3,000 going to Defendant Ray as his 25% facilitation fee.[1]

Plaintiff commenced this action, stating claims against Defendant Ray for champerty, maintenance, and slander of title. She also brought claims against Defendant Attorney for aiding and abetting Defendant Ray's tortious acts.

The trial court dismissed Plaintiff's claims against Defendant Attorney pursuant to Rule 12(b)(6) for failure to state a claim. Plaintiff appeals.

II. Appellate Jurisdiction

The trial court determined the dismissal to be a final judgment as to Defendant Attorney and certified there was no just reason for delay, thus allowing for immediate appeal to our Court. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (2023).

III. Analysis

On appeal, our Court reviews *de novo* a trial court's ruling on a motion to dismiss under Rule 12(b)(6). We must determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000).

[1] Plaintiff first alleges that Defendant Attorney aided and abetted Defendant Ray in his alleged violations of champerty and maintenance.

Maintenance is "an officious intermeddling in a suit which belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it," and champerty is a type of maintenance "whereby a stranger makes a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." *Smith v. Hartsell*, 150 N.C. 71, 76, 63 S.E. 172, 174 (1908).

In her complaint, Plaintiff alleges that Defendant Ray notified the Ewing Defendants and the Branham Defendants about potential claims they had against Plaintiff, that he told them he would pay for the prosecution of those claims, that he would receive 25% of any money recovered

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1. In August 2021, the Branham Defendants deeded their "1/2 interest" in the Property to Defendant Bright & Neat (Defendant Ray's LLC) pursuant to a non-warranty deed. Defendant Bright & Neat now claims to own a one-half interest in the Property as tenants in common with Plaintiff. Defendant Ray and/or Defendant Clarissa Verdugo own all of the ownership interest in Bright & Neat.

from the prosecution of those claims, that he engaged Defendant Attorney to pursue those claims, and that Defendant Attorney indeed engaged in legal work in the pursuit of those claims. Based on the notice pleading requirements under our Rules of Civil Procedure, *see*, *e.g.*, *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 106, 868 S.E.2d 5, 14 (2022), we conclude Plaintiff sufficiently alleged claims against Defendant Attorney for aiding and abetting Defendant Ray's alleged conduct involving champerty and maintenance. Thus, we conclude the trial court erred in dismissing Plaintiff's complaint against Defendant Attorney as to those claims.

[2] Plaintiff next alleges that Defendant Attorney aided and abetted Defendant Ray in his alleged slander of title. For the reasoning below, we conclude that Plaintiff failed to allege a claim for slander of title and, accordingly, that the trial court properly dismissed Plaintiff's claim against Defendant Attorney for aiding and abetting Defendant Ray in his alleged slander of title.

"The elements of slander of title are: (1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) *special damages*." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 30, 588 S.E.2d 20, 28 (2003) (emphasis added).

Our Supreme Court has instructed that "the gist of [a slander of title claim] is the special damages sustained." *Cardon v. McConnell*, 120 N.C. 461, 462, 27 S.E. 109, 109 (1897). Regarding "special damages," that Court has stated that "general damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to a particular individual by reason of the particular circumstances of the case." *Penner v. Elliott*, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945).

Our General Assembly has provided in our Rules of Civil Procedure that "[w]hen items of special damages are claimed[,] each shall be averred." N.C. Gen. Stat. § 1A-1, Rule 9(g) (2023).

Citing that Rule, our Supreme Court has determined that where special damages is an element of a cause of action, the plaintiff *must* allege facts showing how (s)he suffered special damages; otherwise, the complaint is subject to dismissal under Rule 12(b)(6):

> [D]espite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6).

> Moreover [Rule] 9(g) requires that when items of special damages are claimed, each shall be averred. Thus, where the special damage is an integral part of the claim for relief, its insufficient allegation could provide the basis for dismissal under Rule 12(b)(6).

Stanback v. Stanback, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (internal marks omitted).

Indeed, in *Cardon*, our Supreme Court instructed that unless a plaintiff seeking damages for slander of title can show how he suffered special damages from the false/malicious statements of the defendant, "he cannot maintain the action." *Cardon*, 120 N.C. at 462, 27 S.E. at 109. *See also Ringgold v. Land*, 212 N.C. 369, 371, 193 S.E.2d 267 (1937) (concluding that a complaint seeking damages for slander *per quod* which fails to allege facts showing special damages is properly dismissed).[2]

In *Stanback*, for instance, our Supreme Court held that mere allegations that the plaintiff had to pay attorneys to challenge the false statements of the defendant, and that the plaintiff suffered a certain dollar amount of special damages, without more, are inadequate. *Stanback*, 297 N.C. at 204, 254 S.E.2d at 626. Specifically, in that case, the Court held that dismissal was proper for failure to allege special damages where the plaintiff alleged that she "has been damaged in that she has incurred expenses in defending said claim and has suffered embarrassment, humiliation, and mental anguish in the amount of $100,000.00." *Id.*

Accordingly, it is incumbent on a plaintiff seeking damages for slander of title to allege in her complaint how she suffered special damages. That is, it is not enough simply to allege generally that she was damaged because of the false and malicious statements contained in the deed made regarding her interest in the Property or that she hired an attorney to challenge the false statements. For instance, in *Cardon*, our Supreme Court held that the plaintiff suffered special damages for a slander of title where the plaintiff showed that the defendant interfered in the plaintiff's attempt to sell the property, with evidence that the defendant had falsely claimed to a prospective buyer that the plaintiff did not own

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2. Our Court, likewise, has held that where special damages is an element of a cause of action, the failure to allege facts showing special damages subjects the complaint to dismissal. *See Casper v. Chatham Cnty.*, 186 N.C. App. 456, 651 S.E.2d 299 (2007) (dismissal of petition by landowners challenging special use permit granted to a neighbor was proper where landowners failed to allege how they suffered special damages); *Donvan v. Fiumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 574 (1994) (complaint for slander *per quod* properly dismissed where plaintiff failed to allege special damages).

the property, thereby causing the sale to fall through. 120 N.C. at 461, 27 S.E. at 109.

Here, Plaintiff has not alleged facts showing special damages suffered. She simply alleges that she suffered damages in excess of $25,000 by Defendants' actions associated with false statements concerning the Property's title and has incurred expenses in hiring an attorney. Plaintiff has alleged that some of the Defendants split proceeds from the sale of an easement to Piedmont in 2020. However, she does not allege how she suffered special damages from that sale. That sale did not affect Plaintiff's interest in the Property, as a proper title search would have revealed Plaintiff's one-half interest and Plaintiff did not join in that 2020 transaction. Accordingly, her record interest was not affected by that sale. Also, Plaintiff's father (Mr. Washington) had already sold easement rights to Piedmont before his death—though he owned only a one-half interest in the Property.

In sum, since Plaintiff has not alleged facts showing special damages – an essential element of slander of title – we conclude the trial court properly dismissed Plaintiff's claims against Defendant Attorney associated with slander of title.

IV. Conclusion

We reverse the trial court's dismissal of Plaintiff's claims against the Defendant Attorney alleging aiding and abetting the torts of champerty and maintenance. However, we affirm the trial court's dismissal of her claim against Defendant Attorney alleging slander of title and aiding and abetting slander of title. We remand for further proceedings consistent with this opinion on Plaintiff's surviving claims.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges TYSON and GRIFFIN concur.

IN THE MATTER OF D.R.J.

No. COA23-671

Filed 20 August 2024

1. Appeal and Error—preservation of issues—failure to renew motion to dismiss—Appellate Rule 2 not invoked

In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), the Court of Appeals declined to invoke Appellate Rule 2 to review juvenile's unpreserved argument that the district court erred by failing to dismiss petitions for second-degree forcible rape and sexual battery (for insufficiency of evidence that juvenile used physical force beyond that inherent in the sexual contact), where the juvenile did not renew his motion to dismiss at the close of all evidence and the argument was without merit.

2. Constitutional Law—effective assistance of counsel—failure to renew motion to dismiss—prejudice not shown

In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), juvenile could not demonstrate the prejudice necessary to show he received ineffective assistance when his counsel failed to renew a motion to dismiss petitions for second-degree forcible rape and sexual battery for insufficiency of evidence that juvenile used physical force beyond that inherent in the sexual contact. The evidence—including testimony from the victim that juvenile grabbed her and would not let her leave the room after she said no to his advances and told him to stop—taken in the light most favorable to the State, showed juvenile's use of force, however slight, to compel the victim's submission. Accordingly, even had juvenile's counsel renewed the motion to dismiss, it would have been properly dismissed.

3. Evidence—exclusion of testimony—no offer of proof—argument dismissed

In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), juvenile's argument that the district court erred in excluding testimony from the grandparents of the juvenile (and the victim) about prior instances when the victim allegedly conflated fictional television portrayals with her real life—which juvenile contended was relevant to the victim's untruthfulness and admissible pursuant to Evidence Rule

404(b)—was dismissed because juvenile failed to make an offer of proof regarding the excluded testimony, preventing the Court of Appeals from determining whether the exclusion was prejudicial. The court further noted that Evidence Rule 608(b)—not Rule 404(b)—addresses the admission of specific instances of conduct concerning a witness's character for truthfulness or untruthfulness.

Appeal by juvenile from adjudication order entered 17 August 2022 and disposition order entered 5 December 2022 by Judge Julius H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 16 April 2024.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for juvenile-defendant-appellant.

ZACHARY, Judge.

Juvenile-Appellant "David"[1] appeals from the district court's juvenile adjudication and disposition orders adjudicating him delinquent on petitions for misdemeanor sexual battery, felony second-degree forcible rape, and felony incest, and placing him on probation and ordering his cooperation with placement into a sex-offender-specific treatment program. After careful review, we affirm the court's adjudication and disposition orders.

BACKGROUND

On 12 July 2021, David's younger sister Claire shared with a friend that she feared that she might be pregnant, and the girls visited their middle school nurse. Claire told the nurse that she "was concerned she may be pregnant" because "[s]omething happened with [her] brother." After the school nurse explained what intercourse is, Claire confirmed that she and David had had intercourse. Claire also stated that David did not use a condom, and that she did not know "the last time [she] had a period[.]"

At this time, David and Claire were 15 and 13 years old, respectively, and they lived with their grandparents. Further, Claire has an

1. We use the pseudonyms adopted by the parties to protect the identities of the juveniles involved in this matter. *See* N.C. R. App. P. 42(b).

intellectual disability such that "she basically functions at the level of a second grader and emotionally and mentally like an eight-year-old[.]"

Following her conversation with Claire, the school nurse conferred with the school's social worker, who decided to "take it forward and call the county[.]" That same day, Detective Kelsey Allen of the New Hanover County Sheriff's Office Crimes Against Children Unit interviewed Claire at school. The New Hanover County Department of Social Services removed Claire from the home that afternoon.

According to Claire, David slept in Claire's bedroom over the July 4th weekend to accommodate a family guest. Claire recalled that on the evening in question she was in bed when David entered her room and removed her clothing and underwear. Claire remembered that David was naked and that he touched her body with his hands, at one point "laying on top of [her.]" She said that David inserted his penis into her vagina and "ma[d]e [her] hand touch his penis[.]" David told Claire not to tell anyone and then "left the room . . . [t]o go play Xbox."

On 29 July 2021, the State filed juvenile petitions alleging that David was delinquent for the commission of the offenses of felony incest, felony second-degree forcible rape, and misdemeanor sexual battery. On 26 July 2022, the State filed a fourth juvenile petition alleging that David committed the offense of felony crime against nature.[2]

David's adjudicatory hearing took place on 2 August 2022. On 17 August 2022, the district court entered an order adjudicating David delinquent on the misdemeanor sexual battery, felony second-degree forcible rape, and felony incest petitions. On 5 December 2022, the district court entered its disposition order, in which the court, *inter alia*, placed David on supervised probation and ordered that David "cooperate with placement in . . . a residential treatment facility [for] sex offense specific treatment[.]" David filed timely written notice of appeal.

DISCUSSION

On appeal, David first argues that the district court "erred by failing to dismiss the second-degree forcible rape and sexual battery petitions because the State failed to prove the use of force, an essential element of each" offense. Alternatively, if the Court concludes that this issue was not preserved for appeal because David's counsel failed to renew the motion to dismiss at the close of all evidence, David asks that this Court hold that he received ineffective assistance of counsel. Finally, David

2. The State subsequently dismissed this petition.

argues that "[w]here the State's case rested squarely on Claire's version of events[ ] the [district] court erred by excluding testimony from David and Claire's grandparents about prior instances of Claire conflating fictional television portrayals with her real life."

Motion to Dismiss for Insufficiency of the Evidence

[1] David first asserts that the district court "erred by failing to dismiss the second-degree forcible rape and sexual battery petitions," arguing that the State "failed to present substantial evidence that [he] used physical force beyond what was inherent in the sexual contact itself."

David concedes that although his counsel moved to dismiss the second-degree forcible rape and sexual battery petitions at the close of the State's evidence, he failed to renew the motion at the close of all evidence. *See In re Hodge*, 153 N.C. App. 102, 106–07, 568 S.E.2d 878, 881 (explaining that "a [juvenile] who moves to dismiss a charge based on insufficiency of the evidence after the close of the State's evidence waives the benefit of that objection if, after the motion is denied, the [juvenile] presents his own evidence" but "fails to move to dismiss the action at the close of all the evidence" (cleaned up)), *appeal dismissed and disc. review denied*, 356 N.C. 613, 574 S.E.2d 681 (2002); *see also* N.C. R. App. P. 10(a)(3). Thus, David lacks the right to "assert the denial of his motion as grounds for relief on appeal." *Hodge*, 153 N.C. App. at 107, 568 S.E.2d at 881.

Nonetheless, David contends that review of the court's denial of his motion to dismiss is warranted under Rule 2. Pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, this Court may suspend the appellate rules and reach the merits of an otherwise unpreserved issue on direct appeal where necessary "to prevent manifest injustice to a party" that would result from sustaining an adjudication that lacked evidentiary support. *In re S.A.A.*, 251 N.C. App. 131, 134, 795 S.E.2d 602, 605 (2016) (citation omitted). Rule 2 is an "extraordinary step" that must be invoked cautiously; "inconsistent application of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not." *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) (cleaned up), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 159 (2018). "This residual power to vary the default provisions of the appellate procedure rules should only be invoked rarely and in exceptional circumstances . . . ." *In re A.W.*, 209 N.C. App. 596, 599, 706 S.E.2d 305, 307 (2011) (cleaned up).

Here, David's unpreserved argument is without merit, as explained below. Accordingly, in our discretion, we decline to invoke Rule 2 on this issue. *See In re I.W.P.*, 259 N.C. App. 254, 258, 815 S.E.2d 696, 701 (2018).

Ineffective Assistance of Counsel

[2] In the alternative, David maintains that his counsel below provided ineffective assistance in failing to renew the motion to dismiss the second-degree forcible rape and sexual battery petitions at the close of all evidence, thus foreclosing our review of that issue. We are not persuaded.

To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient, and that this deficient performance prejudiced his defense. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (cleaned up). "[T]he two prongs of an ineffective assistance claim (attorney error and prejudice) need not be considered in any particular order. In fact, the [United States Supreme] Court [has] intimated that disposing of an ineffective assistance claim on the ground of lack of sufficient prejudice, if possible, is preferable." *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985).

Accordingly, we begin by determining whether "there is a reasonable probability that, but for counsel's" failure to renew the motion to dismiss on sufficiency grounds at the close of all evidence, "the result of the proceeding would have been different." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citation omitted).

Denial of a juvenile's motion to dismiss will be upheld if there is "substantial evidence (1) of each essential element of the offense charged and (2) of the juvenile's being the perpetrator of such offense." *In re K.M.M.*, 242 N.C. App. 25, 27, 774 S.E.2d 430, 431 (2015) (cleaned up). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re T.T.E.*, 372 N.C. 413, 420, 831 S.E.2d 293, 298 (2019) (citation omitted). "[C]ontradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* (citation omitted). "So long as the evidence supports a reasonable inference of the [juvenile's] guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the [juvenile's] innocence." *Id.* at 420–21, 831 S.E.2d at 298 (cleaned up). Thus,

> [t]he bar to survive a . . . motion to dismiss for insufficiency of the evidence is low, such that . . . . if there be *any* evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, . . . the case should be submitted to the [finder of fact].

State v. Taylor, 379 N.C. 589, 611, 866 S.E.2d 740, 757 (2021) (citation omitted).

Both sexual battery and second-degree forcible rape include force as an element. "The crime of sexual battery is committed when any person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person by force and against the will of the other person." *In re J.U.*, 384 N.C. 618, 624, 887 S.E.2d 859, 864 (2023) (cleaned up); *accord* N.C. Gen. Stat. § 14-27.33(a)(1) (2023). Similarly, "[a] person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person . . . ." N.C. Gen. Stat. § 14-27.22(a)(1).

Our Supreme Court recently addressed the quantum of evidence required to satisfy the force element in the offense of sexual battery. *J.U.*, 384 N.C. at 625, 887 S.E.2d at 864. "[T]he requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion." *Id.* (cleaned up). "Although the term 'by force' is not defined in the relevant statutory scheme," the term "physical force" has been determined to "mean[ ] force applied to the body." *Id.* (citation omitted). The element is present "if the defendant uses force sufficient to overcome any resistance the victim might make[.]" *Id.* at 624, 887 S.E.2d at 864 (citation omitted). Of particular relevance to the present case is the Supreme Court's conclusion that "common sense dictates that . . . one cannot engage in nonconsensual sexual contact with another person without the application of some 'force,' however slight." *Id.* at 625, 887 S.E.2d at 864 (citations omitted). Because the identical phrase "by force and against the will of the other person" is used in both statutes, we apply the Supreme Court's well-reasoned analysis regarding the use of force in sexual battery cases to the second-degree forcible rape petition as well.

In the case at bar, David maintains that "the State failed to elicit any evidence of the use of force during Claire's testimony" and notes that, on cross-examination, "Claire explicitly disavowed that David used any force, denying that she was held, threatened with violence, or hit."

While in response to defense counsel's inquiry, "did [David] hold you—did he grab your hands or—or force you with his hands at all[,]" Claire did respond, "No, sir," our review of the entire transcript of her testimony reveals the following. Claire testified that she told David, "No," that she told him to stop, that she did not give him permission, and that she tried to leave the room. Claire confirmed on cross-examination that she remembered trying "to walk away" and "[l]eave the room"; furthermore, when she refused to remove her clothing, David removed them from her himself. Defense counsel asked, "and so what happened when you tried to step away from him?" Claire responded that David "just made [her] come in closer." She also confirmed on cross examination that David "grab[bed]" her and would "not let [her] go[.]" In evaluating sufficiency, such "conflicts in the evidence are resolved in favor of the State[.]" *T.T.E.*, 372 N.C. at 420, 831 S.E.2d at 298 (citation omitted).

This evidence shows the use of force, however slight, to "compel [Claire's] submission to the sexual acts[,]" *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987), and to "overcome any resistance[,]" *J.U.*, 384 N.C. at 624, 887 S.E.2d at 864 (citation omitted). It is therefore sufficient to clear the low bar of a motion to dismiss and to submit the matter to the finder of fact. *See Taylor*, 379 N.C. at 611, 866 S.E.2d at 757.

Therefore, even had David's counsel renewed the motion to dismiss the second-degree forcible rape and sexual battery petitions at the close of all evidence, the district court would have properly denied it. *See State v. Canty*, 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012), *disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013); *see also In re Clapp*, 137 N.C. App. 14, 24, 526 S.E.2d 689, 696 (2000) ("Thus, even assuming *arguendo* that the juvenile's attorney should have moved to dismiss the petition for insufficient evidence of force, we conclude that this omission did not prejudice the juvenile's defense since sufficient evidence of force was presented during the hearing."). Accordingly, David cannot show prejudice in his counsel's performance on this point, and we overrule David's alternative claim of ineffective assistance of counsel.

Exclusion of Testimony

[3] Finally, David argues that because "the State's case rested squarely on Claire's version of events, the [district] court erred by excluding testimony from [her] grandparents about prior instances of Claire conflating fictional television portrayals with her real life." Specifically, David contends that the district court erred in excluding the grandparents' testimony because the evidence "was [for] a permissible purpose . . . under Rule 404(b)." According to David, "[i]f the [district] court had heard that

Claire's grandparents . . . generally believed her to be untruthful and believed she had difficulty distinguishing between reality and fiction, the court probably would have recognized . . . her story was untrue[.]" We disagree.

Although both Rule 404(b) and Rule 608(b) of the North Carolina Rules of Evidence "concern the use of specific instances of a person's conduct, the two rules have very different purposes and are intended to govern entirely different uses of extrinsic conduct evidence." *State v. Morgan*, 315 N.C. 626, 633, 340 S.E.2d 84, 89 (1986).

Rule 608(b) "provides that specific instances of a witness'[s] conduct may, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning [her] character for truthfulness or untruthfulness." *State v. Lewis*, 365 N.C. 488, 494–95, 724 S.E.2d 492, 497 (2012) (cleaned up). Rule 608(b) states:

> (b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting [her] credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning [her] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. Gen. Stat. § 8C-1, Rule 608(b).

Under this rule, "[t]he focus . . . is upon whether the conduct sought to be inquired into is of the type which is indicative of the actor's character for truthfulness or untruthfulness." *Morgan*, 315 N.C. at 634–35, 340 S.E.2d at 90. Finally, if evidence is admissible under Rule 608(b), then the adjudication judge "must determine, in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury, and that the questioning will not harass or unduly embarrass the witness." *Id.* at 634, 340 S.E.2d at 90.

After the State rested its case, David presented the grandparents as witnesses on his behalf. David's counsel first examined the grandmother regarding Claire's understanding of reality:

Q. Does [Claire] sometimes have difficulty differentiating between what's happening on television and what's real?

A. Yes.

Q. And can you give an example—

[THE STATE]: Objection. . . . [T]ruthfulness of a witness and talking about specific instances of conduct . . . . [is] only allowed on cross-examination. . . .

. . . .

THE COURT: Overruled at this point, but I'll be glad to revisit that with other questions.

. . . .

Go ahead, [defense counsel].

Q. My next question [is] can you give an example of that?

A. There was times when she'd be watching different shows . . . or be watching any shows . . . , she had problems understanding or comprehending that these were actors portraying somebody that this wasn't, like, a livestream of somebody's life. She had hard times understanding that these people were going off a script, and they were acting because she'd see them perhaps on another show, and she'd be like, well, how come, for example, Emmie Fleming is [in] that show? Won't the people on that show get mad at her because she's over there? She couldn't comprehend that these were actors portraying people on situation shows.

Q. Was there ever a time where after seeing a show or a movie that she would claim something similar was experienced by her?

A. She—

[THE STATE]: Objection.

THE COURT: Sustained.

The grandfather attempted to testify similarly:

Q. Okay. And the night before [Claire reported the allegation to school personnel], what were you doing that night?

A. Watching T.V. with [Claire]. We usually sit down and watch Heartland together and then Baywatch and different shows.

Q. And is there something specifically you remember about watching television that night?

A. Yeah. Baywatch had . . . a show where the lifeguards were performing different stunts and stuff and then, they found out that one of their lifeguards was actually a predator that had molested a younger child the night before. And she had seen that and she was asking questions about it, and I told her it was wrong, you don't do that . . . .

. . . .

Q. And then, it was the very next day that [Claire]—

A. Yes, sir.

Q. —said that that happened?

A. Yes, sir.

Q. Is that the first time something like that had happened?

A. No.

[THE STATE]: Objection.

THE COURT: Sustained.

[THE STATE]: Also motion to strike.

THE COURT: Court will consider the witness'[s] statement.

. . . .

Q. Has [Claire] ever said that she was pregnant—

A. Yes, she has.

Q. —or thought she was pregnant prior to that—

A. Yes, sir.

Q. When was that?

[THE STATE]: Objection. . . .

THE COURT: Sustained.

> [DEFENSE COUNSEL]: Judge, I would just argue that it is relevant and that it shows a pattern of behavior by [Claire] and is not character evidence as it's showing . . . . what she did in kind of a sequential kind of patterned behavior.
>
> . . . .
>
> [THE STATE]: Your Honor, it's talking about the credibility of a witness and . . . attacking the credibility of the witness based on previous pattern of behavior . . . . And Rule 608 states that the credibility of a witness may be attacked or supported by evidence in the form of a reputation or opinion . . . .
>
> . . . .
>
> [S]pecific instance[s] of the conduct [are] only allowed on cross-examination with a few other exceptions that just don't apply in this situation . . . .
>
> . . . .
>
> THE COURT: All right. Objection sustained.

"It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness'[s] testimony would have been had [the witness] been permitted to testify." *State v. Applewhite*, 190 N.C. App. 132, 137, 660 S.E.2d 240, 244 (citation omitted), *review denied*, 362 N.C. 475, 666 S.E.2d 648 (2008). "Without a showing of what the excluded testimony would have been, we are unable to say that the exclusion was prejudicial." *Id.* at 138, 660 S.E.2d at 244 (cleaned up). Here, David failed to make an offer of proof demonstrating the substance of the grandparents' excluded testimony, thus hampering our review, and this argument is dismissed.

CONCLUSION

We dismiss David's appeal as to his unpreserved argument regarding the trial court's denial of his motion to dismiss, deny his ineffective assistance of counsel claim, and dismiss his argument regarding the district court's exclusion of testimony. The district court's adjudication and disposition orders are affirmed.

DISMISSED IN PART; AFFIRMED IN PART.

Judges COLLINS and FLOOD concur.

IN RE K.C.

[295 N.C. App. 363 (2024)]

IN THE MATTER OF K.C.

No. COA24-112

Filed 20 August 2024

Child Abuse, Dependency, and Neglect—adjudication—neglect—substantial risk of future neglect—mental health and substance abuse—failure to provide necessary medical care

The trial court did not err in adjudicating respondent-mother's child as neglected where both respondent-mother and the child tested positive for illegal drugs immediately after the child's birth, and where respondent-mother's subsequent failure to complete a substance abuse assessment, timely complete a mental health assessment, and arrange for necessary medical care for the child indicated a substantial risk of future neglect. Notably, even though the child suffered from multiple health issues, including a hernia that required surgical removal, respondent-mother failed to attend twenty-four out of forty-one doctor's appointments for the child due to cancellations and no-shows, all within the first year of the child's life.

Appeal by Respondent-Mother from order entered 24 October 2023 by Judge Beth Heath in Lenoir County District Court. Heard in the Court of Appeals 14 May 2024.

Jeffrey L. Miller, for Respondent-Mother.

Sonya Davis, for Respondent-Father, no brief filed.

Robert Griffin, for Petitioner-Appellee Lenoir County Department of Social Services.

Winston & Strawn, LLP, by Stacie C. Knight, for the Guardian Ad Litem.

CARPENTER, Judge.

Respondent-Mother appeals from an order (the "Order") adjudicating the juvenile, Ken,[1] neglected within the meaning of N.C. Gen. Stat.

1. A pseudonym is used to protect the juvenile's identity and for ease of reading. *See* N.C. R. App. P. 42(b).

§ 7B-101(15) and granting temporary custody of Ken to the Lenoir County Department of Social Services ("DSS"). On appeal, Respondent-Mother argues the trial court erred in adjudicating Ken as a neglected juvenile. After careful review, we affirm the Order.

I. Factual & Procedural Background

Ken was born in August of 2022 to Respondent-Mother and Father, who were and remain an unmarried couple. On 19 May 2023, DSS filed its juvenile petition. The petition alleged that Ken was a neglected juvenile due to a positive meconium test, unsuccessful attempts by DSS to engage Respondent-Mother in substance-abuse treatment, a lack of response from Respondent-Mother to texts and calls from DSS, and multiple missed medical appointments regarding Ken's health issues. That same day, the trial court signed an order for nonsecure custody, placing Ken under temporary DSS custody. On 18 September 2023, the trial court conducted the adjudication hearing. Respondent-Mother appeared with counsel, and the evidence tended to show the following.

At Ken's birth, Respondent-Mother's urine screen was positive for amphetamines. Ken's meconium screening, which tested Ken's first bowel movement, was positive for amphetamines and methamphetamine. On 9 August 2022, DSS began its involvement with Ken, Respondent-Mother, and Father due to Respondent-Mother's positive urine screen and Ken's positive meconium test. DSS regularly communicated, or made unsuccessful attempts to communicate, with Respondent-Mother and Father, attempted to engage Respondent-Mother in substance-abuse treatment, and assisted Respondent-Mother with transportation to some of Ken's necessary medical appointments.

Soon after his birth, Ken developed health conditions—including jaundice, an abscess, a hernia, and MRSA—which required medical care in addition to his wellness checks. On 8 August 2022, Respondent-Mother took Ken to the doctor for jaundice, but then cancelled a newborn visit on 9 August 2022 and no-showed for a sick-newborn recheck on 10 August 2022. On 11 August 2022, Respondent-Mother took Ken to the doctor for a well-child visit. On 15 August 2022, Respondent-Mother took Ken to the doctor for a walk-in appointment due to concerns over his deep sleep, jaundiced color, and white patches on his tongue. She then cancelled a weight check on 18 August 2022 and no-showed two weight checks on 19 and 20 August 2022.

A month later, Respondent-Mother took Ken to the doctor for: concerns regarding formula intolerance, thrush, nasal congestion, coughing, and sneezing on 16 September 2022; a diaper rash on 26 September

2022; and a hernia on 4 October 2022. Respondent-Mother then cancelled an ultrasound appointment for the hernia on 7 October 2022 before completing the ultrasound on 11 October 2022. Afterward, she missed an appointment with the surgical center for Ken's hernia and cancelled twice before meeting with the surgical center on 2 November 2022. Respondent-Mother cancelled a follow-up surgical appointment on 8 November 2022 and a well-child visit at the clinic on 11 November 2022.

On 8 December 2022, Respondent-Mother took Ken to the doctor regarding an abscess on his buttocks. Afterward, she cancelled a well-child visit, a surgical appointment for the hernia, and a checkup for the abscess. On 19 December 2022, Respondent-Mother attended a checkup for Ken's abscess, but cancelled a well-child visit and two checkups for Ken's cough and congestion afterward. On 6 February 2023, she took Ken to the doctor for a positive COVID test but subsequently cancelled two well-child visits.

On 23 February 2023, Respondent-Mother took Ken for his five-month well-child visit when he was six months old. Then she cancelled two follow-up appointments regarding Ken's cough and no-showed a surgical appointment regarding Ken's hernia. Respondent-Mother took Ken for a well-child visit on 24 April 2023, a sick visit regarding seizure activity and MRSA on 9 May 2023, a diagnostic neurological visit for MRSA on 10 May 2023, and a visit for hernia removal on 11 May 2023. Afterward, she cancelled a well-child visit on 26 June 2023 and a urology visit on 29 June 2023. In sum, as of 30 June 2023, Respondent-Mother failed to attend twenty-four out of forty-one medical appointments for Ken.

Respondent-Mother denied any substance use after discovering she was pregnant with Ken at eighteen weeks. She also claimed DSS did not request substance-abuse and mental-health assessments until December 2022. Respondent-Mother did not obtain a mental-health assessment until the week before the adjudication hearing due to issues with insurance, and she never completed a substance-abuse assessment due to having "a lot going on." Respondent-Mother then said she "did not recall" the missed appointments or claimed she only rescheduled or postponed them to a later date. She had difficulty arranging transportation without her own car, despite qualifying for Medicaid and its transportation services, and obtained transportation from her mother, friend, social worker, and EMS when necessary.

In the Order, the trial court made the following findings of fact within Finding 11, in pertinent part:

> [t]he minor child's meconium tested positive for amphetamines and methamphetamines at birth
>
> . . . .
>
> Respondent Mother has no explanation as to why the minor child's meconium was positive for methamphetamine and amphetamines
>
> . . . .
>
> Many of those appointments were no shows and cancellations because of issues with transportation
>
> . . . .
>
> Respondent Mother was requested to complete a mental health assessment and substance abuse assessment; however, Respondent Mother has not submitted to a mental health assessment and/or substance abuse assessment, until submitting to a mental health assessment on the last business day prior to the trial of this matter, more than one year from the birth of the minor child . . . .

Based on these findings, the trial court concluded Ken was a neglected juvenile. A disposition hearing followed the trial court's adjudication decision, and the trial court entered an initial disposition order. On 17 November 2023, Respondent-Mother timely appealed from the Order. Father did not appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(2), 7B-1001(a)(3) (2023).

III. Issue

The issue on appeal is whether the trial court erred in adjudicating Ken as a neglected juvenile.

IV. Analysis

On appeal, Respondent-Mother challenges the trial court's adjudication of Ken as a neglected juvenile. Specifically, Respondent-Mother argues that her attempts to obtain substance-abuse and mental-health assessments, coupled with the fact that she provided Ken with necessary medical care, do not constitute neglect, since a positive meconium test alone is not enough to sustain an adjudication of neglect. Conversely, DSS argues that Respondent-Mother did not provide proper care for

Ken, had not provided or arranged necessary medical care, and allowed the creation of an environment that was injurious to Ken's welfare. We agree with DSS.

A. Standard of Review

"When reviewing a trial court's order adjudicating a juvenile abused, neglected, or dependent, this Court's duty is 'to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by findings of fact.' " *In re F.C.D.*, 244 N.C. App. 243, 246, 780 S.E.2d 214, 217 (2015) (quoting *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007)). "It is well settled that in a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re J.A.M.*, 372 N.C. 1, 8, 822 S.E.2d 693, 698 (2019) (*purgandum*).

"The clear and convincing standard requires evidence that 'should fully convince.' " *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009) (quoting *In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002)). "This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Id.* at 721, 693 S.E.2d at 643 (citing *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 363–64, 177 S.E. 176, 177 (1934)).

Findings of fact are binding if they are not challenged on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). When reviewing findings of fact in a juvenile order, we set aside findings that lack sufficient evidentiary support and examine whether the remaining findings support the trial court's determination. *In re A.J.L.H.*, 384 N.C. 45, 52, 884 S.E.2d 687, 693 (2023).

The determination of whether a child is abused, neglected, or dependent is a conclusion of law. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999). We review the trial court's conclusions of law de novo. *In re K.S.*, 380 N.C. 60, 65, 868 S.E.2d 1, 9 (2022) (citing *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019)). Under a de novo review, this 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)).

B. Adjudication of Neglect

We have a two-step process for abuse and neglect proceedings: an adjudicatory stage and a dispositional stage. *In re K.W.*, 272 N.C. App. 487, 493, 846 S.E.2d 584, 589 (2020). "If the trial court finds at adjudication that the allegations in a petition have been proven by clear and convincing evidence and concludes based on those findings that a juvenile is abused, neglected, or dependent, the court then moves on to an initial disposition hearing." *Id.* at 493, 846 S.E.2d at 589 (citing N.C. Gen. Stat. § 7B-901 (2019)). At the dispositional stage, "the trial court, in its discretion, determines the child's placement based on the best interests of the child." *Id.* at 493, 846 S.E.2d at 589. As Respondent-Mother's appeal is limited to the adjudication phase, we focus our review on the adjudication portion of the Order.

The Juvenile Code defines a neglected juvenile as "[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, except where that juvenile is a safely surrendered infant as defined in this Subchapter.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under [N.C. Gen. Stat. §] 14-321.2.
>
> g. Has placed the juvenile for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2023).

Before adjudicating a juvenile neglected, the trial court must also find "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 Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993)). With 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 McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). The Supreme Court of North Carolina has found neglect in cases where "the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258.

"[T]he 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, 822 S.E.2d 693, 698 (2019). But "[t]he 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.*, 278 N.C. App. 637, 642, 863 S.E.2d 317, 321–22 (2021) (internal quotations and citation omitted). "It is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 780 (2009).

As such, a trial court can consider evidence of a parent's mental health and substance-abuse issues. *See In re C.C.*, 260 N.C. App. 182, 191–94, 817 S.E.2d 894, 900–01 (2018). Mental health issues, which are a "fixed and ongoing circumstance," can lead to an adjudication of neglect. *In re G.W.*, 286 N.C. App. 587, 594, 882 S.E.2d 81, 88 (2022) (citing *In re Q.M.*, 275 N.C. App. 34, 41, 852 S.E.2d 687, 693 (2020) and *In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 870 (2015)). Findings that "show a prolonged period of drug use in the home" which pose a substantial risk of harm to a child can support an adjudication of neglect. *See In re K.H.*, 281 N.C. App. 259, 270, 867 S.E.2d 757, 765 (2022).

1. Meconium Test

On appeal, Respondent-Mother does not challenge the finding of fact that Ken's meconium test, taken shortly after his birth, was positive for amphetamines and methamphetamine. Thus, the results of the meconium test are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

A positive meconium test alone, however, is not sufficient to support an adjudication of neglect. *See In re D.S.*, 286 N.C. App. 1, 16, 879 S.E.2d 335, 346 (2022) ("[T]here [must be] additional adjudicatory evidence showing [the child] was at any further risk of harm from Mother's prior drug use after she was discharged from the hospital . . . ."). Rather, "the trial court must find that there were 'current circumstances' that rendered [the child's] environment unsafe." *Id.* at 16, 879 S.E.2d at 346

(citing *In re G.C.*, 284 N.C. App. 313, 318, 876 S.E.2d 95, 99 (2022), *rev'd on other grounds*, 384 N.C. 62, 884 S.E.2d 658 (2023)).

2. Health Assessments

Health assessments of a parent can help the trial court determine the "current circumstances" of a child's environment. *See id.* at 16, 879 S.E.2d at 346; N.C. Gen. Stat. § 7B-101(15)(e). This is especially true with newborns, when "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" and make a decision that is "predictive in nature." *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127.

Here, Respondent-Mother disputes the timeliness of DSS's requests for her health assessments, arguing that DSS only notified her of its request for a substance-abuse assessment in December 2022, and that she consistently attempted to get a mental-health assessment. We disagree.

First, after a positive drug screen at Ken's birth, Respondent-Mother never completed a substance-abuse assessment. Respondent-Mother's drug use during pregnancy posed "a substantial risk of harm" to Ken. *See In re K.H.*, 281 N.C. App. at 270, 867 S.E.2d at 765. Thus, a substance-abuse assessment after Ken's meconium results and Respondent-Mother's positive urine screen was necessary for the trial court to assess the "current circumstances" of Ken's environment. *See In re D.S.*, 286 N.C. App. at 16, 879 S.E.2d at 346.

Second, Respondent-Mother did not timely obtain a mental-health assessment before the September 2023 adjudication hearing. Respondent-Mother's mental health issues are a "fixed and ongoing circumstance," *see In re G.W.*, 286 N.C. App. at 594, 882 S.E.2d at 88, that pose a "substantial risk of harm" to Ken, *see In re K.H.*, 281 N.C. App. at 270, 867 S.E.2d at 765. Thus, this information is relevant for a trial court to render a decision "predictive in nature" regarding the child's environment. *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127.

Respondent-Mother's failure to complete the substance-abuse assessment and timely complete the mental-health assessment is clear and convincing evidence tending to support a substantial risk of future neglect. *See id.* at 390, 521 S.E.2d at 123. Without these assessments, Respondent-Mother cannot get the proper treatment for the "fixed and ongoing" issues, *see In re G.W.*, 286 N.C. App. at 594, 882 S.E.2d at 88, that impact her ability to provide adequate care for Ken, *see* N.C. Gen. Stat. § 7B-101(15). Thus, because of Ken's positive meconium test and

Respondent-Mother's positive urine screen, coupled with her failure to take substance-abuse and mental-health assessments, the trial court appropriately determined that "there [was] a substantial risk of future abuse or neglect of [Ken] based on the historical facts of the case." *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127.

3. Medical Appointments

Respondent-Mother also contests the trial court's finding of fact that she missed "many" of Ken's medical appointments. Although she concedes she did miss "some" of Ken's medical appointments, she argues that these appointments were merely "rearranged" due to transportation issues, which is not enough to show neglect in providing necessary medical treatment. We disagree.

Despite Ken's health concerns, including a hernia that needed surgical removal, an abscess, and MRSA, Respondent-Mother failed to attend twenty-four out of forty-one appointments due to cancellations and no-shows, all within the first year of Ken's life. When an infant has substantial health concerns, sporadically attending necessary medical appointments and procedures can pose a "substantial risk" of harm. *See In re J.G.B.*, 177 N.C. App. 375, 380–81, 628 S.E.2d 450, 454–55 (2006) (finding that attending some but not all medical appointments can lead to an adjudication of neglect); *see also In re J.N.J.*, 286 N.C. App. 599, 616, 881 S.E.2d 890, 902 (2022) (adjudicating a medically fragile infant as neglected when parents did not provide all necessary medical equipment); *In re S.W.*, 187 N.C. App. 505, 507, 653, S.E.2d 425, 426 (2007) (affirming an adjudication of neglect where respondents allowed the juvenile's four broken ribs to go untreated for up to eight weeks).

By missing a substantial number of Ken's necessary medical appointments, Respondent-Mother failed to provide necessary medical care. *See In re F.C.D.*, 244 N.C. App. at 246, 780 S.E.2d at 217. For example, when Ken needed a hernia removed, Respondent-Mother cancelled or no-showed several surgical appointments. This is "clear and convincing evidence" that Respondent-Mother did not arrange necessary medical care for Ken. *See id.* at 246, 780 S.E.2d at 217.

Respondent-Mother failed to provide Ken with proper care by not ensuring his attendance for necessary medical appointments, not completing the substance-abuse assessment, and not timely completing the mental-health assessment. *See* N.C. Gen. Stat. § 7B-101(15)(a), (c). This evidence, in combination with the unchallenged finding of fact that Ken's meconium test was positive for amphetamines and methamphetamine, *see Koufman*, 330 N.C. at 97, 408 S.E.2d at 731, fully convinces that Ken's

environment was injurious to his welfare, *see Scarborough*, 363 N.C. at 721, 693 S.E.2d at 643; N.C. Gen. Stat. § 7B-101(15)(e). Thus, the trial court correctly determined that Ken faced a substantial risk of future neglect based on the historical facts of the case. *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127.

Based upon the foregoing, the trial court's findings of fact were supported by clear and convincing evidence, and its conclusions were supported by those findings of fact. *See In re F.C.D.*, 244 N.C. App. at 246, 780 S.E.2d at 217. Accordingly, the trial court did not err in adjudicating Ken as a neglected juvenile. *See* N.C. Gen. Stat. § 7B-101(15).

V. Conclusion

We hold that the trial court did not err in adjudicating Ken as a neglected juvenile. The trial court made sufficient findings of fact supported by clear and convincing evidence relating to the current circumstances of Respondent-Mother, which show a substantial risk of future neglect to Ken. The findings in turn support the conclusion of law that Ken is a neglected juvenile.

AFFIRMED.

Judges TYSON and MURPHY concur.

STATE OF NORTH CAROLINA, on relation of the CITY OF SANFORD, Plaintiff
v.
OM SHREE HEMAKASH CORPORATION, a North Carolina Corporation, AMITA PARESHA NAIK, manager PARESHA NARENDRA NAIK, PADMAVATI, LLC, a North Carolina Limited Liability Company, and BHADRESH SHAH, Defendants

No. COA23-1171

Filed 20 August 2024

1. Appeal and Error—abandonment of issues—order modifying temporary restraining order—no issue presented

In a city's action to abate a public nuisance filed against multiple parties, including the owners and manager of a motel (motel defendants), where the motel defendants appealed from two orders of the trial court but presented issues in their brief as to just one of the orders (a default judgment entered against them), their appeal from the second order (granting another defendant's motion to modify a

temporary restraining order and allowing the initiation of foreclosure proceedings) was deemed abandoned and was therefore dismissed.

2. Discovery—sanctions—striking of answer—default judgment —lesser sanctions considered

In a city's action to abate a public nuisance filed against multiple parties, including the owners and manager of a motel, the trial court properly exercised its discretion in imposing sanctions for discovery violations, pursuant to Civil Procedure Rule 37(d), by striking defendants' answer and entering default judgment against them, based on its determination that defendants' failure to respond to the city's written discovery requests was willful and deliberate. Further, the trial court clearly stated in its order that it considered lesser sanctions and gave reasons why more severe sanctions were appropriate.

Appeal by defendants Om Shree Hemakash Corporation, Amita Paresha Naik, and Paresha Narendra Naik from orders entered 30 June 2023 by Judge W. Taylor Browne in Lee County Superior Court. Heard in the Court of Appeals 28 May 2024.

Cranfill Sumner LLP, by Steven A. Bader and James C. Thornton, for plaintiff-appellee.

Hutchens Law Firm LLP, by Michael B. Stein, for defendants-appellees Padmavati, LLC, and Bhadresh Shah.

Wilson, Reives, Silverman & Doran, PLLC, by Jonathan Silverman, for defendants-appellants Om Shree Hemakash Corporation, Amita Paresha Naik, and Paresha Narendra Naik.

ZACHARY, Judge.

Defendants Om Shree Hemakash Corporation, Amita Paresha Naik, and Paresha Narendra Naik ("the Om Shree Defendants") appeal from the trial court's order granting Plaintiff City of Sanford's ("the City") motion to compel discovery and for sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. After careful review, we affirm in part and dismiss in part.

I. Background

This case arises out of an action brought by the City in the name of the State to abate a public nuisance pursuant to N.C. Gen. Stat.

§ 19-2.1. On 14 June 2022, the City filed a complaint alleging that "prohibited nuisance activity is maintained and exists" at the "Prince Downtown" motel in Sanford. At the time of the filing of the complaint, the Om Shree Hemakash Corporation owned and operated the motel; Amita Naik was the registered agent, president, and sole shareholder of the Om Shree Hemakash Corporation; and Paresha Naik was the motel's general manager. Padmavati, LLC, which sold the motel to Om Shree on 1 March 2021, held a promissory note for $700,000 that was secured by a deed of trust on the motel property. Bhadresh Shah is the manager of Padmavati, LLC.

In its complaint, the City alleged that the motel "has a general reputation among citizens within the City of Sanford community and among the law enforcement community as a nuisance . . . and as a place where numerous unlawful activities . . . have taken place." According to the City, the motel "has been established, continued, maintained, used, and owned by . . . Defendants as a place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute breaches of the peace as defined by" N.C. Gen. Stat. § 19-1.1(1). Those acts include, but are not limited to, "fights, communicating threats, assaults inflicting serious injury, homicides, loud abusive and profane language, assaults on females, assaults with deadly weapons, shootings, and drunk and disruptive behavior."

On 27 June 2022, the trial court entered a temporary restraining order prohibiting any further "nuisance[-]related activities" as well as, *inter alia*, prohibiting Defendants from "giving, granting, selling, conveying, or otherwise disposing or transferring ownership" of the motel. On 12 July 2022, the Om Shree Defendants filed a motion for an extension of time to file responsive pleadings, which the trial court granted, extending the Om Shree Defendants' time within which to respond until 22 August 2022. The Om Shree Defendants did not meet this deadline.

On 25 August 2022, the City served the Om Shree Defendants with a set of interrogatories and a request for production of documents. On 1 September 2022, the City filed a motion for entry of default against Defendant Padmavati for failure to file a responsive pleading; the trial court entered default against it on 6 September. On 12 September 2022, the City filed a motion for entry of default against the Om Shree Defendants, which the trial court entered the following day.

On 19 September 2022, the Om Shree Defendants filed their joint answer together with a motion to set aside the entry of default. The next day, the City filed motions for default judgment against the Om Shree Defendants and Padmavati. On 11 January 2023, Padmavati filed a motion to modify the temporary restraining order to allow the initiation

of foreclosure proceedings on the motel, alleging that the Om Shree Defendants had failed to make the previous three monthly payments in accordance with the terms of the note, and were therefore in "arrears[.]"

On 27 March 2023, the trial court entered an order setting aside the entry of default against the Om Shree Defendants for good cause shown. The next day, the Om Shree Defendants filed another answer.

Meanwhile, between December 2022 and March 2023, law enforcement officers had "investigated at least six" drug-related crimes that occurred at the motel. On 5 April 2023, citing these incidents, the City filed a motion to enforce the temporary restraining order by shutting down the motel and holding the Om Shree Defendants in contempt of court. The City supported its motion with multiple law enforcement officer affidavits, including the affidavit of the Captain of the Sanford Police Department Narcotics Division, in which he averred that the motel "has, and for a considerable period of time maintained, the general reputation through the community as a place where crimes . . . take place" such as homicide, robbery, assault, prostitution, and the sale, possession, and use of illegal drugs. The Captain also averred that, based upon his conversations with the Om Shree Defendants, "they do not appear to be concerned about or take any interest in the drug and criminal activity" at the motel. He noted that even after a death on the property resulting from a drug overdose, the Om Shree Defendants "were made aware of the incident, but again showed no interest or concern that it had occurred."

On 27 April 2023, the trial court granted the City's motion, finding the Om Shree Defendants in civil contempt for violating the 27 June 2022 temporary restraining order and ordering that the motel "be closed effective immediately for any further business operations pending trial on the merits." Also on 27 April 2023, the trial court entered an order denying Padmavati's motion to modify the temporary restraining order.

On 17 May 2023, the City filed a motion to compel the Om Shree Defendants to respond to the interrogatories and requests for production of documents with which they had been served on 25 August 2022. On 19 May 2023, Padmavati filed another motion to modify the temporary restraining order to allow the initiation of foreclosure proceedings on the motel.

On 25 May 2023, after the Om Shree Defendants failed to appear for noticed depositions, the City amended its motion to compel requesting, *inter alia*, that the trial court sanction the Om Shree Defendants pursuant to Rule 37 of the Rules of Civil Procedure, including striking the Om Shree Defendants' answer and entering default judgment in favor of the City.

On 30 June 2023, the trial court determined that the Om Shree Defendants' failure to answer interrogatories and produce documents "was willful and deliberate[,]" and sanctioned them by striking their answer and entering default judgment against them. That same day, the trial court entered an order allowing Padmavati to initiate foreclosure proceedings on the motel.

The Om Shree Defendants filed timely notice of appeal from both the default judgment and the order allowing initiation of foreclosure proceedings.

II. Appellate Jurisdiction and Scope of Appeal

[1] The Om Shree Defendants noticed appeal from the default judgment entered against them and the trial court's order granting Padmavati's motion to modify the temporary restraining order and allowing the initiation of foreclosure proceedings. As to the default judgment, "although it is interlocutory, a party may appeal from an order imposing sanctions by striking its answer and entering judgment as to liability." *Feeassco, LLC v. Steel Network, Inc.*, 264 N.C. App. 327, 331–32, 826 S.E.2d 202, 207 (2019). Because the trial court struck the Om Shree Defendants' answer and entered default judgment as a sanction pursuant to Rule 37, the Om Shree Defendants' appeal of the default judgment is properly before us.

However, the Om Shree Defendants have abandoned their appeal of the order granting Padmavati's motion to modify the temporary restraining order by failing to present and discuss any issue related to that order in their appellate brief. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."); *see also Branch Banking & Tr. Co. v. Chicago Title Ins. Co.*, 214 N.C. App. 459, 470, 714 S.E.2d 514, 522 (2011) (declining to review as abandoned order included in appellant's notice of appeal where the appellant made "no argument on appeal concerning the . . . order"). Accordingly, we dismiss the Om Shree Defendants' appeal in part, as to the trial court's order granting Padmavati's motion to modify the temporary restraining order.

III. Discussion

[2] The Om Shree Defendants argue that the trial court abused its discretion by striking their answer and entering default judgment against them as sanctions pursuant to Rule 37(d) for their willful and deliberate failure to respond to the City's 25 August 2022 written discovery requests. We disagree.

A. Standard of Review

"The imposition of sanctions under Rule 37 is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion." *Moore v. Mills*, 190 N.C. App. 178, 180, 660 S.E.2d 589, 591 (citation omitted), *appeal withdrawn*, __ N.C. __, 668 S.E.2d 784 (2008). Additionally, this Court has recognized that the

> imposition of sanctions that are directed to the outcome of the case, such as dismissals, default judgments, or preclusion orders, are reviewed on appeal from final judgment, and while the standard of review is often stated to be abuse of discretion, the most drastic penalties, dismissal or default, are examined in the light of the general purpose of the Rules to encourage trial on the merits.

Id. at 180–81, 660 S.E.2d at 591 (cleaned up).

"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." *Dunhill Holdings, LLC v. Lindberg*, 282 N.C. App. 36, 54, 870 S.E.2d 636, 653 (2022) (citation omitted). "A trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is among those expressly authorized by statute and there is no specific evidence of injustice." *Feeassco*, 264 N.C. App. at 337, 826 S.E.2d at 210 (cleaned up). Additionally, "[i]n reviewing the trial court's order under the abuse of discretion standard, any unchallenged findings of fact are binding on appeal. Any challenged findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Dunhill*, 282 N.C. App. at 55, 870 S.E.2d at 654 (cleaned up).

B. Analysis

The Om Shree Defendants argue that the trial court "erred and abused its discretion in striking the[ir] answer and entering a default judgment without first considering lesser sanctions." The Om Shree Defendants posit that "there is no indication in the transcript of the 5 June 2023 hearing that the trial court considered any lesser sanction" and that "there was no discussion from the trial court on the record as to the relative merits or insufficiencies of any lesser sanction that might have been imposed." These assertions are without merit.

In appropriate circumstances, Rule 37 authorizes a trial court to impose sanctions in the form of "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed,

or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c). "[B]efore imposing a severe sanction such as striking an answer and entering judgment as to liability, a trial court must consider the appropriateness of less severe sanctions." *Feeassco*, 264 N.C. App. at 337, 826 S.E.2d at 210. "Critically, the trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions." *Dunhill*, 282 N.C. App. at 86, 870 S.E.2d at 672 (cleaned up).

"In determining whether the trial court properly considered lesser sanctions, this Court has noted, the trial court is not required to list and specifically reject each possible lesser sanction[ ] prior to determining that [a more severe sanction] is appropriate." *Id.* (cleaned up). "Language stating the trial court considered lesser sanction[s] but had reason to impose the more severe sanction[ ] is sufficient." *Id.*

As the City notes, the Om Shree Defendants' "argument is refuted by the [trial] court's order," in which the trial court made the following findings of fact:

> 25. The Court, in considering ordering default judgment as a sanction, has balanced the right of the proponent to discovery under the North Carolina Rules of Civil Procedure with the Due Process rights of the offending party to have a trial of the case on the merits.
>
> 26. The Court, in considering ordering default judgment as a sanction, has considered lesser sanctions as urged by defense counsel and finds in its discretion that all lesser sanctions are inappropriate. The record amply demonstrates the severity of the disobedience of [the Om Shree] Defendants in failing to respond to the written discovery and thereby impeding the necessary and efficient administration of justice.

These thorough findings of fact, in which the trial court explained that it "considered lesser sanctions" and explained why "all lesser sanctions are inappropriate[,]" are sufficient under our precedents. *See id.* at 88, 870 S.E.2d at 673; *see also*, *e.g.*, *Feeassco*, 264 N.C. App. at 341, 826 S.E.2d at 212; *Batlle v. Sabates*, 198 N.C. App. 407, 421–22, 681 S.E.2d 788, 798–99 (2009); *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828–29 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006). "Given this explanation, the trial court did not abuse its discretion in its choice of sanction." *Dunhill*, 282 N.C. App. at 88, 870 S.E.2d at 673.

The Om Shree Defendants also argue that "it cannot be inferred from the record that the trial court considered all available sanctions" because the trial court did not consider several factors that they advanced. However, there is no need to resort to inference in this instance because, as just discussed, the terms of the trial court's order manifestly demonstrate that the court considered all available sanctions. Moreover, as previously stated, "the trial court is not required to list and specifically reject each possible lesser sanction[ ] prior to determining that [a more severe sanction] is appropriate." *Dunhill*, 282 N.C. App. at 86, 870 S.E.2d at 672 (citation omitted).

Finally, we observe that the Om Shree Defendants do not challenge the trial court's findings of fact as regards their failure to respond to written discovery requests, which are therefore binding on appeal, *id.* at 55, 870 S.E.2d at 654, and which support the trial court's determination to impose sanctions. Moreover, "there is no specific evidence of injustice." *Feeassco*, 264 N.C. App. at 337, 826 S.E.2d at 210 (cleaned up).

"[A] broad discretion must be given to the trial judge with regard to sanctions." *Id.* (citation omitted). Here, "the trial court considered lesser sanctions prior to striking [the Om Shree Defendants'] answer and entering judgment for [the City] . . . , sanctions which are expressly authorized by statute. Thus, the trial court did not abuse its discretion" by striking the Om Shree Defendants' answer and entering default judgment in accordance with Rule 37. *Id.* at 341, 826 S.E.2d at 212.

IV. Conclusion

The trial court's default judgment order is affirmed. As to the trial court's order granting Padmavati's motion to modify the temporary restraining order, the Om Shree Defendants' appeal is dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

Judges COLLINS and STADING concur.

STATE OF NORTH CAROLINA
v.
BLAINE DALE HAGUE

No. COA23-734

Filed 20 August 2024

1. Homicide—first-degree murder—premeditation and deliberation—sufficiency of evidence—new trial

Defendant was entitled to a new trial on a first-degree murder charge—arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm—where the trial court erroneously denied his motion to dismiss the charge for insufficient evidence. Specifically, the evidence did not show that defendant acted with premeditation and deliberation where: defendant, a disabled seventy-two-year-old man, shot the victim, a forty-six-year-old man, after the victim had pushed him to the ground; the altercation was brief, the shooting was sudden, and defendant fired only one shot; and, as a war veteran, defendant had a habit of carrying a gun whenever he left his house. Additionally, defendant's conduct after the shooting did not show planning or forethought where: he drove home and immediately called law enforcement; left his gun on a picnic table outside of his house and directed police to it upon their arrival; and was forthcoming with law enforcement about the shooting.

2. Homicide—first-degree murder—jury instructions—self-defense—omission of stand-your-ground doctrine—private property

In a prosecution for first-degree murder arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm, the trial court did not err by omitting the stand-your-ground doctrine from its jury instructions on self-defense, where there was no evidence that defendant was lawfully on the cornfield, which was located on privately owned property. Even if the court's omission had been erroneous, it was not prejudicial where the court properly instructed the jury that the degree of force used in self-defense must be proportional to the surrounding circumstances—a rule that applies even in instances where defendants are entitled to stand their ground—and, therefore, the jury implicitly decided that defendant used excessive force when it found that defendant did not act in self-defense.

3. Evidence—murder trial—victim's prior felony convictions—admissibility—to show defendant's state of mind—prejudice

In a prosecution for first-degree murder arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm, where defendant fatally shot the victim after the victim pushed defendant to the ground, the trial court erred in excluding evidence that defendant knew of the victim's status as a convicted felon. Under Evidence Rule 404(b), while evidence of the victim's prior felony convictions was inadmissible to show the victim's propensity for violence, it was admissible to show defendant's state of mind during the shooting; specifically, the evidence tended to explain why defendant—a disabled seventy-two-year-old war veteran—might have been afraid of the victim after being assaulted by him. Because the evidence spoke to the reasonableness of defendant's fear, it was essential to his claim of self-defense, and therefore its exclusion was prejudicial to defendant. The court's error further prejudiced defendant where it lead to the exclusion of other evidence regarding defendant's state of mind, and the exclusion of that evidence likely misled and confused the jury.

Judge STADING concurring in part and dissenting in part.

Appeal by Defendant from a judgment entered 9 December 2022 by Judge David L. Hall in Iredell County Superior Court. Heard in the Court of Appeals 15 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

Sandra Payne Hagood, for Defendant.

WOOD, Judge.

Blaine Dale Hague ("Defendant") appeals from a jury verdict finding him guilty of first-degree murder for which he was sentenced to life in prison without parole. Defendant argues the trial court erred (1) by denying his motion to dismiss the first-degree murder charge, (2) by omitting the stand-your-ground provision from the jury instructions when it instructed on self-defense, and (3) by excluding certain evidence that was relevant to his claim of self-defense. For the following reasons, we reverse, vacate and remand to the trial court for a new trial.

I. Factual and Procedural Background

On the morning of 7 September 2020, Tommy Cass ("Tommy") had plans to dove hunt with a group of people, namely: Thomas Cass ("Thomas"), Tommy's son; Don White ("Don"); Grant Evans ("Grant"); and Brent Cass ("Brent"). Tommy told the group to meet him at Bonnie Campbell's cornfield ("the field"), a location where he had written permission from the owner, Bonnie Campbell, to hunt on the "lower field" of the property. The field extends alongside Toby's Footlog Road. Defendant and his wife own fifty acres of property on Toby's Footlog Road adjacent to the field. Defendant and his wife use the property as their primary residence and operate it as a horse rescue farm. Their home is positioned on the property approximately 100 yards from the field in which Tommy and the group had gathered to hunt.

Defendant was aware that Tommy hunted on the property. A few years earlier, around 2017, Tommy had been with a group of hunters in the field when one of Defendant's rescued horses had been shot twice by a dove hunter. Tommy told Defendant he did not know the man who shot the horse. Following the incident, Defendant asked Tommy to be more cautious and not to hunt too close to the fence line because one of his horses had been shot and because the gun fire spooked the horses. Defendant regarded their conversation as a civil encounter and characterized his relationship with Tommy as "[they] had a pretty good rapport."

According to Defendant, they would generally acknowledge one another when Tommy was hunting in the field. Additionally, Defendant had run into Tommy at a Subway. He recalled Tommy making aggressive comments and having a "bad-day attitude," but not directed toward Defendant personally. Tommy's wife, Karla, testified that about a week prior to 7 September 2020, he had told her that Defendant approached him at a 7-Eleven saying that he was not allowed to hunt on the field anymore. Karla claimed Tommy took that conversation as a "joke" and "basically laughed it off."

On the day of the hunt, Grant, Brent, and Don arrived at the field at approximately 6:00 or 6:30 a.m. Tommy arrived shortly thereafter. While waiting for the sun to come up, the group stood around their vehicles engaged in conversation. According to Grant, Tommy started talking about Defendant saying that he was an "asshole." Don testified that during the conversation Tommy informed them that "there was an old man that would come and give him a hard time about hunting, but he would usually tell him that we had permission, and [Defendant] would

just leave, and everything would be alright." Don claimed the group laughed it off since Defendant had not given Tommy any trouble previously. Brent did not remember the specific conversation that took place that morning, but Don and Grant said Tommy did not appear to be angry when he spoke about Defendant.

That morning, Defendant woke up to the sound of gunshots and horse hooves pounding on the ground. Before heading outside to calm the horses, Defendant put his gun in his back pocket as he usually did. Defendant testified it has been "automatic for [him] for the last 50 years." As Defendant drove on Toby's Footlog Road, Thomas was arriving to meet the group. Thomas testified Defendant's vehicle cut him off as he was approaching the entrance to the field. Thomas parked next to Defendant's truck at the parking area near the field. They both exited their vehicles. Thomas testified that Defendant asked if he was there with Tommy. Thomas claimed Defendant appeared to be angry and upset; Defendant denied this exchange occurred. Thomas testified he told Defendant that they had permission from Bonnie Campbell to hunt in the field and that Defendant replied "[the group] didn't have permission to shoot his horses." Thomas then returned to his vehicle to call his father, Tommy, to alert him that Defendant was walking onto the field. During this call, Tommy said to Thomas, "that's fine" and "we have permission to be [here]."

At some point, Defendant encountered Brent and asked him to move from the fence line because the horses were spooked. While Brent was talking to Defendant, Tommy shot two doves nearby. Brent informed Defendant that the shots he had heard earlier were from a different group of dove hunters because no one from their group had fired until just then. Grant and Don testified that the earlier shots had come from another nearby field. Brent reiterated to Defendant that the group was with Tommy, who had permission to be on the field, to which Defendant replied "oh, I know Tommy" and proceeded to walk in Tommy's direction.

As Defendant approached, Tommy rose from where he was sitting and walked to meet him. Grant, Don, and Brent testified that Tommy's hands were empty as he approached Defendant and Don stated that he saw Tommy put his gun down before he started walking. Don testified that Tommy was walking fast and appeared mad, and Grant testified Tommy seemed to be aggravated. Defendant and Tommy continued towards one another until they were about two or three feet apart, almost "face to face." Tommy then stated "every time I come over here hunting you come over here f**king with me."

Tommy then pushed Defendant with both open hands causing Defendant to fall flat of his back onto the ground. Brent, Grant, and Don observed Tommy just stand there after pushing Defendant down. Defendant was almost seventy-two years old; Tommy was forty-six years old. Defendant testified that he struggled to get up from the ground because he was using a cane, had a leg boot on, had two bad legs, and had a torn Achilles tendon on his left leg. Defendant testified it took him around ten seconds to get up from the ground. Don and Grant testified Defendant got up fast, after only a few seconds.

After Defendant stood up, the testimony of what occurred immediately after diverges. Defendant testified that Tommy had walked approximately twenty feet away when Defendant said, "[t]his is a classic felony, assault on a disabled veteran and senior citizen." Defendant stated then Tommy spun around, started coming at him, appeared extremely angry, and said something to the effect of "I'm done with you." Defendant alleged Tommy then did the following:

> He -- well, when he was coming back at me, he grabbed this vest that he had with his left hand. He stuck his right hand inside the pocket area of the vest, right here, and was rummaging around.
>
> So I -- automatically, I looked up at his eyes. And he was coming at me full-steam. And at that second, I knew I was going to die. And fear ran through me that I have never felt since Vietnam.
>
> And the thought of the gun didn't even go into my mind until he kept coming on me so quick. And when that hand was in that vest, that's when it dawned on me I had a weapon for defense.
>
> I can't even tell you that I remember pulling the weapon. It happened that quick. When I came up, I came off so quick to where I was -- I didn't stretch out my arm because by the time I shot -- and that's why, if you heard the testimony by the doctor, the bullet entered underneath the left eye. And it went up in an upward motion because I came up like so.

From Defendant's perspective he shot Tommy to "defend" himself, and according to him, even as Tommy hit the ground after being shot, "his hand was still inside the vest."

Grant offered contradictory testimony during the prosecutor's questioning:

> Q. How long was he standing before he pulled the gun out?
>
> A. As soon as he got up.
>
> Q. Just as soon as he got up?
>
> A. As soon as he got up, he raised his arm.
>
> Q. Okay. If I heard you correctly, Dale gets up and you're saying that he extends his right arm, correct? And you can see the gun from where you're at?
>
> A. Right.
>
> Q. If I heard you right, you just said you could hear Tommy say something. What did Tommy say?
>
> A. He put his hands up and said, "no."
>
> Q. Is that all? That's it? Just the word "no"?
>
> A. Whoa, wait a minute, wait a minute. Bang, and he shot.

Don testified that "as [Defendant's] knees were straightening up, his arm came up in a motion. And I said no, no, and about that time I heard the gunshot." However, Don was unable to see the gun from his point of view, and testified that he said "no, no" because he was familiar with the movement for a handgun. Brent testified that as Defendant was getting up from the ground, he heard Don or Grant holler, turned toward them, and then heard "bang." Testimony was inconsistent as to whether Tommy reached his hand inside his vest and whether Defendant's arm was fully extended or not.

Afterwards, brief exchanges occurred between Defendant and the witnesses. Ultimately, Defendant returned to his truck and left the field. On his way out, he gave Grant his name and told him that he was going home to notify law enforcement. Defendant told his wife what had happened, unloaded his gun, set it on the picnic table, and then called law enforcement. Grant and Thomas also called 911.

During Defendant's call to law enforcement, he told the dispatcher his account of what had happened. His testimony at trial was consistent with his account of events to the dispatcher. He stated that he was disabled, unable to protect himself, and that "[he] had no choice." Further, he told the dispatcher that he advised Tommy's friends to stay away from Tommy's body because he had a gun in his vest.

Grant, Don, and Brent testified they did not touch Tommy's body or remove anything from the area. Grant and Don further testified they

did not see Tommy with any gun that day other than the one with which he was hunting. State Bureau of Investigation Special Agent Williams Waugh, ("Agent Waugh"), assisted with the investigation of the scene that day. He found a note signed by Bonnie Campbell in Tommy's pocket which stated, "Tommy Cass has permission to hunt in [the] lower field." Agent Waugh did not find any weapons on or near Tommy's body other than his shotgun, which was 121 feet from his body. Agent Waugh recovered a pill grinder, five white round pills, two marijuana joints, and a lighter in his jacket. Additionally, he observed that there were no pockets on the chest area of Tommy's jacket and that it was zipped up to his neck.

On 30 September 2020, Defendant was indicted for first-degree murder. Defendant's case came on for trial at the 5 December 2022 session of Iredell County Superior Court. At a pre-trial hearing, the court heard the State's motion in limine to exclude improper character evidence related to Tommy's prior convictions. Tommy had two previous felony convictions: possession of cocaine in 2005 and assault inflicting serious bodily injury in 2009. Since Defendant intended to argue self-defense, defense counsel asserted his knowledge of Tommy's prior convictions should be admissible to show the reasonableness of Defendant's fear of Tommy. The State argued that Defendant did not know Tommy was a felon, and if he did, Defendant did not know what his convictions were. Defendant contended that while he did not know what Tommy's convictions were, he was aware that Tommy was a felon, and that because he was a felon, he was not allowed to possess a firearm but did anyway. The trial court noted that knowledge of a felony conviction has "little to do with the law of self-defense" but, it did not rule on the motion until Defendant decided to testify.

Once Defendant decided to testify, the trial court ruled on the State's motion in limine. The trial court granted the State's motion, explaining:

> But that would go back to the general rule that character evidence is generally impermissible to offer evidence of a person's character to show that the person acted in conformity therewith.
>
> In other words, he was a bad fellow. He was a felon. He must have been the aggressor here because he's a bad fellow because he had been convicted of a felony or, because he is a felon, he shouldn't have been carrying a gun. Those things in my view are probative of nothing.

> So that simply -- the fact that he -- this alleged victim was a felon and could not possess a firearm, just doesn't have any evidentiary value.

Thus, Tommy's prior convictions and testimony related to those convictions were excluded. The State also objected to the jury hearing the portions of Defendant's 911 call that related to Tommy's convictions. The trial court redacted statements from the 911 call to prevent the jury from hearing Defendant's statement about Tommy's status as a convicted felon.

At the close of the State's case, Defendant moved to dismiss the charges for insufficiency of the evidence as relates to premeditation and deliberation. The trial court denied the motion. Defendant renewed his motion at the close of all evidence, which was also denied. At the charge conference, Defendant objected to the trial court's refusal to include the stand-your-ground doctrine in the self-defense instructions to the jury. On 9 December 2022, Defendant was convicted of first-degree murder, and sentenced to life without parole. Defendant gave notice of appeal in open court.

II. Analysis

Defendant raises three issues on appeal. Defendant first argues that the trial court erred when it denied his motion to dismiss the charge of first-degree murder because the State failed to present substantial evidence on premeditation and deliberation. Defendant next contends the trial court erred by omitting the stand-your-ground provision from its instructions on self-defense to the jury. Lastly, Defendant contends that the trial court erred when it excluded evidence of Tommy's felony convictions, because it was crucial to his claim of self-defense. We consider each of Defendant's arguments in turn.

A. First-Degree Murder

[1] We review the trial court's denial of Defendant's motion to dismiss the charge of first-degree murder *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (1980) (citations omitted). When reviewing a motion to dismiss, the evidence

is viewed in the light most favorable to the State, and the State is given "every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975). Furthermore, "[c]ontradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. If there is substantial evidence to support a finding that the offense has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925 (citations omitted).

"First-degree murder is the unlawful killing – with malice, premeditation and deliberation – of another human being." *State v. Simonovich*, 202 N.C. App. 49, 53, 688 S.E.2d 67, 70-71 (2010) (citation omitted). Our Supreme Court defines the elements as:

> Premeditation and deliberation are processes of the mind which are generally proved by circumstantial evidence. Premeditation means that [the] defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing. Deliberation means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation. Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation. Thus, proof of premeditation and deliberation is also proof of intent to kill.

State v. Chapman, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (cleaned up). "Premeditation requires proof of the *time* when the intent to kill was formed, and deliberation requires proof of the defendant's *emotional state* when he formed this intent." *State v. Smith*, 92 N.C. App. 500, 504, 374 S.E.2d 617, 620 (1988).

When considering the circumstances, this Court has outlined factors which assist in the determination of whether premeditation and deliberation were present at the time of the killing. These factors include: (1) want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased; (4) the dealing of lethal blows after deceased has been felled and rendered helpless; (5) the nature and number of the victim's wounds; (6) whether the defendant left the deceased to die without attempting to obtain assistance for the deceased; (7) whether he disposed of the murder weapon; and (8) whether the defendant later

lied about what happened. *State v. Horskins*, 228 N.C. App. 217, 222, 743 S.E.2d 704, 709 (2013) (cleaned up). These factors are assessed under the totality of the circumstances, rather than by giving weight to any one single factor. *State v. Walker*, 286 N.C. App. 438, 442, 880 S.E.2d 731, 736 (2022) (citations omitted).

Defendant requests this Court to vacate the first-degree murder conviction on the grounds of insufficient evidence of premeditation and deliberation, as held in *State v. Corn* and *State v. Williams*. *State v. Corn*, 303 N.C. 293, 298, 278 S.E.2d 221, 224 (1981); *State v. Williams*, 144 N.C. App. 526, 530-31, 548 S.E.2d 802, 805-06 (2001). In *Corn*, the victim, who was "highly intoxicated," went into the defendant's home and insulted the defendant as he was lying on the couch. The defendant "immediately jumped from the sofa," grabbed his gun normally kept near the sofa then shot the victim multiple times in the chest. *Corn*, 303 N.C. at 297-98, 278 S.E.2d at 223-24. Subsequently, the defendant walked across the street to his sister's house, called the police, and returned home to await the arrival of the police. In light of these facts, our Supreme Court held that the shooting was sudden, brought on by provocation by the victim, and the altercation lasted "only a few moments"; the defendant did not "exhibit any conduct which would indicate that he formed any intention to kill [the victim] prior to the incident"; the defendant and victim did not have "a history of arguments or ill will"; and no shots were fired after the victim fell. *Id.* at 298, 278 S.E.2d at 224. The Court concluded that since the defendant killed the victim "without aforethought or calm consideration," the evidence was insufficient to prove the requisite elements of premeditation and deliberation. *Id.*

In *Williams*, the defendant and victim were observing a fight in the parking lot of a nightclub. *Williams*, 144 N.C. App. at 527, 548 S.E.2d at 803. After a verbal altercation between the victim and the defendant, the victim "punched defendant in the jaw" then, "[d]efendant produced a handgun and fired a shot which struck [the victim] in the neck." *Id.* at 527, 548 S.E.2d at 803-04. Considering these factors, this Court concluded that there was no evidence the two individuals knew each other prior to the altercation, there was no "animosity" or "threatening remarks," and the defendant was provoked by the victim's assault, leading to the defendant immediately firing one shot. *Id.* at 530-31, 548 S.E.2d at 805. Further, the "defendant's actions before and after the shooting did not show planning or forethought on his part" as he left immediately but turned himself into the police the next day. *Id.* at 531, 548 S.E.2d at 805.

In the present case Defendant argues, as in *Corn* and *Williams*, that he did not have a history of arguments, ill will, or serious animosity

towards Tommy. Defendant points to his testimony that after Tommy assaulted him, he was in fear for his life because he thought Tommy was reaching for a gun. Moreover, Defendant argues he shot Tommy once immediately following the assault, indicating a reaction to being assaulted, rather than a prior plan or intention to kill him. Lastly, Defendant contends his actions after the shooting did not show "planning or forethought" because he called law enforcement to report what had happened and waited for their arrival at his home. We agree.

We note that whether Tommy reached inside his vest attempting to locate a gun, as Defendant testified, or whether Tommy simply stood there, as the witnesses testified, are "discrepancies [ ] for the jury to resolve." *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925. Thus, we evaluate, in the light most favorable to the State, whether there is substantial evidence of both premeditation and deliberation, to the exclusion of conflicting evidence which is contemplated by the jury. *Id.* First, as in *Corn*, the shooting was sudden, Defendant was provoked by Tommy's assault and yelling, and the altercation was brief. *Corn*, 303 N.C. at 298, 278 S.E.2d at 224. Further, Defendant shot Tommy once, without any "calm consideration," in reaction to being pushed to the ground. *Id.* Similarly, as in *Williams*, Defendant's actions "after the shooting did not show planning or forethought." *Williams*, 144 N.C. App. at 531, 548 S.E.2d at 805. Following the shooting, Defendant left the scene, drove the short distance home, left his weapon on the picnic table outside of his house, and immediately called law enforcement for assistance. Additionally, Defendant gave Grant his name as he was leaving and informed him, he was going to meet law enforcement himself.

The State argues certain interactions that occurred between Defendant and Tommy prior to the incident demonstrated a "history of animosity" between the two. The State directs us to the following: a conversation a few years prior after Defendant's horse was shot by an individual in Tommy's hunting group; an interaction at a Subway; and Karla's testimony that Defendant told Tommy he could no longer hunt on the property. At trial, Defendant testified he and Tommy had a "pretty good rapport" and had "never had an argument" or previously fought. There was no contradictory testimony by any of the other witnesses. Don testified he and Tommy joked about Defendant giving Tommy a hard time about hunting, but that Defendant "usually left" and "never gave him no trouble." Grant and Don testified Tommy seemed normal, not angry, when speaking about Defendant on the day of the hunt. As to the conversation about which Karla testified, she stated Tommy took that conversation as a joke, that it was nothing serious, and he was not

angry at Defendant. Lastly, Defendant did not threaten Tommy or make any statements of a violent nature.

We disagree that these encounters rise to the level of a "history of arguments or ill will." *Corn*, 303 N.C. at 298, S.E.2d at 224. First, the conversation about Defendant's horse being shot by a dove hunter occurred a few years earlier, and Tommy had hunted on the field numerous occasions since without further incident. Second, their encounter at Subway occurred approximately one year earlier and their conversation did not concern their relationship.

Furthermore, upon consideration of the eight factors enumerated by this Court, we are unable to conclude under the facts of this case that premeditation and deliberation were met. *Horskins*, 228 N.C. App. at 222, 743 S.E.2d at 709. The uncontroverted evidence showed Tommy provoked Defendant, an injured 72-year-old man, by yelling at him and pushing him to the ground, and the evidence further demonstrated that it had been Defendant's "habit" since serving in the Vietnam war to carry his gun when leaving the house. The State asserts that "arriving at the scene of a murder with a weapon supports an inference of premeditation and deliberation." *State v. Hicks*, 241 N.C. App. 345, 355, 772 S.E.2d 486, 493 (2015) (cleaned up). We cannot agree. Defendant did not threaten Tommy before or during their interaction leading to the shooting. Defendant did not approach Tommy's body nor attempt to tamper with anything at the scene. Tommy was shot once. Defendant did not deal additional lethal blows after Tommy had fallen to the ground. Defendant left the scene to call law enforcement although aware that others present were also calling for assistance. Defendant did not dispose of his gun, rather he unloaded it, placed it on the picnic table and directed law enforcement to it upon their arrival. Although the witnesses' testimony conflicted at trial, Defendant's statements in his 911 call were consistent with his testimony at trial. Defendant did not attempt to lie about killing Tommy or conceal any facts to law enforcement. Under the totality of the circumstances, giving equal weight to all factors, we are unable to hold Defendant's conduct met the threshold of premeditation and deliberation. *Walker*, 286 N.C. App. at 442, 880 S.E.2d at 736.

The dissenting opinion concludes that there is sufficient evidence of premeditation and deliberation, in relevant part, because the parties had a history of arguments and ill will. When drawing such conclusion, the dissent focuses on a confrontation between Defendant and Tommy at a Subway; that Tommy was hunting on the same property when Defendant's horse had been shot; and the conversation between

Defendant and Tommy at a 7-Eleven, when Defendant told him that he could not hunt on the property.

First, Defendant and Tommy's conversation at Subway occurred approximately one year prior. Defendant stated that while in the store, Tommy was making comments about judges, attorneys, and cops, and it seemed like he was having a bad day. The conversation ended with Defendant patting Tommy on his shoulder and saying "[h]ave a good day. Be careful out there," and Defendant exiting the store. This interaction does not rise to the level of "confrontation" and there is no evidence to indicate otherwise. Second, although the dissent is correct that Tommy was hunting on the same property where Defendant's horse had been shot by someone in Tommy's hunting party, it occurred several years prior. As noted previously, Tommy subsequently hunted on the field without the parties having any further issues. Lastly, in response to Defendant telling Tommy that he could not hunt on the field during their interaction at 7-Eleven, Karla, Tommy's wife, testified that he "basically laughed it off." These interactions cannot amount to ill will or animosity between the parties, as Defendant did not communicate any threatening remarks and generally, Defendant "never gave [Tommy] no trouble, just a hard time" about hunting on the field.

For these reasons, taken in the light most favorable to the State, the evidence is insufficient to prove the requisite elements to support a conviction of first-degree murder. *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925. Accordingly, Defendant's conviction of first-degree murder must be reversed and vacated.

B. Jury Instructions

[2] Defendant next argues the trial court erred in omitting the stand-your-ground doctrine from the jury instructions. "[T]he trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (citation omitted). "A trial court must give the substance of a requested jury instruction if it is correct in itself and supported by the evidence." *State v. Williams*, 283 N.C. App. 538, 542, 873 S.E.2d 433, 436–37 (2022) (cleaned up). "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation omitted). A defendant has the burden of establishing prejudice. *Id.* (citation omitted).

At the charge conference, Defendant objected to the omission of the stand-your-ground doctrine from the self-defense instruction of the jury charge. The trial court reasoned:

> [T]he evidence is as follows, the defendant lived on an adjacent, or a pertinent, tract of land. All the evidence, including that of the defendant is that the defendant went on this land owned by a Campbell, and then Bonnie Campbell, as a tenant in common, being the wife of the other gentleman. The alleged victim had written permission from the landowner.
>
> There's no evidence that one way or another that the defendant had permission to be on the property, but it's worthy to note that it was not the defendant's property, it was not his home, it was not his place of business, it was not a common area, and it was not public property.

Defendant argues pursuant to N.C. Gen. Stat. § 14-51.3, he was entitled to the stand-your-ground instruction. Under the statute, "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be" if "[h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." N.C. Gen. Stat. § 14-51.3. Thus, "one who is not the initial aggressor may stand his ground, regardless of whether he is in or outside the home" and therefore has no duty to retreat. *State v. Lee*, 370 N.C. 671, 675 n.2, 811 S.E.2d 563, 566 n.2 (2018).

Defendant's argument as to these instructions centers on whether Defendant shot Tommy at a place he was lawfully allowed to be. He argues (1) the court erred in finding that he was not entitled to the instruction because he was not in his home, workplace, or motor vehicle; and (2) the trial court erroneously assumed that a person who has not been given explicit permission to be on the land of another cannot be present there lawfully. Defendant urges this Court to hold that "a person who is merely somewhere he or she has a lawful right to be has the same right to stand his ground and not retreat as a person in his home, workplace, or motor vehicle." Further, Defendant argues he was prejudiced by the omission of the instruction because the reasonableness of his actions is intertwined with whether he had a duty to retreat and had the jury understood that he had no duty to retreat, but could stand his ground, he likely would have been acquitted based on self-defense.

It is undisputed that Defendant shot Tommy in a field located on property owned by Bonnie Campbell. There is no evidence that Defendant

had a lawful right to be on this *privately owned* property. Defendant contends however, that absent evidence that he was a trespasser, he had a lawful right to be in the field and there is no reason to assume he was there unlawfully. We disagree.

Defendant's argument is contradicted by our case law which establishes the circumstances in which the individual had a *lawful right to be* in the respective place. For example, in *Lee*, our Supreme Court held the defendant could stand his ground while standing in a public street, a place where he had a lawful right to be. *Lee*, 370 N.C. at 675-76, 811 S.E.2d at 567. In *Irabor*, this Court held the defendant was entitled to a stand-your-ground instruction when he shot the victim while standing outside the door to his apartment. *State v. Irabor*, 262 N.C. App. 490, 496, 822 S.E.2d 421, 425 (2018). In *Ayers*, this Court held "[the] [d]efendant was present in a location he lawfully had a right to be: driving inside his vehicle upon a public highway." *State v. Ayers*, 261 N.C. App. 220, 228, 819 S.E.2d 407, 413 (2018). Here we cannot conclude Defendant had a lawful right to be on *privately* owned property, absent evidence sufficient to establish that he had the lawful right to be in the field on property he did not own. Defendant failed to present any evidence that the owner of the field had given permission for him to be in the field that day or any other day. In contrast, the State presented evidence that Tommy had written permission from the owner to hunt in the field on the day he was killed.

Assuming *arguendo*, the trial court erred by omitting the instruction, Defendant was not prejudiced by its omission. The trial court instructed the jury as follows:

> The defendant would be excused of first-degree murder and second-degree murder on the ground of self-defense if first, the defendant believed it was necessary to kill the victim in order to save the defendant from death or great bodily harm.
>
> And second, the circumstances as they appear to the defendant at the time, were sufficient to create such belief in the mind of a person of ordinary firmness. In determining the reasonableness of the defendant's belief, you should consider these circumstances as you find them to have existed from the evidence presented, including the size, age, strength of the defendant as compared to the victim, the fierceness of the assault, if any, by the victim upon the defendant, whether the victim had

> a weapon in the victim's possession at the time he was killed. The defendant would not be guilty of any crime if the defendant acted in self-defense, if the defendant did not use excessive force under the circumstances.
>
> A person is also justified in using defensive force when the force used by the alleged victim was so serious that the defendant reasonably believed that he was in imminent danger of death or serious bodily harm and the defendant had no reasonable means to retreat. And the use of force likely to cause death or serious bodily harm was the only way for the defendant to escape the danger.
>
> A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you, the jury, to decide the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.

Under the stand-your-ground doctrine, a defendant is permitted to "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." *Walker*, 286 N.C. App. at 449, 880 S.E.2d at 739. Thus, "the 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*." *State v. Benner*, 380 N.C. 621, 636, 869 S.E.2d 199, 209 (2022) (emphasis added).

Here, the trial court provided the jury with the excessive-force instruction and the reasonableness of such force. The trial court also instructed the jury to contemplate the "size, age, strength of the defendant as compared to the victim, the fierceness of the assault, if any, by the victim upon the defendant, [and] whether the victim had a weapon in the victim's possession at the time he was killed." In other words, the trial court instructed the jury to evaluate the proportionality between the degree of force and the surrounding circumstances. Thus, the jury implicitly decided that Defendant's use of force was not proportional by declining to find that Defendant acted in self-defense. Further, the record contains substantial evidence from which a reasonable jury could have concluded that Defendant used excessive force when he shot Tommy. Accordingly, even if the trial court erred by omitting the instruction, Defendant failed to establish "a reasonable possibility that,

had the error in question not been committed, a different result would have been reached at the trial." *Benner*, 380 N.C. at 636, 869 S.E.2d at 209 (citation omitted).

C. 404(b) Evidence of Prior Convictions

[3] Defendant next argues the trial court erred by excluding testimony concerning Tommy's prior convictions. "We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). The defendant is tasked with the burden of proving "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *State v. Scott*, 331 N.C. 39, 46, 413 S.E.2d 787, 791 (1992) (citation omitted). As discussed *supra*, the trial court excluded the evidence on the basis that "character evidence is generally impermissible to offer evidence of a person's character to show that the person acted in conformity therewith." The trial court opined that evidence that Tommy was a felon, and therefore could not legally possess a firearm, would lead the jury to conclude he was a "bad fellow" and "must have been the aggressor." Further, the trial court found "[a] criminal conviction of an alleged victim may be introduced if the defendant had knowledge of the conviction at the time of the fatal encounter . . . pursuant to [Rule] 404(b)" and, "being aware that one is a felon is simply not going to pass evidentiary muster."

Here, the trial court contemplated the exclusion of the evidence under Rules 404(a)(2) and 404(b). Rule 404(a) provides, "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." N.C. Gen. Stat. § 8C-1, Rule 404. However, Rule 404(a)(2) provides an exception to the general rule and allows a party accused of a criminal offense to offer evidence of a pertinent character trait of the victim. *Id.* Rule 404(a)(2). It provides that the following evidence is admissible:

> Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

Id. Under this Rule, the trial court excluded the evidence based on a finding that Defendant offered it to prove that Tommy was the

initial aggressor and to prove a particular character trait of Tommy. Alternatively, Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Id. Rule 404(b). Here, the trial court excluded the evidence because Defendant did not know what Tommy's prior convictions were.

Defendant argues that under Rule 404(b) the evidence should have been admitted, not to prove that Tommy had a propensity for violence, but that Defendant's knowledge that Tommy was a convicted felon was relevant to the reasonableness of Defendant's fear. Defendant contends that knowing that Tommy was a convicted felon, and thus was more afraid of him, was essential to his claim of self-defense. Defendant concedes he did not know the "exact nature" of Tommy's prior convictions; however, because he knew of Tommy's "status" as a convicted felon, the evidence was relevant for the jury when analyzing Defendant's state of mind at the time he killed Tommy.

In *Jacobs*, our Supreme Court analyzed a similar admissibility issue. *State v. Jacobs*, 363 N.C. 815, 689 S.E.2d 859 (2010). The Court explained:

> Defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim's time in prison led defendant to believe he was about to be shot, is principally pertinent to defendant's claim at trial that he shot the victim in self-defense and consequently was not guilty of first-degree murder on the basis of malice, premeditation, and deliberation. This excluded evidence supports defendant's self-defense claim in two ways: (1) defendant's knowledge of the victim's past at the time of the shooting is relevant to defendant's mental state; and (2) the light this knowledge cast on the victim's character could make it more likely that the victim acted in a way that warranted self-defense by defendant.

Id. at 822, 689 S.E.2d at 864. Like *Jacobs*, Defendant's proposed testimony here, that he was aware of Tommy's status as a convicted felon, and that such knowledge led Defendant to be more afraid of Tommy and believe he was going to be shot, is "principally pertinent to [D]efendant's

claim at trial that he shot the victim in self-defense." *Id.* Further, with respect to self-defense, this evidence provides insight as to Defendant's state of mind at the time of the killing and an understanding as to the reasonableness of Defendant's fear and whether such fear justified his actions.

Additionally, the *Jacobs* Court clarified that such evidence would be impermissible character evidence if its only basis for admissibility was to explain the victim's behavior at the time of the incident. *Id.* at 823, 689 S.E.2d at 864. On the other hand, "because the evidence is relevant to defendant's state of mind, it is not prohibited by Rule 404(b)." *Id.* (citation omitted). Defendant did not wish to testify about Tommy's status as a convicted felon to show Tommy had a propensity for violence or that his previous convictions were connected to his behavior that day; rather, Defendant's proposed testimony was relevant to his state of mind at the time he shot Tommy and was not prohibited by Rule 404(b).

We note North Carolina Courts have uniformly held that Rule 404(b) is a rule of *inclusion*. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "Rule 404(b) is a clear general rule of *inclusion* of relevant evidence . . . 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. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (citation omitted). Therefore, "evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused." *Id.* (cleaned up). We are unpersuaded by the State's argument in support of the trial court's decision to exclude evidence of Tommy's status as a felon as the evidence presented serves a non-propensity purpose and such evidence should generally be admissible. Accordingly, the trial court erred in excluding this evidence.

If the trial court's Rule 404(b) ruling was erroneous, this Court "must then determine whether that error was prejudicial." *State v. Pabon*, 380 N.C. 241, 260, 867 S.E.2d 632, 645 (2022) (citation omitted). To determine if a 404(b) error is prejudicial, the test is "whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial" and "[t]he burden of demonstrating prejudice lies with defendant." *Id.* 380 at 260, 867 S.E.2d at 645 (cleaned up). Here, Defendant has shown a reasonable possibility that the jury would have reached a different result had he had the ability to testify about his knowledge of Tommy's status as a convicted felon. At trial, the jury heard two conflicting narratives: (1) Defendant's testimony that Tommy charged at him and was reaching in his vest for what Defendant

believed was a weapon; and (2) the witnesses' testimony that Tommy stood there after pushing Defendant to the ground when Defendant retrieved his weapon and shot Tommy. The excluded evidence would most certainly have provided the jury with insight into Defendant's state of mind, which is essential to his claim of self-defense, and whether Defendant's fear and degree of force was reasonable. Without this evidence, Defendant's testimony about the sequence of events that day lacks corroboration and support. Accordingly, a different result would probably have been reached at trial had the jury heard evidence related to Defendant's state of mind.

Further, the trial court's exclusion of this evidence required portions of Defendant's 911 call to be redacted, preventing the jury from hearing evidence of Defendant's state of mind. In the call, the dispatcher asked Defendant, "And y'all have had this issue before in previous years?" Defendant responded, "No. No. I've known Tommy. He's a felon. When I was a detention officer at Iredell County, he was also my neighbor at one time. And I've always known he hunts illegally, and I could have called the law on him a million times, and I didn't." After the trial court redacted statements from the call, the jury heard, "And y'all have had this issue before in previous years?" "[H]e was also my neighbor at one time. And I've always known he hunts illegally, and I could have called the law on him a million times, and I didn't." Thus, the jury was allowed to hear that Defendant knew Tommy hunts illegally but did not have the context to understand Defendant's basis for this statement.

During the cross-examination of Agent Waugh, the State asked if a valid hunting license was found in Tommy's wallet, to which Agent Waugh responded "Yes, there was." This evidence was allowed to be presented to the jury, even though Tommy was hunting there illegally because as a convicted felon he could not *legally possess* a firearm *even with* a valid hunting license. Further, evidence that Defendant knew Tommy from when he was employed as a detention officer for the Iredell County Sheriff's office was omitted.

Additionally, at trial, the jury heard numerous times that Tommy was lawfully on the field, with written permission from the owner. This was offered through the testimony of the witnesses and the State's exhibit of the note found in Tommy's jacket that stated he had such permission. Further, other testimony was presented that revealed Defendant took issue with whether Tommy had permission and even if he did, Defendant did not want Tommy hunting on the property. Therefore, when the statements from the 911 call were excluded, the jury could only speculate as to why Defendant believed Tommy hunted illegally,

likely concluding that "illegally" meant "without permission" because they heard evidence that Tommy had a valid hunting license.

This exclusion from the 911 call likely misled and confused the jury. The State presented evidence that Tommy had a valid hunting license and written permission to be on the property. The redacted statements rebutted this evidence, providing the jury with a basis for Defendant's statements. Moreover, it could have led the jury to affirmatively conclude that Defendant did not believe Tommy had permission, when in fact his statement related to Tommy's status as a convicted felon, not Defendant's belief of whether Tommy had permission. This redaction was both error and prejudicial to Defendant. We conclude Defendant satisfied his burden of proving "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Scott*, 331 N.C. at 46, 413 S.E.2d at 791.

While the dissent correctly acknowledges that the trial court engaged in the Rule 403 balancing test and recognized the potential for prejudice, we disagree that the trial court did not abuse its discretion in reaching its conclusion. The dissent notes that the jury arrived at their decision after hearing all the evidence and judging the credibility of the witnesses. However, as a result of the trial court's 404(b) exclusion, the jury heard incomplete, misleading evidence, which potentially undermined Defendant's credibility and defense. Without this evidence, Defendant was unable to articulate his state of mind at the time he shot Tommy and could not explain his basis for why he believed Tommy was hunting illegally. Without this context, the jury could have drawn incorrect conclusions, believing Defendant shot Tommy because he did not want him hunting on the land anymore and did not believe he had permission, especially when presented with Tommy's hunting license and written note of permission. Thus, this evidence was crucial for Defendant to develop his defense. When viewing the excluded evidence as it applies to each set of facts, specifically Defendant's state of mind, the redacted 911 call, and the admission of Tommy's hunting license and note, we hold the trial court abused its discretion when it reached its conclusion to exclude the Rule 404(b) evidence of Tommy's status as a convicted felon.

III. Conclusion

We hold the trial court erred in denying Defendant's motion to dismiss the charge of first-degree murder because substantial evidence of premeditation and deliberation was not presented at trial. The trial court did not err in omitting the stand-your-ground doctrine from the

jury instructions; however, the trial court erred in excluding the Rule 404(b) evidence of Tommy's status as a convicted felon. Because Defendant was prejudiced by the trial court's error, Defendant's conviction is reversed and vacated. Defendant is entitled to a new trial, and we remand to the trial court for a new trial. It is so ordered.

NEW TRIAL.

Judge HAMPSON concurs.

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

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

I concur with part B of the majority's analysis addressing Defendant's argument about the trial court's jury instructions. However, I respectfully dissent from the majority's conclusion in part A and would hold that there is sufficient evidence to survive a motion to dismiss when considering the evidence in the light most favorable to the State. I also dissent from the majority's opinion in part C and would hold that the trial court did not err by excluding the victim's status as a felon.

I. Motion to Dismiss

First-degree murder is a "willful, deliberate, and premeditated killing." N.C. Gen. Stat. § 14-17(a) (2023). To survive a motion to dismiss, there must be substantial evidence that the defendant intentionally killed the victim with malice, premeditation, and deliberation. *State v. Corn*, 303 N.C. 293, 296, 278 S.E.2d 221, 223 (1981) (citations omitted). "Whether an action is premeditated depends on whether thought preceded action, not the length of the thought. Further, both premeditation and deliberation are mental processes generally proven by actions and circumstances surrounding the killing." *State v. Joyner*, 329 N.C. 211, 215, 404 S.E.2d 653, 655 (1991) (citation omitted).

> In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case – they are for the jury to resolve. The

> court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. The defendant's evidence, unless favorable to the State, is not to be taken into consideration.

State v. Earnhardt, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982) (cleaned up).

Considering the evidence through the proper lens shows that the trial court did not err. Before the events of 7 September 2020, a confrontation had occurred between Defendant and the victim at a Subway. And during a prior dove season, the victim was hunting on the same property when Defendant's horse had been shot. At the time, Defendant questioned the victim about the responsible party and believed the victim's response was dishonest. Also on an earlier occasion, while at a 7-Eleven, Defendant told the victim he could not hunt on the neighboring property. On 7 September 2020, Defendant was awakened by the sounds of gunshots and horse hooves pounding. He got up, put on his clothes, placed a pistol in his back pocket, and drove to confront the hunters. Defendant exited his truck, was angry, and asked the victim's son if he was there with the victim by name. The victim's son replied in the affirmative and added that they had written permission to hunt on the property. Defendant walked towards the victim. The victim put down his shotgun and had nothing in his hands when walking to meet Defendant. The victim expressed his irritation with Defendant continually bothering him while hunting on the property. The two men exchanged words, and the victim pushed Defendant down. Defendant remained on the ground for a few seconds and then drew his gun as he got up. The victim put up his hands and said "no," but Defendant shot him from a distance of only a few feet. The other hunters nearby also said "no" upon seeing Defendant draw his gun before shooting the victim. One of the hunters called 911 and told Defendant not to leave. Defendant walked by another hunter on the way to his car, told him to put down his gun, and nonchalantly acknowledged killing the victim. Defendant then got in his truck and returned to his home.

Viewing the evidence in the light most favorable to the State and weighing the factors noted by the majority under the totality of the circumstances shows substantial evidence was presented from which a jury could determine that Defendant intentionally shot the victim with malice, premeditation, and deliberation at the time of the killing. *See State v. Hager*, 320 N.C. 77, 82, 357 S.E.2d 615, 618 (1987); *see also State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992) ("Some of the circumstances from which premeditation and deliberation may be

implied are (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds."). Contrary to Defendant's urging, the present matter is distinguishable from *Corn*, 303 N.C. 293, 298, 278 S.E.2d 221, 224 (1981) and *State v. Williams*, 144 N.C. App. 526, 530-31, 548 S.E.2d 802, 805 (2001) because, among other reasons, the parties here have a history of arguments and animosity.

II. Evidence the Victim was a Felon

Generally, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character of the victim of the crime offered by an accused. . . ." N.C. Gen. Stat. § 8C-1, R. 404(a) (2023). And, "[e]vidence 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." N.C. Gen. Stat. § 8C-1, R. 404(b) (2023). "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." *Id.* "[P]rior to admitting extrinsic conduct evidence, [the trial court is required] to engage in a balancing, under Rule 403, of the probative value of the evidence against its prejudicial effect." *State v. Morgan*, 315 N.C. 626, 640, 340 S.E.2d 84, 93 (1986). This balancing test requires the trial court to determine whether the offered evidence may be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." N.C. Gen. Stat. § 8C-1, R. 403 (2023). The trial court's determination concerning admitting evidence under Rule 403 is reviewed for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Here, the trial court found that Defendant's awareness that the victim was a felon did not permit admission of such fact before the jury under either evidentiary rule. Even so, Defendant maintains that Rule 404(b) applies, and the trial court erred in not permitting evidence that the victim was a convicted felon as it was relevant to show that Defendant was afraid of the victim. The majority analysis holds for Defendant in comparing this matter to *State v. Jacobs*, 363 N.C. 815,

689 S.E.2d 859 (2010). Yet, *Jacobs* instructs that "under Rule 403, relevant evidence may be excluded if its probative value 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " *Id.* at 823, 689 S.E.2d at 864 (citing N.C. Gen. Stat. § 8C-1, R. 403). And "[t]he exclusion of evidence under the Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). The trial court here engaged in this balancing test, noted the potential for prejudice, and determined that the evidence was "probative of nothing" and did not abuse its discretion in reaching its conclusion.

After receiving instructions from the trial court on first-degree murder, second-degree murder, and voluntary manslaughter, the jury found Defendant guilty of first-degree murder. The jury arrived at their decision after hearing all the evidence and judging the credibility of the witnesses. Here, Defendant received a fair trial free from prejudicial error. Based on the foregoing, I would affirm the judgment below.

STATE OF NORTH CAROLINA
v.
FREDERICK PLOTZ, DEFENDANT

No. COA23-749

Filed 20 August 2024

1. Stalking—jury instruction—conduct alleged in charging instrument—plain error not shown

In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor, the trial court did not plainly err by failing to instruct the jury that it could only convict defendant if it believed he harassed his neighbor specifically "by placing milk jugs outside [the neighbor's] home spelling" racial and homophobic slurs, as alleged in the statement of charges. While defense counsel acquiesced and failed to object to the pattern jury instruction for the offense as requested by the State, the course of conduct alleged in the charging instrument was not discussed in the charge conference, and thus defendant's appellate argument was not waived by invited error. However, although at least eight other

examples of defendant's harassing conduct were before the jury, he could not show prejudice given the overwhelming evidence regarding his use of the milk jugs to harass his neighbor—including defendant's admission that he wrote letters on the jugs that would spell the epithets and placed them in his driveway (although he denied arranging them to be read by his neighbor).

2. Evidence—other crimes, wrongs, or acts—limiting instruction not requested—no error

In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor by means of epithets written on milk jugs, the trial court did not err in failing to give a limiting instruction regarding evidence of additional, uncharged harassing acts by defendant—including making a profane gesture and racist remarks, revving his truck and flashing its headlights at the neighbor's residence in the middle of the night, and banging on a shared wall of the duplex—admitted pursuant to Evidence Rule 404(b) where defendant did not request such an instruction, either when the evidence was admitted or during the charge conference.

3. Stalking—jury instruction—fear of death and bodily injury—invited error

In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor, the trial court did not plainly err by instructing the jury on all three statutory forms of emotional distress that can support a stalking conviction—being placed in fear of death, bodily injury, or continued harassment—where the charging instrument only alleged that defendant knew his course of conduct would cause his neighbor to fear continued harassment. This portion of the pattern jury instruction was explicitly discussed in the charge conference, and defense counsel agreed to it; accordingly, any error was invited and could not be heard on appeal. Even if the argument had been before the appellate court, all of the evidence concerned the neighbor's fear of continued harassment, and therefore, defendant would not have been able to demonstrate prejudice.

4. Constitutional Law—effective assistance of counsel—failure to request limiting instructions and object to jury charge—prejudice not shown

The appellate court rejected defendant's arguments that he received ineffective assistance when his trial counsel failed to (1) request limiting instructions directing the jury to consider only the

conduct alleged in the charging instrument (communicating slurs spelled out on milk jugs displayed toward his neighbor's home) and regarding Evidence Rule 404(b) testimony of other harassing behavior directed at the neighbor; and (2) object to the jury instruction on stalking listing fear of death and bodily injury—in addition to fear of continued harassment—as a type of emotional distress defendant knowingly caused his neighbor. Defendant could not demonstrate prejudice in light of his admitted placement in his driveway of milk jugs he had had marked with letters spelling out slurs and the absence of evidence that the victim experienced any emotional distress other than a fear of continued harassment; accordingly, there was no reasonable probability that, but for defense counsel's alleged errors, the jury's verdict would have been different.

5. Stalking—motion to dismiss—insufficiency of evidence—course of conduct—properly denied

In a prosecution for misdemeanor stalking arising from defendant's placement of jugs bearing letters that were arranged to communicate slurs toward a duplex neighbor, the trial court properly denied defendant's motion to dismiss for insufficiency of evidence of his alleged course of conduct where, in the light most favorable to the State, the evidence of defendant's use of the jugs and the intent behind that use—including other harassing behavior by defendant such as calling the neighbor a racial slur, banging on their shared wall, revving his vehicle, and otherwise disturbing the neighbor at night—would permit the jury to determine that defendant engaged in harassing behavior that he knew or should have known would cause a reasonable person substantial emotional distress.

Appeal by Defendant from Judgment entered 1 February 2023 by Judge Robert Broadie in Forsyth County Superior Court. Heard in the Court of Appeals 2 April 2024.

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

Daniel M. Blau for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Frederick Plotz (Defendant) appeals from a Judgment entered on a jury verdict convicting him of Misdemeanor Stalking. The Record—including the evidence presented at the jury trial—reveals the following:

In 2019, Julious Parker, a 65-year-old Black man, moved into his new residence, one half of a duplex in Winston-Salem. Defendant lived in the other half of the duplex. Parker and Defendant had no communication with each other from the time Parker moved in until the following interactions occurred.

One night in July 2020, at approximately 4 AM, Parker observed Defendant taking yard waste and placing it on an existing pile on Parker's side of the yard. Parker went outside to confront Defendant, leading to the following exchange, as testified to by Parker:

Parker:	Excuse me. You need to put that stuff on your side.
Defendant:	You started that.
Parker:	Started what?
Defendant:	Boy.
Parker:	You call me what?
Defendant:	Nigga.

Defendant then returned to his house.

The next day, Parker found a letter from Defendant in his mailbox, addressed to "Occupant/Tenant" and indicating the owner of Parker's half of the duplex had been copied. The letter begins:

> Printed this out and hope it's clear *to you* in terms of our city ordinance(s). At the law firm, we deal with both civil and local ordnance. (sic) It would benefit you to read this as I highlighted the most significant sections of our city's sub code. Sec. 74-19 is for your review hoping your level of literacy lends itself to clear comprehension and the necessary expedience of your subsequent pending remedy.

The letter complains about a pile of debris in Parker's yard and alleges that it obstructs visibility for vehicles. It continues:

> Secondly, you may want to consider encroachment and destruction of property as it relates to trespassing. I will

> soon have to post NO TRESPASSING signs (no thanks to you). Do not cut or tamper the with (sic) survey line (again). Other than my recordation of said event(s) there are other means of surveillance employed. You've certainly made a huge statement about yourself based on the enormous junk & debris pile in front of YOUR RESIDENCE on our street. Not good! Not very bright, either. *Complete disregard on many counts*, **but mostly for the safety of drivers to navigate a residential street, in the city of Winston-Salem, North Carolina**.

(emphasis in original). The letter ends by quoting purportedly verbatim the majority of Section 74-19 of the Winston-Salem Code of Ordinances, which addresses the responsibility of residents to keep streets and sidewalks clear from vegetation.

Upon receiving this letter, Parker called the owner of his residence, who advised that he call the police. He did so, and officers arrived and spoke with Defendant.

Following this exchange, from July through August 2020, Defendant began placing milk jugs filled with water in his driveway. Some of these jugs had a letter written on them and were positioned such that Parker could read the letters from his bedroom window. Defendant would move the jugs around on his driveway and position them so that one jug at a time faced Parker's window. Parker informed the owner and began to take pictures of the jugs. He noticed that the jugs spelled out different words, one letter each day spelling out "N" "I" "G" "G" "A" and later "H" "O" "M" "O". On other days the jugs displayed two letters at a time, "F. N." and "Q. N." Parker understood these to be abbreviations for homophobic and racist slurs.

On several occasions during this time period, Defendant would rev his truck's engine with its taillights aimed at Parker's bedroom window at around 2:00 AM. Parker placed video cameras at the front of his property, which captured video recordings of Defendant positioning milk jugs and running his truck in the early hours of the morning. It also captured Defendant pointing a flashlight at Parker's floodlight sensor.

Parker testified at trial to multiple encounters he had with Defendant during July and August 2020. During one, Defendant "threw up his middle finger" at Parker and called him a racial slur. During another, Defendant, apparently speaking on the phone, spoke loudly enough while outside that Parker could hear him say: "Yeah they need to go back on his other side of town." During other telephone conversations

Defendant would "talk about bullets, ammo, gun," at a volume Parker interpreted as intended to allow him to overhear. Defendant would also at night bang on the adjoining wall between their residences, which was Parker's bedroom wall.

Following these events, Parker called the police a second time. Upon their advice, Parker went to the magistrate's office to take out charges against Defendant. The State filed a Misdemeanor Statement of Charges on 28 June 2021 charging Defendant with Misdemeanor Stalking and Disorderly Conduct by Abusive Language. Defendant received a bench trial in District Court on 4 August 2021. At this bench trial, Defendant was found not guilty of Misdemeanor Disorderly Conduct by Abusive Language. However, Defendant was found guilty of Misdemeanor Stalking. Defendant appealed this conviction to Superior Court.

Defendant was tried *de novo* in Superior Court on 30 January 2023. At trial, Parker testified to the above. Defendant testified that he had lived in the residence for nearly 40 years and that his family was "the original anchor family in the neighborhood." He said that when Parker moved in during 2019 Defendant attempted to introduce himself, but Parker turned to the men helping him move and said "Look, a cracker neighbor." He denied calling Parker slurs or spelling out slurs with the milk jugs. He explained that he would fill the jugs with water to distribute to unhoused persons, and that he would label them with the initials of different individuals. He also testified that the jugs in Parker's photographs were not placed where he had put them and appeared to have been moved. He denied banging on the adjoining wall and explained that the phone calls Parker overheard involving "ammo" and "gun" were likely conversations about varieties of coffee sold by the Black Rifle Coffee Company. He testified that he had not intended to intimidate or harass Parker.

On 1 February 2023, the jury returned its verdict finding Defendant guilty of Misdemeanor Stalking. The trial court sentenced Defendant to 18 months of supervised probation and a 15-day active sentence. Defendant gave written notice of appeal.

Issues

The multiple issues raised by Defendant on appeal are whether: (I) the trial court erred in instructing the jury on Misdemeanor Stalking without limiting its consideration to the course of conduct alleged in the charging instrument; (II) the trial court erred by failing to provide a limiting instruction regarding evidence of Defendant's conduct not alleged in the charging instrument; (III) the trial court's jury instruction as to the

elements of Misdemeanor Stalking was improper because it allowed the jury to consider the infliction of fear of death or bodily injury as an element, which was unsupported by the evidence and was not alleged in the charging instrument; (IV) Defendant received ineffective assistance of counsel because Defendant's trial counsel failed to object at trial regarding any of those issues; and, (V) there was sufficient evidence to support his conviction for Misdemeanor Stalking.

Analysis

I. Jury instructions regarding course of conduct alleged in charging instrument

[1] Defendant first argues the trial court erred by failing to instruct the jury as to the specific course of conduct alleged in the Misdemeanor Statement of Charges, allowing the jury to find him guilty of Misdemeanor Stalking upon a theory of conduct not alleged in the charging instrument.

Stalking is the (1) willful harassment on multiple occasions or (2) willful engagement in a course of conduct without legal purpose that the defendant knows or should know would cause a reasonable person (a) to fear for their safety or the safety of immediate family or close personal associates or (b) suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment. N.C. Gen. Stat. § 14-277.3A(c) (2023). The Statement of Charges filed against Defendant alleges he engaged in a course of conduct directed at Parker "by placing milk jugs outside of Mr. Parker's home spelling the words 'nigga' and 'homo.' " During the jury charge, the trial court instructed the jury on the elements of stalking:

> The Defendant has been charged with stalking. For you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the Defendant willfully engaged in a course of conduct directed at the victim without legal purpose.
>
> And second, that the Defendant at the time knew or should have known that the course of conduct would create a reasonable person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

The trial court did not specify to the jury that it was required to find the course of conduct described in the Misdemeanor Statement of Charges—the placement of the milk jugs—as the basis for a stalking

conviction. Defendant argues that, because evidence was presented at trial of additional conduct—including the first July 2020 confrontation, placing the letter in Parker's mailbox, revving his truck's engine at night, aiming a flashlight at Parker's floodlights, banging on the adjoining wall, calling him slurs, and using threatening language while on the phone—the jury instruction was ambiguous and potentially allowed the jury to convict based on a theory of conduct not alleged in the charging instrument.

A. Invited Error

As a threshold matter, the State argues that Defendant invited any error by agreeing to the jury instructions given, foreclosing his appeal on this issue. In general, we review jury instructions for plain error when the defendant failed to object at trial. *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001); *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000) (reviewing jury instructions for plain error when defendant had "ample opportunity to object to the instruction outside the presence of the jury" and did not do so). However, "a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001).

During the charge conference, the trial court discussed with counsel for Defendant and the State the jury instructions regarding Misdemeanor Stalking:

> The State: Yes, your honor. First parenthetical is on one or more occasion of harass and the other is charge a course of con–or sorry--engagement in a course of conduct. The misdemeanor statement alleges engaging in a course of conduct. We would be asking for that one.
>
> The Court: Okay. Any objection?
>
> Defense Counsel: No objection, your honor.
>
> The State: For the second parenthetical, harassment or course of conduct, same thing. Misdemeanor statement's alleged course of conduct. We would be asking for that.
>
> Defense Counsel: No objection.
>
> The Court: Okay.

The State: Your Honor, the statute says for misdemeanor stalking--I do have a copy of that if I may approach. And Mr. Hines.

Defense Counsel: Thank you.

The State: In reference to--the statute before A and B says "Any of the following." The State just interprets that as either A or B. Now you have to prove A and B. The instructions aren't really clear on that. The charging document falls into the category of B, so I would ask that A be stricken.

Defense counsel: That's fine, your Honor.

The Court: Okay. So we're going with A. I–

The State: No, we're striking it.

The Court: No, we're striking A. All right.

The State: Striking A and then going with B, which would just be "suffers substantial emotional distress by placing a person in fear of" the statute reads "death, bodily injury, or continued harassment." The charging document does allege continued harassment.

I think if you were to find any of those, that would be sufficient, so I would ask for all three with the "or in there between them. But if we just have to go with one, I would go with continued harassment as that's what's in the charging document.

Defense Counsel: Well, I'm not opposed to that, your Honor.

The Court: All right. So we'll go with death, bodily injury or--

The State: Continued harassment.

The court: Continued. Okay. All right.

The State: And I think the rest is just the same.

The Court: And so we went with course of conduct.

The State: Course of conduct striking A, and B is all three with "or continued harassment."

> The Court: So for the -- 4B is it-- okay. So suffer substantial emotional distress. Okay. All right.
>
> The State: Yeah, and then, yeah, engage in a course of conduct at the top of that page as well. I think I missed that but--
>
> The Court: All right. Yes.
>
> The State: And I think that should be it for the stalking charge.
>
> The Court: Okay
>
> Defense counsel: We're fine with that, Your Honor.

This discussion reflects the application of North Carolina Pattern Jury Instruction Crim. § 235.19 to the evidence before the trial court in this case. This pattern instruction includes various alternate constructions in brackets that may be used to apply the disjunctive elements of the charge to the specific facts of the case:

> The defendant has been charged with stalking.
>
> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant willfully [on more than one occasion harassed] [engaged in a course of conduct directed at] the victim without legal purpose.
>
> And Second, that the defendant at the time knew or should have known that the [harassment] [course of conduct] would cause a reasonable person to:
>
> a. [fear for [that person's safety] [the safety of that person's [immediate family] [close personal associates]. One is placed in reasonable fear when a person of reasonable firmness, under the same or similar circumstances, would fear [death] [bodily injury].]
>
> b. [suffer substantial emotional distress by placing the person in fear of [death] [bodily injury] [continued harassment]].

N.C.P.I. Crim. § 235.19.

During the charge conference quoted above, the State requested the trial court instruct the jury using the "course of conduct" option, and "emotional distress" as the result of that course of conduct. Defendant's counsel affirmed that he did not object to this implementation of the pattern instructions, and did not propose additional instructions limiting the underlying facts on which the jury could convict to those described in the charging instrument. We must determine if Defendant's level of participation in crafting this jury instruction constitutes invited error. Because the trial court did not discuss with the parties the specific issue of limiting the jury's consideration to the course of conduct alleged in the charging instrument, we conclude that it does not.

In prior cases examining invited error in jury instructions, we have reviewed a broad spectrum of attorney participation in crafting those instructions. At one end of that spectrum, error is clearly invited when the defendant requested the instruction at issue: in *State v. McPhail*, for example, the defendant specifically requested the trial court read the pattern jury instruction regarding confessions. 329 N.C. 636, 643-44, 406 S.E.2d 591, 596 (1991). Any error stemming from that instruction was invited error and could not be heard on appeal. *Id.*

At the opposite end of the spectrum, an attorney's simple failure to object to proposed instructions does not constitute invited error. In *State v. Harding*, the State argued the defendant was precluded from plain error review because he "failed to object, actively participated in crafting the challenged instruction, and affirmed it was 'fine.' " 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018). In rejecting the State's argument, we noted that a failure to object does not constitute invited error but instead gives rise to plain error review. *Id.* (citing *Hooks*, 353 N.C. at 633, 548 S.E.2d at 505 (2001)). While the State argued the defendant participated in crafting the jury instruction at issue, the transcript only reflected participation in the subsection (a) "purpose" element of kidnapping and not the subsection (b) elements elevating the charge to first-degree, which were at issue on appeal. *Id.*; N.C. Gen. Stat. § 14-39.

We have recognized a threshold of participation in crafting jury instructions above the mere failure to object which constitutes invited error, even when the appealing party did not specifically request the instruction and language at issue. For example, the State cites to *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996). In that case, the defendant faced multiple charges, with the evidence supporting instruction on identical mitigating factors for each charge. 344 N.C. at 234-35, 474 S.E.2d at 395. During the charge conference, the trial court specifically inquired if the defendant objected to the court instructing the jury on the

mitigating factors a single time, rather than repeating them for each separate charge: "And there's no reason, particularly, to repeat the mitigating circumstances in the entire charge. But I'll only do it if the defendant consents that way." *Id.* at 235, 474 S.E.2d at 396. As the defendant specifically agreed to this manner of instruction, our Supreme Court held any error to be invited, additionally noting that the instructions were not erroneous and resulted in no prejudice to the defendant. *Id.* Also in that case, the defendant submitted a proposed instruction in writing, the trial court substituted a word in the proposed instruction, and the defendant did not object to that change. *Id.* at 213, 474 S.E.2d at 383. The Court held any error in that instruction to likewise be invited by the defendant. *Id.*

In *State v. White*, the defendant requested an instruction on nonstatutory mitigating factors but failed to provide the trial court with proposed language for the requested instruction. 349 N.C. 535, 568-69, 508 S.E.2d 253, 274 (1998). The trial court read out loud its proposed instruction on nonstatutory mitigating factors, and defense counsel specifically agreed to the language. *Id.* Citing *Wilkinson*, our Supreme Court held that any error in that instruction was invited, and the defendant could not raise as an issue on appeal the language used in that instruction. *Id.*

Likewise, when the State requested no instruction be given on a lesser-included offense and the defendant's counsel affirmatively stated no such instruction was necessary, the Court held any error resulted from the defendant's own conduct. *State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993). And in *State v. Harris* the defendant argued that the trial court erred in the language it used to instruct the jury on a mitigating factor, but he had "agreed at the charge conference that the court would charge on this feature of the case as it did." 338 N.C. 129, 150, 449 S.E.2d 371, 380 (1994). Therefore, any error was invited, though the Court also held there was no error in the trial court's instruction. *Id.* at 129, 449 S.E.2d at 380-81.

As Defendant did not request the instruction at issue in this case, the question before us is whether his participation in the crafting of the jury instruction from the Misdemeanor Stalking pattern instruction forecloses any appeal related to the instruction on that charge. The trial court and counsel effectively worked through the pattern instruction line by line, and Defendant, through counsel, consented to each of the trial court's choices of construction. However, the specific issue of instructing the jury that its conviction could only be based on the course of conduct alleged in the charging instrument did not arise during the charge conference.

This case is similar to our decision in *State v. Chavez*, 270 N.C. App. 748, 842 S.E.2d 128 (2020), *rev'd on other grounds*, 378 N.C. 265, 861 S.E.2d 469 (2021). In *Chavez*, the indictment named only a single co-conspirator in the offense of conspiracy to commit first-degree murder but, at trial, the State provided evidence of two co-conspirators. 270 N.C. App. at 754, 842 S.E.2d at 133. The defendant argued the trial court erred by failing to limit the jury's consideration to the co-conspirator named in the indictment. *Id.* Counsel for the defendant participated in crafting the instruction during the charge conference, did not object to the proposed instruction on the conspiracy charge, and additionally requested that an instruction on "mere presence" be added to the language. *Id.* at 755, 842 S.E.2d at 134. The trial court provided written copies of the instructions to both parties, the defendant had multiple opportunities to object outside the presence of the jury, and the defendant's counsel indicated to the court that she was satisfied with the instructions. *Id.* at 754-55, 842 S.E.2d at 133-34. Citing *Harding*, we held that the failure to object to the applied pattern instruction did not constitute invited error. *Id.* at 757, 842 S.E.2d at 135 ("As Defendant did not request the conspiracy instruction, but merely consented to it, Defendant did not invite error like the defendant in *Wilkinson*, and is entitled to plain error review like the defendants in *Harding* and *Hardy*.").[1]

As in *Chavez*, Defendant participated in the crafting of the jury instruction on the charge at issue, but on appeal argues the trial court should have added an instruction limiting the basis upon which the jury could convict. Following *Chavez*, Defendant did not invite the error.

This is in accord with the general patterns of our appellate decisions regarding invited error in jury instructions. In cases where the defendant participates in crafting the instructions and specifically consents to the instruction as given, he may not argue on appeal that the language or form of the instruction that was given was in error. *See*, *e.g.*, *Harris*, 338 N.C. at 150, 449 S.E.2d at 380. When a provision is excluded from the instruction and that provision was specifically discussed with the defendant who explicitly consented to its exclusion, likewise no appeal will be heard. *See Williams*, 333 N.C. at 728, 430 S.E.2d at 893. However, when a provision is excluded from the instruction and the appealing party did not affirmatively consent to its exclusion but only consented

1. In its review of this Court's decision in *Chavez*, our Supreme Court likewise reviewed the jury instructions for plain error, ultimately holding that the defendant could not show prejudice and reversing the prior decision. 378 N.C. 265, 270, 861 S.E.2d 469, 473 (2021).

to the instructions as given, even when given "ample opportunity to object," *Hardy*, 353 N.C. at 131, 540 S.E.2d at 342, we cannot say that he invited the alleged error. Accordingly, we review the trial court's instruction for plain error.

B. Plain error review

A defendant may only be convicted of "the particular offense charged in the bill of indictment." *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202 (2018) (citing *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016)). It is "error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the [charging instrument]." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980).

Because Defendant did not object to the jury instructions at trial, we review this issue for plain error. "The plain error rule . . . is always to be applied cautiously and only in the exceptional case[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 661, 300 S.E.2d at 378. To show plain error, Defendant must show not only that the trial court erred, but that the error had a probable impact on the jury's finding that he was guilty. *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 334 (2012).

Here, Defendant argues that, although the Statement of Charges alleges only the placing of milk jugs outside of Parker's home as the course of conduct underlying the stalking charge, the State introduced evidence of at least eight other types of harassing conduct directed toward Parker. As such, Defendant contends, we cannot know whether the jury convicted Defendant based on the course of conduct alleged in the charging instrument or other conduct for which evidence was presented.

"In order for a variance to warrant reversal, the variance must be material," meaning it must "involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). A jury instruction that is not specific to the factual basis alleged in the charging document is acceptable so long as there is "no fatal variance between the [charging instrument], the proof presented at trial, and the instructions given to the jury." *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993). For example, where evidence of only a single wrongful act is presented to the jury, it is not error for the

trial court to fail to give instructions specific to that act. *See, e.g.*, *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566-67 (2005).

In this case, evidence of multiple potentially wrongful acts was presented to the jury. For Defendant to show plain error, he must show that, but for the challenged instructions, the jury probably would have reached a different verdict. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). For this to be the case, the jury must have rejected the evidence of the milk jugs as satisfying the "course of conduct" element of stalking but accepted evidence of Defendant's other conduct to satisfy this element. There are only two ways the jury could have reached this result: by finding (1) that Defendant did not place the milk jugs in his driveway; or (2) that he did not do so with the requisite mental state: knowledge that placing the milk jugs would cause a reasonable person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment. Neither of these possibilities are probable.

First, the evidence of the act of placement of the milk jugs was overwhelming. In addition to Parker's testimony, Defendant admitted to placing the milk jugs in his driveway and to writing the letters on them. The only conduct he did not concede was specifically turning the milk jugs to face Defendant's window in sequence, and he hypothesized that someone had repositioned them. But he conceded that he wrote the letters used to spell out multiple slurs and provided no explanation for who may have moved the jugs or why. He also engaged in a course of additional conduct that, under Defendant's argument, was sufficiently egregious that it caused the jury to convict him for stalking. Given the evidence before them, including Defendant's own testimony, it is not probable that the jury found he did not place the milk jugs in the driveway.

Nor is it likely that the jury found he did not place the milk jugs with the requisite intent. Defendant's theory requires that the jury convicted him based on a course of conduct other than the placement of the jugs, necessarily finding that this course of conduct was committed with knowledge that it would cause a reasonable person emotional distress. This would require the jury to conclude that, although Defendant engaged in a course of conduct he knew would cause emotional distress, the placement of milk jugs in his driveway—angled toward Parker's home and spelling out racial and sexual epithets—was coincidental and not a part of that course of conduct. We note as well that the primary focus of the trial was the course of conduct alleged in the charging document: a significant portion of the testimony at trial was related to the milk jugs, and Parker testified that he took out charges in response

to their placement. We cannot conclude that the jury found Defendant engaged in some course of conduct that constitutes stalking but that his conduct involving the milk jugs was innocent.

Defendant relies primarily on two cases to support his argument, both of which are distinguishable. In *State v. Taylor*, the trial court failed to instruct the jury on "removal," the theory of kidnapping contained in the indictment, and instead instructed on "confinement" and "restraint," neither of which were alleged in the indictment. 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). Unlike in this case, the variance in *Taylor* was fatal because the jury, following the trial court's instructions, could not have convicted under the theory alleged in the indictment. *Id.* In *State v. Ferebee*, 137 N.C. App. 710, 529 S.E.2d 686 (2000), the pattern jury instruction given was facially ambiguous and allowed the jury to convict for conduct the legislature did not intend to criminalize. Additionally, the defendant in that case objected to the instructions at trial and our review was not for plain error. 137 N.C. App. at 713-14, 529 S.E.2d at 688.

The evidence in this case supports a conviction based on the course of conduct alleged in the Statement of Charges, and a different jury instruction would not have produced a different result. Defendant was not prejudiced by the trial court's instructions. *See State v. Tirado*, 358 N.C. 551, 576, 599 S.E.2d 515, 533 (2004) ("[T]he evidence supported both the theory set out in the indictment and the additional theory set out in the trial court's instructions. Accordingly, we conclude . . . that the error in the instructions was not prejudicial."). The trial court did not plainly err.

II. Rule 404(b) evidence

[2] As described above, the State produced evidence of acts committed by Defendant that were not alleged in the charging instrument. Defendant argues that this evidence was admitted under Rule 404(b) of our Rules of Evidence, which allows evidence of other crimes and acts to be admitted, among other purposes, to show motive and intent. Because Rule 404(b) evidence is admissible only for limited purposes, he argues the trial court erred by failing to provide a limiting instruction to the jury, either at the time the evidence was admitted or during the formal jury charge.

However, as Defendant concedes, the trial court is not required to provide a limiting instruction when no party has requested one. "The admission of evidence which is relevant and competent for a limited purpose will not be held error in the absence of a request by the defendant for a limiting instruction. 'Such an instruction is not required unless

specifically requested by counsel.' " *State v. Stager*, 329 N.C. 278, 309, 406 S.E.2d 876, 894 (1991) (citing *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989)). This is in accord with our Rules of Evidence: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." N.C. Gen. Stat. § 8C-1, Rule 105 (emphasis added).

Here, Defendant failed to request a limiting instruction. Defendant did not at trial and does not on appeal challenge the admissibility of the evidence of his conduct. The trial court did not err by failing to give a limiting instruction when no instruction was requested. *State v. Wade*, 155 N.C. App. 1, 18, 573 S.E.2d 643, 654 (2002).

III. Death and Bodily Injury

[3] Defendant next argues that the trial court plainly erred by instructing the jury on extraneous theories of guilt not alleged in the charging document. In order to convict a defendant of stalking, the State must show that the defendant (1) harassed another person or (2) engaged in a course of conduct directed at that person. Then it must show that the defendant knew that their actions would cause a reasonable person to either (1) fear for their safety or that of others, or (2) suffer substantial emotional distress by being placed in fear of (a) death, (b) bodily injury, or (c) continued harassment. N.C. Gen. Stat. § 14-277.3A(c).

The charging instrument in this case alleged only that Defendant knew that his course of conduct would place Parker in fear of continued harassment. However, the trial court instructed the jury on all three forms of emotional distress that can support a stalking conviction:

> And second, that the Defendant at the time knew or should have known that the course of conduct would create (sic) a reasonable person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

Defendant argues that instructing the jury on the fear of death or bodily injury allowed the jury to convict based upon a theory of conduct not alleged in the indictment.

Unlike the instruction at issue above, where the trial court failed to give an instruction that was not discussed at the charge conference, the trial court discussed this instruction and its specific construction with the parties:

> The State: Striking A and then going with B, which would just be "suffers substantial emotional distress by placing a person in fear of" the statute reads "death, bodily injury, or continued harassment." The charging document does allege continued harassment.
>
> I think if you were to find any of those, that would be sufficient, so I would ask for all three with the "or" in there between them. But if we just have to go with one, I would go with continued harassment as that's what's in the charging document.
>
> Defense Counsel: Well I'm not opposed to that, Your Honor

Defendant, through counsel, specifically and affirmatively consented to this construction of the charge. Accordingly, any error in giving this instruction was invited and cannot be heard on appeal. *See Harris*, 338 N.C. at 150, 449 S.E.2d at 380.

Additionally, Defendant cannot show that he was prejudiced by the trial court's instruction. In order to show prejudice, absent an objection at trial, Defendant must show that it was probable the jury found that he had placed the victim "in fear of death or bodily harm" and that it probably would have found him not guilty if instructed only on "fear of continued harassment."

The evidence at trial related to Defendant's harassing behavior towards Parker, and Parker testified to his fear of continued harassment. Parker did testify that Defendant's behavior caused him to fear for his safety, but this evidence of Defendant's behavior constitutes further evidence of fear of continued harassment. We cannot conclude that the trial court instructing the jury only on continued harassment "would have tilted the scales in favor of Defendant." *See State v. Gainey*, 355 N.C. 73, 95, 558 S.E.2d 463, 478 (2002) (finding no plain error where kidnapping indictment alleged "confinement" as theory of conviction, trial court instructed on "restraint or removal," and evidence supported all three theories). Defendant was not prejudiced by this instruction.

IV. Ineffective Assistance of Counsel

[4] Defendant argues that he received ineffective assistance of counsel, in that his counsel failed to object to each of the alleged errors above: (1) by failing to request the trial court instruct the jury to limit its consideration to only the conduct identified in the charging document; (2) by failing to request a limiting instruction as to the 404(b) evidence of

the additional conduct; and (3) by failing to object to the jury instruction listing death and bodily injury in addition to continued harassment.

The right to effective counsel stems from the Sixth Amendment to the United States Constitution. In order to show ineffective assistance of counsel, Defendant must first 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." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The North Carolina Constitution also guarantees effective counsel, but the rights protected and ensuing analysis are identical to the federal standard. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985); N.C. Const. Art. 1, §§ 19, 23.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). In particular, where the alleged deficient performance concerns "potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *Id.* at 556, 557 S.E.2d at 548. Without evidence concerning the decisions made and strategy engaged by counsel, it can be difficult to determine if counsel's performance fell below an objective standard.

However, we need not address whether or not defense counsel's performance was deficient before examining whether or not Defendant was prejudiced by the alleged deficiencies. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 694.

In order to show prejudice in an ineffective assistance of counsel claim, Defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* This "reasonable probability" standard is lower than the "probable impact" standard for plain error, and it is possible to find prejudice in an ineffective assistance claim where there was no plain error. *See State v. Lane*, 271 N.C. App. 307, 311-16, 844 S.E.2d 32, 37-40 (2020). And, unlike when we review trial court decisions for plain error, we may consider the cumulative effect of counsel's alleged errors. *Id.* Still, Defendant must show that "[t]he likelihood of a different result [is] substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 178 L. Ed. 2d 624, 647 (2011). Defendant does not meet this threshold.

We first consider the cumulative impact of defense counsel's failure to request an instruction limiting the jury's consideration to the course of conduct alleged in the indictment—the placement of the milk jugs—and counsel's failure to request a limiting instruction as to evidence of other conduct. Assuming counsel had properly objected, a limiting instruction had been given as to the evidence of defendant's other conduct, and the jury was instructed it could only convict based on the course of conduct from the charging instrument, we do not hold there is a substantial likelihood that the jury would have found Defendant not guilty. As discussed above, the possibility that the jury convicted Defendant of stalking based on his other behavior but believed his displaying of milk jugs with racial and homophobic slurs to be innocent behavior is remote at best.

Second, the trial court's instruction on fear of death or bodily harm made the jury no more likely to convict than if it had limited its instruction to the fear of continued harassment. We cannot hold that it was likely the jury believed Parker was placed in fear of death or injury but not further harassment. Defendant was not prejudiced by his counsel's allegedly deficient performance.

V. Sufficiency of evidence

[5] Finally, Defendant argues the trial court erred by denying his motion to dismiss as there was insufficient evidence to support his conviction for Misdemeanor Stalking. Specifically, Defendant contends the evidence of whether he communicated something to Parker using the milk jugs, or what was communicated thereby, is too speculative to sustain a conviction.

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). On review, we determine "whether there is substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Lane*, 163 N.C. App. 495, 499, 594 S.E.2d 107, 110 (2004). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "The 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." *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 842-43 (2011) (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

To survive a motion to dismiss, the State was required to provide substantial evidence of each element of Misdemeanor Stalking. As applied

to this case, those elements are that Defendant (1) willfully engaged (2) in a course of conduct (3) directed at Parker (4) without legal purpose (5) which Defendant knew or should have known would cause a reasonable person to suffer substantial emotional distress (6) by placing that person in fear of continued harassment. N.C. Gen. Stat. § 14-277.3A(c). In this case, a "course of conduct" consists of two or more acts by which Defendant threatened or communicated with Parker. N.C. Gen. Stat. § 14-277.3A(b)(1).

Taken in the light most favorable to the State, the evidence showed Defendant placed milk jugs in his driveway with handwritten letters directed towards Parker's residence. Over the course of multiple days, these jugs spelled out "N" "I" "G" "G" "A" and "H" "O" "M" "O," as well as "Q" "N" and "F" "N," which Parker interpreted to be abbreviations for further slurs. Defendant admitted to labeling the milk jugs and placing them in his driveway, leaving only the question of whether he willfully engaged in this course of conduct, and whether he knew or should have known it would cause a reasonable person substantial emotional distress.

"It is well-established that intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Wooten*, 206 N.C. App. 494, 501, 696 S.E.2d 570, 576 (2010) (citations omitted). Taking the evidence of Defendant's course of conduct, combined with evidence of his other actions toward Parker, including calling him a racial slur, banging on the adjoining wall, and revving his vehicle and disturbing Parker's property at night, it was reasonable for the jury to conclude that Defendant's actions were willful and to find him guilty of Misdemeanor Stalking. The trial court did not err by denying Defendant's motion to dismiss.

Thus, in sum, the trial court properly submitted the case to the jury on the evidence presented and—to the extent error was not invited—did not plainly err in its jury instructions or in failing to provide additional limiting instructions, and trial counsel's allegedly deficient performance did not prejudice Defendant. Therefore, there is no reversible error in this case. Consequently, the trial court properly entered judgment upon the jury verdict.

Conclusion

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

NO ERROR.

Judges ZACHARY and THOMPSON concur.

STATE v. SIMPSON

[295 N.C. App. 425 (2024)]

STATE OF NORTH CAROLINA
v.
SHANITA YVETTE SIMPSON

No. COA23-618

Filed 20 August 2024

1. Indictment and Information—uttering a forged instrument—subject matter jurisdiction—essential elements alleged

The trial court had subject matter jurisdiction in a prosecution for uttering a forged instrument (N.C.G.S. § 14-120) arising from the theft of personal checks by a home health care worker from the residence of a client where the indictment alleged each essential element of the offense, including that defendant passed a check bearing an endorsement that she knew was forged with the intent to defraud or injure.

2. Identification of Defendants—out-of-court identification—photograph—Eyewitness Identification Reform Act—not applicable

In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker from the residence of a client, the trial court properly admitted testimony from a police officer that the victim had identified a photograph of defendant as the only person (other than the victim's spouse, who suffered from dementia) who had been in her home when the checks were taken and to whom the forged checks had been made payable. This out-of-court identification was not a "show-up" under the Eyewitness Identification Reform Act (EIRA) and, therefore, was not rendered inadmissible on the basis that the officer failed to follow EIRA procedures.

3. Constitutional Law—due process—out-of-court identification—not raised in trial court—Appellate Rule 2 not invoked

In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker from the residence of a client, the Court of Appeals declined to invoke Appellate Rule 2 to reach defendant's argument—raised for the first time on appeal—that her constitutional due process rights were violated by the admission of testimony from a police officer that the victim had identified a photograph of defendant as the only other person who had been in her home (other than the victim's spouse, who suffered from dementia) when the checks

were taken and to whom the forged checks had been made payable. Defendant could not show that the identification was so suggestive as to create a substantial likelihood of irreparable misidentification; thus, she failed to demonstrate the need for discretionary review to prevent a manifest injustice.

4. Constitutional Law—effective assistance of counsel—failure to move to suppress out-of-court identification—no error shown

In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker from the residence of a client, defendant did not receive ineffective assistance as a result of her counsel's failure to move to suppress—as either a violation of the Eyewitness Identification Reform Act (EIRA) or her constitutional due process rights—testimony from a police officer that the victim had identified a photograph of defendant as the only other person who had been in her home (other than the victim's spouse, who suffered from dementia) when the checks were taken and to whom the forged checks had been made payable. The identification did not fall under the EIRA and was not so suggestive as to create a substantial likelihood of irreparable misidentification; accordingly, a motion to suppress on either basis would have been denied as meritless.

Appeal by defendant from judgment entered 9 December 2022 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 2 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Caryn Strickland for defendant-appellant.

ZACHARY, Judge.

Defendant Shanita Yvette Simpson appeals from the judgment entered upon a jury's verdicts finding her guilty of felony forgery of endorsement and felony uttering a forged endorsement. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error, but remand for correction of a clerical error.

BACKGROUND

This case concerns financial crimes committed against Gorda Singletary. Mrs. Singletary's late husband, Dr. Henry Singletary, had dementia and, beginning around 2012, Mrs. Singletary hired SYNERGY HomeCare ("Synergy") to provide in-home care for him, with various caretakers providing assistance. Synergy assigned Defendant to care for Dr. Singletary on 7 February 2019. After Defendant arrived that morning, Mrs. Singletary left the home to run errands and returned around noon, just before Defendant's shift ended.

The next day, Mrs. Singletary discovered that two checks were missing from her bank checkbook, which she kept "in a desk drawer in a spare bedroom" of the home. She then determined that "[t]here was a third check taken from a brokerage account[.]"

Mrs. Singletary "called the bank immediately" to place stop-payment orders on the missing checks,[1] and reported to Synergy that she believed that she "had checks stolen and that [Defendant] was the one who did it because [Defendant] was the only one that was in the house." As Mrs. Singletary noted, "besides [Defendant], it was just [her] and [her] husband between the last time [Mrs. Singletary] saw the checks on February 5th and the last time that [she] noticed . . . they were missing on February 8th[.]"

About six months later, on 23 August 2019, Mrs. Singletary received a notice regarding one of the checks on which she had placed a stop-payment order. The check, on which Mrs. Singletary's signature had been forged, was dated 20 July 2019 and made payable to "Shanitta Dixon" in the amount of $580.00. Officer Robert Ferencak of the Wilmington Police Department testified that in the course of his investigation he discovered that the name Shanitta Dixon was one of at least eight aliases used by Defendant.

On 22 June 2020, a New Hanover County grand jury returned an indictment charging Defendant with felony larceny of a chose in action, felony forgery of endorsement, and felony uttering a forged endorsement. On 16 August 2021, the grand jury returned a habitual-felon indictment against Defendant.

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1. Pursuant to N.C. Gen. Stat. § 25-4-403, "[a] customer . . . may stop payment of any item drawn on the customer's account . . . by an order to the bank describing the item . . . with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it[.]" N.C. Gen. Stat. § 25-4-403(a) (2023).

On 30 November 2022, this matter came on for jury trial. The same day, the jury found Defendant guilty of felony forgery of endorsement and felony uttering a forged endorsement,[2] and Defendant subsequently pleaded guilty to attaining habitual-felon status. On 9 December 2022, the trial court entered judgment, sentencing Defendant to a term of 36 to 56 months in the custody of the North Carolina Division of Adult Correction.[3]

Defendant gave oral notice of appeal.

DISCUSSION

Defendant raises three issues on appeal. First, she argues that the trial court erroneously denied her motion to dismiss the charge of uttering a forged endorsement because the indictment insufficiently alleged the essential elements of that offense. Defendant also contends that the trial court erred by admitting Mrs. Singletary's out-of-court identification of Defendant based on a photograph shown to her by an officer in violation of the Eyewitness Identification Reform Act ("EIRA") and Defendant's due process rights. Finally, Defendant maintains that she received ineffective assistance of counsel.

I. Sufficiency of Indictment

[1] Defendant first asserts that Count III of "[t]he indictment . . . was fatally defective because it failed to allege the essential elements of the offense of uttering a forged endorsement[,]" thereby depriving the trial court of subject-matter jurisdiction to enter judgment on this offense. We disagree.

A. Preservation

Both "jurisdictional and non-jurisdictional pleading issues [are] automatically preserv[ed] . . . for appellate review." *State v. Singleton*, 386 N.C. 183, 208, 900 S.E.2d 802, 819 (2024). "Thus, issues related to alleged indictment defects, jurisdictional or otherwise, remain automatically preserved . . . ." *Id.* at 210, 900 S.E.2d at 821.

B. Standard of Review

"The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019). Under

2. The State dismissed the charge of larceny of a chose in action as part of Defendant's habitual-felon plea arrangement.

3. The record on appeal does not contain a copy of the judgment entered on Defendant's guilty plea to attaining habitual-felon status.

de novo review, an appellate court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (cleaned up).

C. Analysis

There are "two distinct species of indictment deficiencies, jurisdictional and non-jurisdictional[.]" *Singleton*, 386 N.C. at 196, 900 S.E.2d at 812. A jurisdictional defect, rendering a trial court without subject-matter jurisdiction, exists where the State's indictment "fails to charge a crime against the people or laws of this State." *Id.* at 184-85, 900 S.E.2d at 805. "[J]urisdictional defects are rare . . . ." *Id.* at 184, 900 S.E.2d at 805; *e.g.*, *id.* at 205, 900 S.E.2d at 818 (explaining that jurisdictional defects might include, for example, "charging a defendant with a crime committed in another state" or charging a defendant "with wearing a pink shirt on a Wednesday").

A nonjurisdictional defect occurs where the indictment fails "to allege with sufficient precision facts and elements of [the] crime[.]" *Id.* at 199, 900 S.E.2d at 814. Thus, "[t]aken together with the purpose of an indictment to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy, a test for indictment validity becomes whether the indictment alleges facts supporting the essential elements of the offense to be charged." *State v. Stewart*, 386 N.C. 237, 241, 900 S.E.2d 652, 656 (2024) (cleaned up). This category of deficiency is nonjurisdictional because "so long as a crime against the laws and people of this State has been alleged, defects in indictments do not deprive the trial court of jurisdiction." *Id.* at 240, 900 S.E.2d at 655. To obtain relief on the basis of a nonjurisdictional defect, a defendant must "show that the indictment contained a statutory or constitutional defect and that such error was prejudicial." *Id.*

Such is the case before us, in which Defendant does not assert that the indictment fails to charge a crime. Rather, Defendant contends that the indictment fails to allege the facts and elements of the crime of felony uttering a forged endorsement with sufficient precision, leaving her without notice of the offense being charged and unable to prepare a defense. As Defendant explains, "[w]hile counts I and II [of the indictment] identify a specific check number, Count III does not provide any information regarding the allegedly forged check except to state that [she] uttered 'a check, which contained a forged and falsely made endorsement of GLORIA C. SINGLETARY.' "

N.C. Gen. Stat. § 14-120 criminalizes the act of uttering a forged paper or uttering an instrument containing a forged endorsement:

> If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall falsely make, forge or counterfeit any endorsement on any instrument . . . , whether such instrument be genuine or false, or shall knowingly utter or publish any such instrument containing a false, forged or counterfeited endorsement or, knowing the same to be falsely endorsed, shall pass or deliver or attempt to pass or deliver any such instrument containing a forged endorsement to another person, the person so offending shall be guilty of a Class I felony.

N.C. Gen. Stat. § 14-120.

The essential elements of uttering a forged endorsement are therefore that (1) the defendant "passed a check"; (2) "such check contained an endorsement which was forged"; (3) the defendant "knew that such endorsement was forged"; and (4) the defendant "acted for the sake of gain or with the intent to defraud or injure any other person." *State v. Forte*, 80 N.C. App. 701, 702, 343 S.E.2d 261, 262, *disc. review denied*, 316 N.C. 735, 345 S.E.2d 400 (1986).

Here, Defendant was charged in Count III of the indictment with the offense of uttering a forged endorsement. The indictment cites the relevant statute—N.C. Gen. Stat. § 14-120—and lists an offense date of "02/07/2019-07/26/2019[.]" Count III of the indictment then alleges that, in New Hanover County, Defendant "unlawfully, willfully and feloniously did utter, publish, pass and deliver as true to NORTH CAROLINA STATE EMPLOYEE'S CREDIT UNION (LELAND BRANCH, BRUNSWICK COUNTY) a check, which contained a forged and falsely made endorsement of GLORIA C. SINGLETARY." Count III of the indictment further alleges that Defendant "knew at the time that the endorsement was falsely made and forged and acted for the sake of gain and with the intent to injure and defraud."

Count III of the indictment alleges facts supporting each essential element of the offense. "[T]he indictment states the charge against [D]efendant in a plain, intelligible, and explicit manner, citing the statute under which [D]efendant was charged. Defendant was placed on notice of the charge levied against h[er], allowing h[er] to prepare for trial and protecting h[er] from double jeopardy." *Stewart*, 386 N.C. at 242, 900 S.E.2d at 656. Indeed, Defendant did not "allege[ ] that [the indictment] failed to put [her] on notice of the charged offense[,]" a copy of the check at issue having been produced by the State in discovery. *Id*. Accordingly,

Count III of the indictment is facially valid, having sufficiently alleged each essential element of N.C. Gen. Stat. § 14-120.

"Because no error occurred, we need not consider the issue of prejudice." *Singleton*, 386 N.C. at 214, 900 S.E.2d at 823; *see id.* at 211 n.16, 900 S.E.2d at 821 n.16. Defendant's argument is overruled.

II. Compliance with the Eyewitness Identification Reform Act

[2] Next, Defendant contends that Mrs. Singletary's "out-of-court identification of [Defendant] based on a single photograph" did not comport with the requirements of the EIRA and that this error was prejudicial. We conclude that Defendant's argument is misplaced.

A. Standard of Review

"Only if the EIRA applies do we need to reach Defendant's arguments about a violation of the EIRA and the trial court's alleged errors in relation to any such violation." *State v. Morris*, 288 N.C. App. 65, 81, 884 S.E.2d 750, 762, *appeal dismissed*, 385 N.C. 315, 891 S.E.2d 288 (2023). "The applicability of the EIRA presents an issue of statutory interpretation[,]" which we review de novo. *Id.*

B. Analysis

"The EIRA, codified in N.C. Gen. Stat. § 15A-284.52, establishes standard procedures for law enforcement officers when conducting out-of-court eyewitness identifications of suspects." *State v. Crumitie*, 266 N.C. App. 373, 376, 831 S.E.2d 592, 594 (2019), *disc. review denied*, 374 N.C. 269, 839 S.E.2d 851 (2020). "The EIRA includes required procedures for . . . show-ups . . . ." *Morris*, 288 N.C. App. at 82, 884 S.E.2d at 762.

"Show-ups are procedures in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." *Crumitie*, 266 N.C. App. at 377, 831 S.E.2d at 594–95 (cleaned up). The EIRA bans photographic show-ups. *See Morris*, 288 N.C. App. at 82, 884 S.E.2d at 762 ("[A] show-up can only permissibly include a live person."); *see also id.* at 83–84, 884 S.E.2d at 763. However, not all out-of-court identifications are show-ups as defined in and subject to the EIRA.

In *Morris*, a witness identified the defendant after "seeing a single photograph of [the defendant] and being asked if he was the person from whom [the witness had] bought the drugs." *Id.* at 83, 884 S.E.2d at 762–63. The defendant challenged the identification as "a banned photographic show-up" in violation of the provisions of the EIRA. *Id.* at 84, 884 S.E.2d at 763. This Court explained that the EIRA show-up provisions

did not apply "where the State already had identified" and charged the defendant as the perpetrator of the crime. *Id.* at 85, 884 S.E.2d at 764. Accordingly, because "the identification . . . did not seek the same purpose as a show-up, it was not a show-up under the EIRA[,]" and therefore there could be no EIRA violation. *Id.* at 84, 884 S.E.2d at 764.

Similarly, in *Crumitie*, a law enforcement officer responding to a reported shooting at an apartment complex noticed a man running in the area. 266 N.C. App. at 375, 831 S.E.2d at 593. When the officer reached the injured victim, she "wrote down [the] defendant's name" and the officer looked up the defendant's Department of Motor Vehicles record. *Id.* at 375, 831 S.E.2d at 594. The officer recognized the "DMV photograph of [the] defendant . . . as the same man he had seen running [away] when he arrived at the scene." *Id.* This Court concluded that the officer's "inadvertent out-of-court identification of [the] defendant, based on a single DMV photograph [that he] accessed . . . , was neither a lineup or show-up under the EIRA, and thus not subject to those statutory procedures." *Id.* at 377, 831 S.E.2d at 595.

Here, Defendant challenges an out-of-court photographic identification of Defendant by Mrs. Singletary about which Officer Ferencak testified on direct examination:

> [THE STATE:] Could you tell the members of the jury about your meeting with Mrs. Singletary?
>
> [OFFICER FERENCAK:] Certainly. So [I] went to the residence, met with Mrs. Singletary. Dr. Singletary was there in another room. Spoke with Mrs. Singletary one-on-one, . . . and she was able to confirm for me that she hadn't given permission for anybody else to have this check, that the check had been stolen when only one other individual, [Defendant], had been in the house, and I actually brought a photo of [Defendant] from our police records system, and I showed her the photo—
>
> [DEFENSE COUNSEL]: I object, Your Honor. I'd like to be heard.
>
> . . . .
>
> [T]wo quick objections.
>
> . . . .
>
> Showing a single photograph to a witness violates the eyewitness identification act, which requires a photo

> lineup and procedure, detective not associated with the case to show six photographs, give the witness the speech about you may or may not see the person who's involved in the case . . . .
>
> The second objection is that Mrs. Singletary did not testify to identifying the photograph in her direct testimony. . . .
>
> So those are my two objections.
>
> THE COURT: Objection is overruled.
>
> . . . .
>
> [THE STATE:] And you spoke with [Mrs. Singletary], and what was the conversation?
>
> [OFFICER FERENCAK:] So she was able to confirm for me . . . that the only person that was in the residence other than she and her husband at the time that the check would have been stolen was [Defendant].
>
> . . . .
>
> I brought along a photo of the individual, [Defendant] Shanitta Dixon/Shanita Simpson, and I showed her the photo, saying, Is this the Shanitta Simpson/Shanitta Dixon you were speaking of? She confirmed that for me.
>
> . . . .
>
> [DEFENSE COUNSEL]: I'll repeat my objections from earlier, but I don't need to be heard.

The trial court again overruled Defendant's objections and then admitted the photograph into evidence as State's Exhibit 5.

Defendant argues that Mrs. Singletary's identification of Defendant as the person pictured in State's Exhibit 5, as recounted in Officer Ferencak's testimony, constituted "an unlawful 'show-up' that plainly failed to comply with the EIRA." She further contends that "at a minimum," she "was entitled to a jury instruction 'that it may consider credible evidence of . . . noncompliance [with the EIRA] to determine the reliability of eyewitness identifications.' " N.C. Gen. Stat. § 15A-284.52(d). The State asserts that the out-of-court identification of Defendant by Mrs. Singletary about which Officer Ferencak testified was not subject to the EIRA's statutory procedures. We agree with the State.

As in *Morris*, the procedure of which Defendant complains here was, "critically, . . . not conducted to try to determine if a suspect was the perpetrator." *Morris*, 288 N.C. App. at 84, 884 S.E.2d at 764. Officer Ferencak accessed the law enforcement database photograph of Defendant *after* Mrs. Singletary reported the missing checks and the fraudulent check that had been made payable to Defendant, and *after* Mrs. Singletary named Defendant as the only individual other than herself and her husband who had an opportunity to take the checks. "As a result," Mrs. Singletary and officers "had already concluded" that Defendant "was the perpetrator" at the time that Mrs. Singletary identified Defendant as the individual in State's Exhibit 5. *Id.* "Since the identification here did not seek the same purpose as a show-up, it was not a show-up under the EIRA." *Id.*

"[T]he EIRA does not apply to the identification at hand"; thus, the trial court did not err in denying Defendant's objections to the admission of the identification as an EIRA violation. *Id.* at 85, 884 S.E.2d at 764. In turn, because the EIRA is inapplicable here, Defendant's arguments regarding prejudice and the need for a jury instruction are inapposite.

III. Due Process Protections

[3] Finally, Defendant argues that, even if the identification procedure here did not violate the EIRA, "[t]he admission of the out-of-court identification violated [her] due process rights because it was impermissibly suggestive and created a substantial likelihood of irreparable misidentification."

A. Direct Appeal

Defendant acknowledges that "[b]ecause [she] did not raise a due process challenge below, this Court's review is pursuant to Rule 2."

"[D]ue process protections exist on top of the EIRA's statutory protections." *Morris*, 288 N.C. App. at 85, 884 S.E.2d at 764. Nonetheless, a party must "make a timely request, objection, or motion at trial, stating the specific grounds for the desired ruling in order to preserve an issue for appellate review." *State v. Mulder*, 233 N.C. App. 82, 86, 755 S.E.2d 98, 101 (2014) (cleaned up). "As a general rule, constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *Id.* (cleaned up); *accord* N.C. R. App. P. 10(a)(1).

"Despite the rule disallowing appellate review of issues not raised at trial, our Supreme Court has stated that the appellate courts may elect to review an unpreserved [constitutional] issue on appeal pursuant to our supervisory power over the trial divisions and Rule 2 of the North

Carolina Rules of Appellate Procedure." *Mulder*, 233 N.C. App. at 87, 755 S.E.2d at 101 (cleaned up). The decision to invoke Rule 2 "is entirely discretionary" and is used only in exceptional cases to prevent manifest injustice to a party. *Id.*

We conclude that Defendant has not shown error by the trial court sufficient for this Court, in its discretion, to invoke Rule 2 to prevent a manifest injustice that occurred to Defendant.

Our Supreme Court has explained that in addressing the constitutional requirements of due process in eyewitness identification, we must determine "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *State v. Malone*, 373 N.C. 134, 146, 833 S.E.2d 779, 787 (2019) (citation omitted).

In the case at bar, Mrs. Singletary reported the fraudulent check, which was made payable to Defendant, as well as the other missing checks, and Mrs. Singletary reported that Defendant was the only individual other than Mrs. Singletary and her husband who had access to the checks during the time that the checks must have been taken. Subsequently, Officer Ferencak used the name given to him by Mrs. Singletary to access Defendant's law enforcement database photograph. He then showed the photograph to Mrs. Singletary and asked, "Is this the Shanitta Simpson/Shanitta Dixon you were speaking of?" Mrs. Singletary confirmed that Defendant was the individual in the photograph later admitted at trial as State's Exhibit 5.

Our Supreme Court has cautioned that the appellate "courts have widely condemned the practice of showing suspects singly to persons for the purpose of identification." *Morris*, 288 N.C. App. at 76, 884 S.E.2d at 758 (quoting *State v. Yancey*, 291 N.C. 656, 661, 231 S.E.2d 637, 640 (1977)). However, in the present case, Mrs. Singletary had identified Defendant *prior* to being shown Defendant's law enforcement database photograph, "independent of [any alleged] impermissibly suggestive identification procedure conducted by the State." *Malone*, 373 N.C. at 152, 833 S.E.2d at 791. Even assuming that Mrs. Singletary's viewing of Defendant's photograph was "inherently suggestive[,]" Defendant fails to demonstrate that the procedure "create[d] a substantial likelihood of irreparable misidentification." *Id.* at 146, 833 S.E.2d at 787 (citation omitted).

"At this second step, the central question is whether under the totality of the circumstances the identification was reliable even if the confrontation procedure was suggestive." *Morris*, 288 N.C. App. at 71–72,

884 S.E.2d at 756 (cleaned up). Our Supreme Court has identified five factors for use in the totality of the circumstances analysis:

> [(1)] the opportunity of the witness to view the accused at the time of the crime[; (2)] the witness' degree of attention at the time[; (3)] the accuracy of [the] prior description of the accused[; (4)] the witness' level of certainty in identifying the accused at the time of the confrontation[;] and [(5)] the time between the crime and the confrontation.

Malone, 373 N.C. at 147, 833 S.E.2d at 787 (citation omitted).

A court need not conclude that "all five factors weigh against a substantial likelihood of irreparable misidentification to admit the evidence over due process concerns." *Morris*, 288 N.C. App. at 78, 884 S.E.2d at 760 (citation omitted). "The factors must ultimately be weighed against the corrupting effect of the suggestive procedure itself." *Id.* (cleaned up).

Here, as concerns the first and second factors, Mrs. Singletary had a clear opportunity to view Defendant. Mrs. Singletary saw Defendant twice, both during the daytime and in the home with the lights on. Mrs. Singletary showed Defendant around her home, and Defendant was not wearing a face mask while she interacted with Mrs. Singletary. There was also every incentive to pay close attention to Defendant: Mrs. Singletary planned to run some errands while Defendant cared for her husband, entrusting Defendant with her ill husband and her home. Thus, the first and second factors "count[ ] against a due process violation." *Id.* at 79, 884 S.E.2d at 760.

There does not appear to be any information as to Mrs. Singletary's physical description of Defendant, or its accuracy if she gave a description. Therefore, the third factor neither supports nor weighs against a determination of a due process violation.

As for Mrs. Singletary's "level of certainty in identifying the accused at the time of the confrontation," *Malone*, 373 N.C. at 147, 833 S.E.2d at 787 (citation omitted), she confirmed that the photograph produced by the officer was one of Defendant, who she knew by name independent of any suggestion by law enforcement officers. *See Crumitie*, 266 N.C. App. at 378–79, 831 S.E.2d at 595–96. This fourth factor weighs against a due process violation.

Finally, it is undisputed that more than six months had passed between the day of the crime and the confrontation. However, the length in time between the offense and the identification is mitigated by the

fact that Mrs. Singletary was familiar with Defendant prior to being shown the photograph. This factor slightly weighs in favor of a due process violation.

"Weighing all those factors as part of the totality of the circumstances against the corrupting influence of the identification procedure itself, the procedure did not create a substantial likelihood of irreparable misidentification." *Morris*, 288 N.C. App at 80, 884 S.E.2d at 761 (cleaned up). Therefore, Defendant's due process rights were not violated by the admission of the out-of-court identification, and Defendant has failed to show an error such that hers is "the exceptional case" in which the invocation of Rule 2 is appropriate. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted).

B. Ineffective Assistance of Counsel

[4] We likewise reject Defendant's alternative arguments that trial counsel's failure to move to suppress the out-of-court identification on either EIRA or due process grounds constituted ineffective assistance of counsel.

"A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel." *State v. Perdomo*, 276 N.C. App. 136, 144, 854 S.E.2d 596, 602 (2021) (citation omitted), *disc. review denied*, 380 N.C. 678, 868 S.E.2d 859 (2022). "To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *State v. Worley*, 268 N.C. App. 300, 310, 836 S.E.2d 278, 286 (2019) (cleaned up), *disc. review denied*, 375 N.C. 287, 846 S.E.2d 285 (2020). "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." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985).

As discussed above, the identification here 1) does not fall "under the EIRA [and is] not subject to those statutory procedures," *Crumitie*, 266 N.C. App. at 377, 831 S.E.2d at 595, and 2) was not "so suggestive as to create a substantial likelihood of irreparable misidentification[,]" *Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (citation omitted). Defendant's trial counsel was not ineffective in failing to file a motion to suppress on bases that lacked merit. Accordingly, Defendant's ineffective assistance of counsel arguments are overruled.

IV. Clerical Error

Finally, we note that the judgment in this case indicates that the trial court sentenced Defendant for felony forgery of endorsement and felony uttering a forged endorsement pursuant to Defendant's guilty plea, when the record reveals that Defendant was found guilty by jury verdict of these charges and pleaded guilty only to the charge of attaining habitual felon status. Because this error "result[ed] from a minor mistake or inadvertence . . . in writing or copying something on the record," it is a clerical error, and therefore we remand to the trial court for the limited purpose of correcting this error. *State v. Allen*, 249 N.C. App. 376, 380, 790 S.E.2d 588, 591 (2016) (citation omitted).

CONCLUSION

For the foregoing reasons, Defendant received a fair trial, free from error. We remand to the trial court for the limited purpose of correcting the clerical error in the judgment as indicated herein.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges HAMPSON and THOMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 AUGUST 2024)

2120 ARLINGTON PLACE TR. v. JONES No. 24-39	Henderson (22CVS527)	Affirmed
BAILEY v. S. LITHOPLATE, INC. No. 24-55	N.C. Industrial Commission (18-732798)	Remanded
CHAVEZ v. LOGAN No. 23-528	Edgecombe (21CVS1)	Reversed and Remanded
DYKERS v. TOWN of CARRBORO No. 23-638	Orange (23CVS124)	Affirmed
REISS v. REISS No. 23-950	Wake (20CVD7284)	Dismissed
STATE v. BELL No. 23-967	Beaufort (20CRS51204-05)	No Error
STATE v. DAVIS No. 22-938	Wake (18CRS219359)	No plain error in part; No error in part; Reversed and remanded in part.
STATE v. HOLDER No. 23-395	Nash (21CRS52515)	No Error
STATE v. JORDAN No. 24-1	Mecklenburg (18CRS213903) (18CRS213905)	No Error
STATE v. KNIGHT No. 23-67	Pitt (18CRS57744) (18CRS57746)	No Error and No Plain Error
STATE v. LEGETTE No. 23-1153	Mecklenburg (21CRS234379)	Affirmed
STATE v. McLAUGHLIN No. 23-929	New Hanover (15CRS58657)	No Error
STATE v. SISK No. 23-803	Transylvania (22CRS50240)	No Error

DURHAM COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER
v.
AMANDA SHENELLE WALLACE, RESPONDENT

No. COA23-96

Filed 3 September 2024

1. Injunctions—no-contact order—Workplace Violence Prevention Act—harassment definition—respondent's direction of conduct by third parties toward petitioner

In an appeal from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent), who founded an organization dedicated to protesting against DSS and its policies, where advocates of the organization sent text messages and social media posts to DSS employees, it was held that the texts and social media posts met the WVPA's statutory definition of "harassment" as knowing conduct directed at a specific person that torments, terrorizes, or terrifies, and serves no legitimate purpose. Notably, the ordinary meaning of "directed at" implicated not only respondent's own harassing conduct but also her direction of third parties' conduct (here, the sending of messages and posts) toward DSS employees.

2. Civil Procedure—Rule 52(a)—specific findings requirement—civil no-contact order—content and source of harassment

A civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent)—who founded an organization dedicated to protesting against DSS and its policies—was vacated where the trial court's findings of fact regarding the "unlawful conduct" directed at DSS were insufficient to permit meaningful appellate review. Although the order documented respondent's protests against DSS, as well as a DSS social worker's receipt of numerous text messages that left her feeling "fearful," the trial court did not enter specific findings describing the content of the harassment or identifying the source of the texts, choosing instead to enter a finding merely incorporating the facts alleged in DSS's petition. The matter was remanded for entry of a new order containing specific findings as required under Civil Procedure Rule 52(a).

3. Injunctions—no-contact order—enjoining unidentified non-parties—unenforceable

A civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent)—who founded an organization dedicated to protesting against DSS and its policies—and her "followers" was vacated because the trial court did not identify who these "followers" were and therefore could not enjoin them, particularly given that injunctions are regularly voided where they affect the rights of non-parties who lack any identifiable relationship to the parties and who did not receive notice of the proceedings.

4. Constitutional Law—freedom of speech—time, place, manner restrictions—intermediate scrutiny—protests outside government office and employee's home

In a case where the trial court entered a civil no-contact order pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent), who founded an anti-DSS organization and led protests on the streets and sidewalks near DSS's main office and the DSS director's personal residence, the court did not violate respondent's state or federal free-speech rights by ordering respondent to peacefully protest no less than twenty-five feet from the DSS office employee entrance without using "voice amplification devices" or yelling when children were leaving the building. These content-neutral restrictions properly regulated the time, place, and manner of respondent's speech where they passed the highest applicable judicial standard—here, intermediate scrutiny—because they were narrowly tailored to serve a significant government interest (protecting DSS employee safety and preventing psychological harm to children leaving the DSS office) and left ample alternative channels of communication open for respondent to peacefully protest.

5. Appeal and Error—preservation of issues—violation of constitutional right to petition—failure to raise issue at trial

In an appeal from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act on behalf of the department of social services (DSS) against a former employee (respondent), who founded an organization dedicated to protesting against DSS and its policies, respondent's argument that the order violated her state and federal constitutional rights to petition the government was dismissed as unpreserved because she failed to raise a

request, objection, or motion before the trial court regarding that specific issue.

Appeal by Respondent from order entered 24 August 2022 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 7 June 2023.

Stam Law Firm, PLLC, by R. Daniel Gibson, for the respondent-appellant.

Teague Campbell, Dennis & Gorham, L.L.P., by Patrick J. Scott, Natalia Isenberg and Jacob H. Wellman, for the petitioner-appellee.

The ACLU of North Carolina Legal Foundation, by Samuel J. Davis, Kristi L. Graunke, and Muneeba S. Talukder, amicus curiae.

STADING, Judge.

Respondent Amanda Wallace appeals from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act. N.C. Gen. Stat. §§ 95-260 to -271 (2023). After carefully reviewing the trial court's no-contact order, we hold that its findings of fact are insufficient to permit meaningful appellate review and thus vacate and remand the order for further proceedings.

I. Background

Respondent previously worked as a child abuse and neglect investigator for Petitioner Department of Social Services ("DSS") in Durham, North Carolina. Dissatisfied with DSS's child-placement policies, Respondent pursued external advocacy. She founded an organization, Operation Stop Child Protective Services ("Operation Stop CPS"), purporting to "be a solution, to give families a voice and empower them to be able to speak out about what's going on." Operation Stop CPS maintained a social media presence, rallied against DSS's policies, and protested against DSS.

Respondent was involved with many of these protests against what she terms "the kidnapping of children in Durham County." She also led these protests near DSS's office at the intersection of East Main Street and Queen Street in Durham. Respondent and at least two of her fellow Operation Stop CPS advocates protested near the personal residence of the Durham DSS Director on 24 May 2022 and 13 August 2022. As

a result of these protests, DSS employees began to express concerns about their personal safety and that of their family members.

In response to these concerns, on 16 August 2022, Petitioner filed a complaint for a civil no-contact order on behalf of itself and its employees to enjoin Respondent "and her followers" from contacting either party at their office or home under North Carolina's Workplace Violence Prevention Act (the "WVPA" or "Act"). N.C. Gen. Stat. §§ 95-260 to -271. The complaint's allegations focused on protests near DSS's office and an employee's house, as well as social media posts and text messages sent to Petitioner's employees by Operation Stop CPS advocates.

The trial court granted Petitioner's motion for a temporary *ex parte* no-contact order and, on 24 August 2022 conducted a hearing on whether to make the no-contact order permanent. The trial court heard from multiple witnesses whom Respondent cross-examined. After the hearing, the trial court found that Respondent's actions constituted harassment and issued a permanent no-contact order. In this order, the trial court documented the following findings of fact:

- Respondent and her followers have regularly appeared and protested on E[ast] Main [and] Queen St[reet] at DSS offices[;]
- Respondent and her followers have appeared at the personal residence of [the Durham DSS Director] and harassed and intimidated [him;]
- [A named social worker] received no less than 300 text messages [on] July 27—28 [2022] from 7:43 PM—2 AM complaining of her handling of DSS cases[;]
- [The Durham DSS Director] and DSS employees are fearful[; and]
- All other facts allege[d] in [the] petition are incorporated herein[.]

As a conclusion of law, the trial court held that Respondent committed "unlawful conduct" under N.C. Gen. Stat. § 95-264 (2023), but would still "be allowed to peacefully protest." The no-contact order also directed Respondent to:

- [N]ot visit, assault, molest, or otherwise interfere with the employer or the employer's employee at the employer's workplace or otherwise interfere with the employer's operations[;]

- [C]ease stalking the employer's employee at the employer's workplace[;]
- [C]ease harassment of the employer or the employer's employee at the employer's workplace[;]
- [N]ot abuse or injure the employer, including employer's property, or the employer's employee at the employer's workplace[;]
- [N]ot contact by telephone, written communication, or electronic means the employer or the employer's employee at the employer's workplace.

The no-contact order further decreed that "Respondent and her followers" must:

- [B]e allowed to peacefully protest[;]
- [R]emain no less than [twenty-five] feet from the employee entrance and the main entrance of DSS while protesting[;]
- [N]ot use any voice amplification devices[;]
- [N]ot yell or chant when minor children are leaving the building when they appear to be exercising DSS supervised visitation.

Following its entry, Respondent timely appealed the no-contact order.

II. Jurisdiction

This Court has jurisdiction to consider Respondent's appeal of the trial court's no-contact order because it is a "final judgment of a district court in a civil action." N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Analysis

Although Respondent timely objected to Petitioner's standing at trial, she abandoned the issue with this Court because she raised it only in her reply brief. *McLean v. Spaulding*, 273 N.C. App. 434, 441, 849 S.E.2d 73, 79 (2020) (citing N.C. R. App. P. 28(b)(6)). Further, because Respondent did not "present to the trial court a timely request, objection, or motion" that clearly and specifically "state[d] the grounds for the ruling [she] desired the court to make," she also abandons her right-to-petition claim. N.C. R. App. P. 10(a)(1). Thus, Respondent presents four preserved issues on appeal:

(1) Whether the statutory meaning of "harassment . . . directed to a specific person" under N.C. Gen. Stat.

§§ 14-377.3A(b)(2) (2023) and 95-260(3)(b) (2023) includes these repeated text messages to an employee and social media posts about Petitioner;

(2) Whether a no-contact order in response to Respondent's "harassment" requires an express finding of fact that she acted "with the intent to place the employee in reasonable fear" of their safety under N.C. Gen. Stat. § 95-260(3)(b);

(3) Whether N.C. Gen. Stat. § 95-264 grants a trial court authority to enjoin non-parties; and

(4) Whether the no-contact order's prohibition of noise-amplification devices, protesting within twenty-five feet of DSS's office, or yelling violates Respondent's freedom of speech under the United States and North Carolina Constitutions.

This Court reviews a trial court's record for "competent evidence that supports the trial court's findings of fact" and the propriety of its "conclusions of law . . . in light of such facts." *DiPrima v. Vann*, 277 N.C. App. 438, 442, 860 S.E.2d 290, 293 (2021). Those conclusions of law are reviewed *de novo*. *Id.*

A. The WVPA's Statutory Meaning

[1] First, Respondent argues that the trial court's no-contact order violates the statutory requirements of the WVPA's own language because the text messages and social media posts do not meet the Act's statutory definition of "harassing." *See* N.C. Gen. Stat. § 95-260 (2023) (incorporating by reference the definition of "harassment" found in N.C. Gen. Stat. § 14-277.3A(b)(2) (2023)); *see also Ramsey v. Harman*, 191 N.C. App. 146, 150, 661 S.E.2d 924, 927 (2008). A trial court may issue a civil no-contact order upon a finding that an "employee has suffered unlawful conduct committed by" a respondent. N.C. Gen. Stat. § 95-264(a). In addition to several statutory elements not at issue here, this "unlawful conduct" includes a catch-all element of "otherwise harassing [conduct], as defined in [N.C. Gen. Stat. §] 14-277.3A. . . ." *Id.* § 95-260(3)(b).

In this context, civil harassment constitutes five relevant elements: (1) knowing conduct (2) directed at (3) a specific person (4) that torments, terrorizes, or terrifies, and (5) serves no legitimate purpose. *Id.* § 14-277.3A(b)(2). Absent a controlling statutory definition, this Court otherwise interprets statutory text according to its ordinary meaning "understood at the time of the law's enactment at issue." *Birchard v. Blue Cross & Blue Shield of N.C., Inc.*, 283 N.C. App. 329, 333, 873 S.E.2d 635,

638 (2022) (citation omitted). Respondent does not address the fourth element's meaning on appeal, nor do we. Contrary to Respondent's argument, for the reasons below, we hold that the text messages and social media posts meet the Act's statutory definition of "harassment."

1. Knowledge & Specificity

"Knowing conduct" and "specific person" are statutorily undefined but reasonably ascertainable in this context. N.C. Gen. Stat. § 14-277.3A(b)(2). "Knowing" describes the required *mens rea* for civil harassment here. *See Knowing*, *Black's Law Dictionary* (12th ed. 2024) (defining as a "[d]eliberate" or "conscious" action). Respondent acknowledged that she sought to engage in community advocacy by "protest[ing] the kidnapping of children of Durham County." Respondent at least knowingly intended to advocate for certain causes and deliberately acted in furtherance of her objective by taking those actions which Petitioner sought to have enjoined.

"Specific person" similarly refers to Petitioner and its employees. In any event, the order listed two specific employees. Most of the texts and social media posts in the record did explicitly relate to or involve particular named DSS employees—the Durham DSS Director and a specific social worker named in the no-contact order. *See Specific*, *Black's Law Dictionary* (12th ed. 2024) (defining "specific" as "[o]f, relating to, or designating a particular or defined thing."). Whether Respondent's intentional advocacy and the specific people involved rose to sanctionable harassment is a separate question for the factfinder to determine. *Duke v. Xylem, Inc.*, 284 N.C. App. 282, 286, 876 S.E.2d 761, 764 (2022) ("It is a long-standing principle of appellate law that appellate courts 'cannot find facts.' "). Thus, we hold that Respondent's conduct here accords with the ordinary meaning of the "knowing conduct" and "specific person" elements of N.C. Gen. Stat. § 14-277.3A(b)(2).

2. Direction

Although the term "directed at" also is statutorily undefined, our case law indicates that "directed at" or "directed to" involves an action personally undertaken by one person in relation to another. In *State v. Wooten*, 206 N.C. App. 494, 498, 696 S.E.2d 570, 574 (2010), this Court upheld a stalking conviction in part because the defendant included personalized mailing and telephone information on his harassing faxes to identify the victim as their "directed" recipient. This Court upheld another stalking conviction on similar grounds in *State v. Van Pelt*, 206 N.C. App. 751, 754–55, 698 S.E.2d 504, 506 (2010), when it affirmed the trial court's finding that the defendant "directed" repeated messages

and notes by specifically identifying the victim to his employees as the intended recipient.

The passive voice used in § 14-277.3A(b)(2)'s text,[1] however, allows for another equally reasonable interpretation: whether a respondent can "direct at" a victim the harassing conduct of a *third party*. Both parties frame their arguments around whether Respondent *directed* third parties' texts and social media posts *at* those employees. A statute with multiple reasonable interpretations—such as subsection (b)(2) here—is subject to judicial construction. *Visible Props., LLC v. Vill. of Clemmons*, 284 N.C. App. 743, 754, 876 S.E.2d 804, 813 (2022). Although we have not yet addressed the plain meaning of this specific statutory phrase, reading the proscription in its grammatically logical orientation allows for a straightforward analysis.

The WVPA sanctions unlawful conduct committed by the respondent defined for our purposes as a willful act of harassing conduct. N.C. Gen. Stat. §§ 95-260(3)(b), -264(a). The incorporated § 14-277.3A provision defines "harassment" as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and serves no legitimate purpose." *Id.* § 14-277.3A(b)(2). That said, all but one legal definition of "direct" as a verb that we have found expressly contemplate one person orienting or otherwise influencing another person's actions towards a specific outcome. *See Direct*, *Black's Law Dictionary* (12th ed. 2024) ("*vb.* (14c) 1. To *aim* (something or *someone*). 2. To *cause* (something or *someone*) to *move on a particular course.* 3. To *guide* (something or *someone*); to govern. 4. To *instruct* (*someone*) with authority. 5. To address (something or *someone*).") (italicized emphases added). Thus, this Court holds, as a question of law, that the ordinary meaning of Paragraph (2)'s "direct at" element also implicates Respondent's direction of third parties towards a targeted employee.

3. Legitimacy

N.C. Gen. Stat. § 95-260 sheds light on § 14-277.3A(b)(2)'s meaning of "legitimate" with its own element of "legal purpose." N.C. Gen. Stat. § 95-260. Our precedents discussing this element inform our understanding here. In *St. John v. Brantley*, 217 N.C. App. 558, 563, 720 S.E.2d 754, 758 (2011) (citing § 14-277.3A(b)(2)), this Court upheld the trial

1. *See generally* Bryan A. Garner with Jeff Newman & Tiger Jackson, *The Redbook: A Manual on Legal Style* § 29.3(b), at 605 (5th ed. 2023) ("Omitting [an implied subject from a statutory sentence] leads to . . . the *truncated passive*—often the source of inexplicit ambiguity in governmental prescriptions.").

court's finding that the defendant's actions to discourage the plaintiff from testifying in a pending court case were for a "criminal purpose" and "without any legitimate purpose." In *Keenan v. Keenan*, 285 N.C. App. 133, 140, 877 S.E.2d 97, 103 (2022) (citing § 14-277.3A(b)(2)), this Court also upheld the trial court's finding that the defendant ex-husband's single instance of "passive-aggressive" trespass to mow his ex-wife's lawn "did not serve a legitimate purpose" and thus constituted civil harassment. Since the trial court found Respondent "intimidated" the Durham DSS Director, case law supports its conclusion that this is not a "legitimate purpose." Numerous text messages sent within a short timeframe could also be considered for an illegitimate purpose. Yet, we must still review the sufficiency of the underlying findings of fact.

B. No-Contact Order

Second, Respondent argues that the trial court erred by: (1) not expressly finding that Petitioner had "suffered unlawful conduct committed by" Respondent; and (2) purporting to enjoin her "followers" without constitutional or jurisdictional authority. N.C. Gen. Stat. § 95-264(a). We review a trial court's findings of fact only to determine whether they competently support the conclusions of law undergirding the judgment. *See DiPrima*, 277 N.C. App. at 442, 860 S.E.2d at 293.

1. Findings of Fact

[2] When acting as the sole factfinder, a trial court must state the specific findings of fact on which it bases its conclusions of law. *See* N.C. R. Civ. P. 52(a)(1). A trial court must expressly document this specific intent, not merely imply it for this Court to infer. *See St. John*, 217 N.C. App. at 562, 720 S.E.2d at 757 ("[A] civil no-contact order requires findings of fact that show . . . the defendant's harassment was accompanied by . . . specific intent." (quotation omitted)); *see also DiPrima*, 277 N.C. App. at 443, 860 S.E.2d 294 (Rejecting the argument "that such a finding can be inferred from the trial court's other findings" because "our holdings in *Ramsey* and *St. John* [make clear] that such a finding must be specifically made, not inferred.").

In *Ramsey*, 191 N.C. App. 146, 661 S.E.2d 924, this Court interpreted near-identical statutory language and schema, N.C. Gen. Stat. §§ 50C-1 to -11 (2007).[2] The Court held that statutory "stalking" requires discrete

2. North Carolina's jurisprudence on civil no-contact orders focuses on Chapter 50C of our General Statutes, which parallels the WVPA's statutory framework. *See* Act of 17 August 2004, ch. 50C, 2003 N.C. Sess. Laws 2004-194 (codified at N.C. Gen. Stat. §§ 50C-1 to -11), https://www.ncleg.gov/enactedlegislation/sessionlaws/pdf/2003-2004/sl2004-194.pdf.

findings of harassment as defined in N.C. Gen. Stat. § 14-277.3(c) (2007), "accompanied by the *specific intent*" to engage in one of two statutory acts. *Ramsey*, 191 N.C. App. at 148–49, 661 S.E.2d at 925–26 (emphasis added) (quoting § 50C-1(6)). The analogously "unlawful conduct" at issue here requires discrete findings of harassment, as defined in N.C. Gen. Stat. § 14-277.3A, "without legal purpose and with the *intent* to place the employee in reasonable fear for the employee's safety." N.C. Gen. Stat. § 95-260 (emphasis added).

Here, the trial court documented in its no-contact order Respondent's protests at DSS's main office and the personal residence of an employee. It also found that "Respondent and her followers . . . intimidated" the DSS Director. Furthermore, it found that the named social worker received text messages numerous enough to make the social worker and her coworkers "fearful." But other than incorporating the facts alleged in the petition, the trial court omitted any findings concerning the content of the "harass[ment] and intimidat[ion]." The facts alleged in the petition may be sufficient to support the claim; however, the trial court did not expressly document them in its order. *See DiPrima*, 277 N.C. App. at 443, 860 S.E.2d at 294. Absent those findings, we cannot review whether Respondent's conduct served a "legitimate purpose" or specific intent to "torment, terrorize, or terrif[y]" Petitioner's employees—relevant elements of the harassment statute at issue. N.C. Gen. Stat. § 14-277.3A(b)(2). Because the trial court did not make specific findings of fact about this conduct, we remand this matter to the trial court with instructions to make specific findings of fact to arrive at its conclusion of law of whether Respondent engaged in the "unlawful conduct" of "harassment" under N.C. Gen. Stat. §§ 14-277.3A(b)(2) and 95-260(3)(b). The trial court also did not identify the source of the numerous text messages; it merely found that the social worker received them. For this reason, we must also remand the order for the trial court to determine who sent these messages, if it is able to do so, thereby permitting meaningful appellate review.

See generally DiPrima v. Vann, 277 N.C. App. 438, 860 S.E.2d 290 (2021); *Francis v. Brown*, No. COA21-466, 872 S.E.2d 182 (N.C. App. 17 May 2022) (unpublished table decision).

For example, Chapters 50C and 95 both require "intent to place" either a person or an employee, respectively, "in reasonable fear for the[ir] safety." *Compare* N.C. Gen. Stat. § 95-260, *with id.* § 50C-1(6). The General Assembly further synthesized these two protective order chapters by incorporating the same § 14-277.3A "harassment" definition into their respective provisions. *See* Act of 5 June 2009, chs. 50C, 95, secs. 6–7, 2009 N.C. Sess. Laws 2009-58 (amending N.C. Gen. Stat. § 50C-1(6); then amending N.C. Gen. Stat. § 95-260(3)(b)), https://www.ncleg.gov/enactedlegislation/sessionlaws/pdf/2009-2010/sl2009-58.pdf.

2. Injunction

[3] Respondent asserts that the no-contact order against her "followers" violates her constitutional right to due process. Petitioner suggests that Respondent lacks standing to raise this claim. However, both are mistaken. The trial court cannot enforce its no-contact order against these non-parties—the "followers"—because it failed to identify them. As discussed above, this Court can only review those conclusions of law supported by findings of fact. Here, the trial court did not identify any "followers" to enjoin in the order. Our courts have long voided injunctions "affecting [the] vested rights" of non-parties who lack any identifiable relationship to the parties or any notice of the proceedings. *Buncombe Cnty. Bd. of Health v. Brown*, 271 N.C. 401, 404, 156 S.E.2d 708, 710 (1967) (quoting *Card v. Finch*, 142 N.C. 140, 144, 54 S.E. 1009, 1010 (1906)); *see Ferrell v. Doub*, 160 N.C. App. 373, 378, 585 S.E.2d 456, 459 (2003). Thus, we vacate the portion of the trial court's injunction against Respondent's undetermined and unnamed "followers."

C. Constitutional Rights

Third, Respondent argues that the no-contact order violates her State Article One and Federal First Amendment rights to speak freely and petition the government. *See* N.C. Const. art. I, §§ 12, 14; U.S. Const. amend. I, cls. 3, 6. We base our analysis of Respondent's rights under North Carolina's Article I, § 14 on an articulation of preexisting federal Free Speech Clause jurisprudence. U.S. Const. amend. I, cl. 3.

The Free Speech Clause of our State Constitution guarantees the citizens of North Carolina the freedom of speech as one "of the great bulwarks of liberty. . . ." N.C. Const. art. I, § 14, cl. 1. The adjacent Responsibility Clause expresses what the federal First Amendment only implies: that "every person shall be held responsible for . . . abus[ing]" his or her free-speech rights.[3] *Id.* art. I, § 14, cl. 3. These Clauses collectively mirror their federal counterpart in jurisprudence and enforcement. *See State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 840–41 (1993). The United States Supreme Court's interpretations of the First Amendment do not bind this Court in interpreting our State's equivalent, though we weigh them heavily in doing so. *Id.* Respondent's outcomes

3. *See Hest Techs. v. State ex rel. Perdue*, 366 N.C. 289, 297–98, 749 S.E.2d 429, 435 (2012) (recognizing that "particular categories of speech [ ] receive no First Amendment protection; these categories include 'obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.' ") (quoting *United States v. Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 1584 (2010)).

on appeal do not substantively or materially differ depending on her state or federal sources of constitutional free-speech protections.

1. Free Speech Claim

[4] Respondent asserts that the no-contact order violated her right to freedom of speech under North Carolina's Article I, § 14 because the streets and sidewalks outside DSS's office and its employees' homes are "traditional public forums." In *Petersilie*, our Supreme Court adopted federal jurisprudence addressing time, place, and manner ("TPM") restrictions of speech on government-owned property (*i.e.*, a "forum"). 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993). *See N.C. Council of Churches v. State*, 343 N.C. 117, 468 S.E.2d 58 (1996), *aff'g per curiam*, 120 N.C. App. 84, 90, 461 S.E.2d 354, 358 (1995).

Considering the complex landscape of public-forum jurisprudence and our State courts' careful examination of TPM restrictions to date, we must first summarize the general principles applicable to Respondent's claims. *State v. Bishop*, 368 N.C. 869, 873–74, 787 S.E.2d 814, 817–18 (2016). We review this preexisting First Amendment approach to apply North Carolina's Free Speech and Responsibility Clauses to private speech in public fora.[4] Analyzing the intersection of Article One–First Amendment free-speech rights and government fora requires four inquiries, the first three of which our Supreme Court has already applied in similar cases:

(1) Whether the restriction affects protected speech or expressive conduct, *e.g.*, *Hest Techs. v. State ex rel. Perdue*, 366 N.C. 289, 296–97, 749 S.E.2d 429, 434–35 (2012);

(2) If so, whether the restriction is either content-based or content-neutral, *e.g.*, *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818;

(3) If content-neutral, which tier of judicial review below strict scrutiny applies to the restriction, *e.g.*, *id.*; and

(4) Which category of forum the restriction concerns.

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4. The Court in *Petersilie* expressly adopted the entire corpus of federal free-speech jurisprudence to interpret our state Constitution's Article I, § 14 through at least its 1993 disposition. As our current Supreme Court noted, though, "it was unclear how a court should determine" certain threshold questions of the federal public-forum doctrine until the recent decision in *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218 (2016). *State v. Bishop*, 368 N.C. 869, 818–19, 787 S.E.2d 814, 875–76 (2016) (citing *Reed*, 576 U.S. at 166, 135 S. Ct. at 2228).

a. Expression, Content, & Scrutiny

The first inquiry is whether the restriction affects either protected speech, inherently expressive conduct, or non-expressive conduct. *See Hest Techs*, 366 N.C. at 296–97, 749 S.E.2d at 434–35. Non-expressive conduct does not raise free-speech concerns. However, restrictions on either of the former two activities implicate constitutionally protected rights that require further inquiry. *See id.*; *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818. Neither party contests Respondent's facially sincere desire to protest DSS's alleged practices. Both parties acknowledge that the no-contact order and its organic statutes, N.C. Gen. Stat. §§ 14-277.3A(b)(2) and 95-264, apply to expressive conduct (*i.e.*, Respondent's protests). Thus, the trial court's effectuation of these statutes through the no-contact order implicates Respondent's constitutional free-speech rights as a question of law.

The second inquiry is whether the restriction is either content-*based* or content-*neutral*. *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818. A content-based speech restriction *prima facie* discriminates against the speech's message, ideas, or subject matter; a content-neutral restriction does not. *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2018) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 2226 (2015); then citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989); then citing *Bishop*, 368 N.C. at 872–75, S.E.2d at 817–18). A court may identify this discrimination in the restrictions "plain text of the statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message." *Bishop*, 368 N.C. at 875, 787 S.E.2d at 819. If the restriction is content-based, it is presumptively unconstitutional and must survive strict scrutiny review. *Id.* at 874, 787 S.E.2d at 818. If the restriction is content-neutral, different tiers of judicial scrutiny apply depending on the forum. *Id.* Because Respondent challenges the WVPA only as applied to her, we need not consider the *prima facie* content-neutrality of the Act itself.

The next inquiry is which tier of judicial scrutiny applies to the restriction and the appropriate forum. These tiers of judicial scrutiny apply to speech regulations in descending order of exactness. To satisfy strict scrutiny, the restriction must serve a compelling government interest and be narrowly tailored to effectuate that interest. *Id.* at 876, 787 S.E.2d at 819 (citing *Reed*, 576 U.S. at 163, 135 S. Ct. at 2226); *Hest Techs*, 366 N.C. at 298, 749 S.E.2d at 436. To satisfy intermediate scrutiny's free-speech variant, the restriction must be narrowly tailored to achieve an important or substantial government interest in a manner that allows

for ample alternative channels of communication. *See Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818 (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. at 2753); *Hest Techs*, 366 N.C. at 298, 749 S.E.2d at 436. This particular "regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but [ ] it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798, 109 S. Ct. at 2757. Lastly, to satisfy rational basis, the restriction need only rationally further a legitimate state interest. *Hest Techs*, 366 N.C. at 298–99, 749 S.E.2d at 436. Content-neutral restrictions of traditional and designated (collectively, "unlimited") fora are subject to intermediate scrutiny while limited and nonpublic fora restrictions need only have a rational basis. *Id.*

b. Forum Categorization

To determine which level of scrutiny applies, we must determine which of the four forum categories the speech or expressive conduct occurred: (1) a "traditional" public forum, (2) a "designated" public forum, (3) a "limited" public forum, or (4) a "nonpublic" forum. *Christian Legal Soc. Ch. v. Martinez*, 561 U.S. 661, 679 n.11, 130 S. Ct. 2971, 2984 n.11 (2010). Our state courts have described unlimited fora as "quintessential community venue[s], such as a public street, sidewalk, or park." *State v. Barber*, 281 N.C. App. 99, 108, 868 S.E.2d 601, 607 (2021). These opinions have relied on federal Supreme Court precedents that describe a limited public forum as "property that the State has opened for expressive activity by part or all of the public" on a temporary basis, *Int'l Soc. for Krishna Consc. v. Lee*, 505 U.S. 672, 678, 112 S. Ct. 2701, 2705 (1992) (cited by *Council*, 120 N.C. App. at 90, 461 S.E.2d at 358), and a nonpublic forum as property maintained for a purpose "inconsistent with . . . [or] disrupted by expressive activity." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804, 105 S. Ct. 3439, 3450 (1985) (cited by *Barber*, 281 N.C. App. at 107–08, 868 S.E.2d at 606–07).

Here, the order's findings provide that "Respondent . . . regularly appeared and protested on E. Main [and] Queen St. at DSS offices and at the personal residence of [the Durham DSS Director]." Resting on those and other findings, the order concluded that Respondent violated the WVPA and decreed that Respondent shall be allowed to peacefully protest no less than twenty-five feet from the DSS office employee entrance without voice amplification devices or yelling when minor children are leaving the building. Respondent does not challenge the *prima facie* constitutionality of the statutes at issue, N.C. Gen. Stat. §§ 14-277.3A, 95-260(3)(b), and 95-264. She instead suggests their application to her through the no-contact order's decrees is unconstitutional.

In its current form, the no-contact order's findings of fact lack sufficient precision, which creates difficulty for judicially scrutinizing forum classification. For example, the order ambiguously points to protesting at DSS's office at the corner of East Main Street and Queen Street in Durham. In any event, presuming this is a "quintessential community venue," the restrictions imposed here pass the appropriate level of scrutiny. *Barber*, 281 N.C. App. at 108, 868 S.E.2d at 607. This is not to say that we hold the places referenced in this order are traditional public fora. To be certain, protesting on private property, such as a personal residence, is not a protected right under the Federal or State Constitutions. *See State v. Felmet*, 302 N.C. 173, 177, 273 S.E.2d 708, 712 (1981). In this case, we merely employ the most stringent applicable test—intermediate scrutiny—to evaluate whether the restrictions imposed by the trial court pass constitutional muster. *See Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818.

The plain text of the no-contact order places limitations on Respondent's conduct without consideration of the content. *Id.* at 875, 787 S.E.2d at 819. Since the restrictions are content-neutral, they are permissible regulations of the time, place, and manner of expression, so long as they are narrowly tailored to serve a significant government interest and leave ample alternative channels of communication open. *See Ward*, 491 U.S. at 791, 109 S. Ct. at 2753; *see also Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818. Protecting employee safety and preventing psychological harm to minor children entering or leaving the building serve a significant government interest. *See Bishop*, 368 N.C. at 877, 787 S.E.2d at 819 (holding protecting children from physical and psychological harm is a compelling interest). The order is narrowly tailored because its restrictions promote this significant government interest and would be achieved less effectively absent the restrictions. *See Ward*, 491 U.S. at 796–99, 109 S. Ct. at 2758 (enumerating the standard for narrow tailoring and addressing limitations such as sound-amplification); *see also Burson v. Freeman*, 504 U.S. 191, 209, 112 S. Ct. 1846, 1857 (1992) (holding that, even under strict scrutiny, a 100-foot boundary may be "perfectly tailored" to achieve the government's interest). Finally, the no-contact order leaves open ample alternative channels of communication, as it specifies that Respondent may still peacefully protest subject to those narrow limitations. Accordingly, this Court holds that the no-contact order at least satisfies intermediate scrutiny and does not violate Respondent's free speech rights under the Federal or State Constitutions.

2. Redress of Grievances

[5] Respondent asserts that the no-contact order violated her right to petition DSS under the state Application Clause and federal Petition Clause. However, Petitioner correctly points out that Respondent preserved her free-speech claim for appeal but not her right-to-petition claim. *See* N.C. Const. art. I, § 12, cl. 3 (Application Clause); *cf.* U.S. Const. amend. I, cl. 6 (Petition Clause). To properly preserve an issue for review, Respondent must "present[ ] to the trial court a timely request, objection, or motion" that clearly states "the specific grounds for the ruling the party desired the court to make." N.C. R. App. P. 10(a)(1).

Here, Respondent objected at trial only to "freedom of speech on [her] social media" in response to Petitioner's motion to enter certain photographs into evidence. Respondent did not raise otherwise valid right-to-petition claims at any point during the trial or as part of an expressed objection. Article One and First Amendment rights to free speech may very well be "closely intertwined with the right to protest and petition the government." Nonetheless, because Respondent did not raise a request, objection, or motion regarding the state Application Clause or federal Petition Clause at any point during the trial, this Court holds she did not preserve any constitutional right-to-petition claim for appeal.

IV. Conclusion

For the reasons above, we vacate the trial court's civil no-contact order and remand it to the trial court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and MURPHY concur.

HARNEY v. HARNEY

[295 N.C. App. 456 (2024)]

OLIVER HARNEY, PLAINTIFF
v.
CHRISTINA HARNEY, DEFENDANT

No. COA23-364

Filed 3 September 2024

1. Child Custody and Support—subject matter jurisdiction—UCCJEA—jurisdiction declined by foreign court

In a custody dispute between a minor child's mother (a resident of New York) and maternal grandfather (a resident of North Carolina) which began in the courts of New York, the district court in Vance County, North Carolina had subject matter jurisdiction where that court made findings of fact that: although the child was born in New York, he had lived in North Carolina since shortly thereafter; the New York court had entered an order declining to exercise jurisdiction in favor of North Carolina as the "more appropriate forum"; and North Carolina was the child's home state pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act.

2. Appeal and Error—appellate rules violations—nonjurisdictional—substantial violation—sanction imposed

Where the appellant brief submitted by respondent-mother in a child custody case contained numerous nonjurisdictional violations of Appellate Procedure Rules 26 and 28—including misuse of appendices to evade word-count limits, use of nonconforming font and formatting, and failure to include a non-argumentative statement of facts—burdening both the appellee's response (and compelling a rule violation by appellee in its brief) and the appellate court's review, the Court of Appeals, as a sanction, declined to consider any arguments presented by respondent-mother in her appendices and addressed her challenges to the district court's findings of fact only to the limited extent they were referenced in the body of her brief. In so doing, the court overruled respondent-mother's contentions because she only argued the existence of evidence tending to conflict with the district court's findings and quibbled with their wording, and the weight and credibility of the evidence was for the district court to decide.

3. Child Custody and Support—custody—modification—temporary order—substantial change in circumstances

In a custody dispute between a minor child's mother and maternal grandfather which began in the courts of New York, a

"So-Ordered Stipulation" entered in June 2019 by the New York court with the consent of the parties—which granted the parties "joint custody," awarded the grandfather "physical residential custody," and granted "supervised parental access to the mother"—was properly treated by the district court as a temporary order, and the district court's statement that the stipulation "became more of a permanent agreement" simply reflected the mother's failure to take any action to regain physical custody of the child. Moreover, the substantial changes in the circumstances affecting the child's best interest detailed in the court's 144 findings of fact were obvious and supported custody being awarded to the grandfather.

4. Child Custody and Support—custody—awarded to non-parent—constitutionally protected status of parent—sufficiency of findings

In a custody dispute between a minor child's mother and maternal grandfather, the district court's numerous well-supported findings of fact—including that the mother: had limited contact with the child after his birth; had little involvement with the child's medical and therapy providers, despite the grandfather's provision of their contact information; provided no financial support for the child, despite being employed; behaved in a hostile manner toward the grandfather, including in the child's presence; and was unprepared to manage the child's care in light of his extensive developmental and physical issues—supported its conclusion of law that the mother acted inconsistent with her constitutionally protected rights as a parent and, as a result, it would be in the child's best interests to award custody to the grandfather.

Appeal by defendant from order entered 15 June 2022 by Judge S. Katherine Burnette in District Court, Vance County. Heard in the Court of Appeals 14 November 2023.

Gailor Hunt Davis Taylor & Gibbs, PLLC, by Jonathan S. Melton, for plaintiff-appellee.

The Law Office of Colon & Associates, PLLC, by Arlene L. Velasquez-Colon and Kendra R. Alleyne, for defendant-appellant.

STROUD, Judge.

Defendant-mother appeals from a custody order granting custody of her minor child, Sam[1], to Plaintiff, who is Sam's maternal grandfather. Although Sam was born in New York and a temporary custody order was entered in New York shortly after his birth, the New York court declined to exercise continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") following a hearing in compliance with North Carolina General Statute Section 50A-207. *See* N.C. Gen. Stat. § 50A-207(a) (2023) ("A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court."). North Carolina has subject matter jurisdiction over custody under the UCCJEA. *See* N.C. Gen. Stat. § 50A-203 (2023) ("Except as otherwise provided in G.S. 50A-204, a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and: (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207[.]"). The trial court's detailed and extensive findings of fact, made by clear and convincing evidence, are supported by competent evidence. These findings support the trial court's conclusion that Mother acted inconsistently with her constitutionally protected right as a parent and the trial court did not err by granting custody to Grandfather based on Sam's best interests.

I. Background

Mother lives in New York and she gave birth to Sam in New York in June 2019. Plaintiff ("Grandfather") lives in Vance County, North Carolina. When the complaint in this matter was filed, Sam's biological father was "unknown" to Grandfather[2] although Mother later identified

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1. We have used a pseudonym for the minor child to protect his identity.

2. The custody complaint in North Carolina alleged that Sam's father is "unknown," and Mother admitted this allegation in her answer. Sam's birth certificate has no father listed. The New York Stipulation and other documents do not mention a father for Sam. However, Mother later admitted she knew the identity of the biological father although she had previously claimed he was an anonymous sperm donor. The trial court ordered that he be notified of this proceeding, and he accepted service of the complaint and other documents in the custody case and waived any further rights to notice or participation in this proceeding.

the biological father during this custody case. Grandfather traveled to New York to be with Mother when Sam was born. Soon after Sam's birth, Grandfather had a "consultation with the New York child protective services agency," and Grandfather "was able to obtain temporary custody of [Sam]." On 26 June 2019, about a week after Sam's birth, Grandfather filed an "Order to Show Cause Pursuant to Section 651 of the Family Court Act with Temporary Relief and Petition for Custody" in Suffolk County, New York seeking custody of Sam. He alleged Mother's home was a health hazard due to water damage and mold and that Mother was a hoarder. At the time of Sam's birth, Mother's home was not habitable due to "mold issues that had not been remediated or addressed by" Mother and the home "smelled of mold and cat urine." Grandfather also alleged concerns regarding Mother's mental health.

After Grandfather filed his petition in New York on 26 June 2019, the Suffolk County Family Court entered an order granting emergency temporary custody of Sam to Grandfather.[3] On 28 June 2019, with the consent of both parties, the Suffolk County Family Court entered a "So-Ordered Stipulation"[4] ("Stipulation") which granted the parties "joint custody" of Sam, with Grandfather as "the physical residential custodian" and giving Mother "rights of supervised parental access through EAC or with a family member or other person approved by [Grandfather]" or as "otherwise agreed" by the parties in writing. The Stipulation noted that Grandfather would pay for Mother's flight for a "scheduled visit" with Sam on 11-16 July as Grandfather "is currently residing in" North Carolina and Sam would reside with him. Mother agreed to "undergo psychiatric evaluation and follow through with any and all recommendations by medical professionals" and to make the results of the evaluation available to Grandfather. The Stipulation granted Grandfather "final decision making authority regarding all major decisions" as to Sam's care and

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3. The 28 June 2019 Stipulation provides that Grandfather "*was* awarded temporary physical and residential custody of the infant issue by way of Order of the Honorable Matthew Hughes, which Order is on file with this Court" but the initial New York emergency order is not in our record. (Emphasis added.)

4. Under New York law, "[a] so-ordered stipulation is a contract between the parties thereto and as such, is binding on them and will be construed in accordance with contract principles and the parties' intent[.]" *Tyndall v. Tyndall*, 144 A.D.3d 1015, 1016, 42 N.Y.S.3d 250, 251 (2016) (citation and quotation marks omitted). The Stipulation also provided that it would be construed based upon New York law: "13. This Agreement is being executed and entered into in the State of New York. This Agreement shall be construed in accordance with and shall in all respects be governed by the Laws of New York now or hereafter in effect, without giving effect to the choice of law provisions thereof, and regardless of where the parties, or either of them, in fact reside."

education. The Stipulation also provided that both parties "were entitled to receive all medical records and to converse with any physician or professional" regarding Sam. Mother agreed to have three mold tests done of her home in New York by a "certified air quality specialist," to be done in three month increments and "all three (3) tests shall prove to be negative for any mold." The Stipulation notes that Grandfather was represented by counsel in New York and Mother was *pro se*, although she "was encouraged and strongly advised to seek independent representation but has refused[.]" After entry of the Stipulation, Grandfather and Sam traveled back to his home in North Carolina "on June 29, 2019 and [ ] remained there since that time[.]"

On 17 June 2020, Grandfather filed a "Complaint for Custody and Protective Order" against Mother in Vance County, North Carolina. His complaint included allegations regarding the New York custody action and an attached copy of the Stipulation. On 6 July 2020, Mother filed a "Petition for Modification of Order of Custody" in New York, alleging that she lived in New York at the same address as she lived at the time of Sam's birth, and Grandfather and Sam lived in North Carolina. She alleged there "has been a change of circumstances" since the prior order in that "Mold Air test passed and evaluations met. Ready for unification.[5] Requirements met. N.Y State jurisdiction, not North Carolina." She further alleged Grandfather "is trying to remove my custody rights and order I can not fight for them with an order. Parental alienation, malice, hersay (sic) & defamation of my character." She also filed a "Petition to Enforce Custody or Visitation Order" in New York, making allegations regarding the entry of the Stipulation and the filing of the North Carolina custody action by Grandfather. She sought in part "to continue jurisdiction in New York" and "to protect my rights as mother and continue all cases in N.Y. Suffolk Family Court." On 22 July 2020, Mother also filed a Motion for "Dismissal Based on Lack of Jurisdiction" in Vance County.

On 2 October 2020, Mother filed an "Amended Answer and Motion to Dismiss" in Vance County. She alleged North Carolina did not have jurisdiction over custody of Sam and that New York "has Exclusive, Continuing Jurisdiction" regarding custody. She also admitted or denied the allegations of Grandfather's complaint for custody. As relevant to this appeal, Mother admitted Sam had been living in North Carolina with Grandfather since June 2019. She also admitted the allegation that Sam's father is "unknown."

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5. Or "verification." This portion of the Motion is hand-written and difficult to read.

On 23 October 2020, the Suffolk County Family Court in New York entered a "Final Order on Petition for Modification of Order of Custody made by Family Court." This Order indicates that the Honorable Heather P.S. James Esq, Referee in Suffolk County and Judge Adam Keith in Vance County conducted the hearing and both parties "appeared in North Carolina with counsel[.]" The New York Order declining to exercise jurisdiction stated:

> [A]fter examination and inquiry into the facts and circumstances of the case, after hearing the arguments of the parties through their counsel both in the Family Court of the State of New York, County of Suffolk, before the undersigned and in the General Court of Justice, District Court Division, Vance County, NC [Docket# 20CVD592] (hereinafter, 'the North Carolina matter') before the Hon. Adam Keith, and for all of the reasons set forth upon the record this date,
>
> **NOW, therefore, it is hereby**
>
> **ORDERED**, that pursuant to DRL section 76-f, New York hereby declines exclusive continuing jurisdiction in favor of the more appropriate forum in North Carolina; and it is further,
>
> **ORDERED**, that the parties are directed to appear in and cooperate with the further proceedings in the North Carolina matter.

On 3 June 2021, the trial court entered a temporary custody order addressing various issues including communication between the parties, family therapy, mental health assessments for both parties, and visitation for Mother. The trial court also noted that "[a]ccording to the parties, the natural father of the minor child" was an "anonymous sperm donor" and "all parties necessary to this action are properly before the court for hearing."

On 16 July 2021, the trial court entered an "Order Regarding Expert Appointment and Notice." This order appointed a psychiatrist to evaluate both parties and provide a report to the trial court for the 9 December 2021 hearing. In addition, by this point in the proceeding – after Grandfather had filed a motion seeking to compel Mother to identify the biological father based on a need for medical history information to assist in dealing with a health condition of the child – Mother identified the previously "anonymous" sperm donor as the putative father

of the child. This order states that "[n]either party objected to providing the putative father with notice of the proceeding pursuant to N.C. Gen. Stat. § 50A-205(a). Via the parties, the putative father has request[ed] that his name be placed under seal in the Court file." This order required Grandfather to "properly notice the putative father of the child-custody proceeding[.]"

On 9 September 2021, Mr. Doe,[6] the putative father of Sam, filed an "Acceptance of Service and Waiver of Responsive Pleading." Mr. Doe averred that "he is the biological father of the minor child involved in this proceeding" and he acknowledged receipt of the Summons, Complaint, Amended Answer, and orders "in this action"; that he was making a general appearance in this matter; and that he waived "further responsive pleadings" and "all notice requirements."

A hearing was held on custody on 1 June 2021[7] and 21 April 2022, and on 15 June 2022, the trial court entered a Custody Order granting legal and physical custody of Sam to Grandfather, with Mother to have limited visitation after complying with various requirements for Mother to consult with Sam's medical providers to learn about his diagnosis of autism and "to understand [his] diagnosis and treatment options." Mother filed timely notice of appeal of this Order and included the orders entered on 23 October 2020 and 3 June 2021.[8]

II. Subject Matter Jurisdiction under the UCCJEA

[1] Although Mother's last argument on appeal addresses jurisdiction under the UCCJEA, we will address this first, as subject matter jurisdiction is a necessary prerequisite for a court to take any action. *See McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) ("When a court decides a matter without the court's having jurisdiction, then the

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6. This is a pseudonym to protect the putative father's identity. Although the trial court directed the putative father's name be placed under seal, the Record on Appeal filed with this Court included his unredacted "Acceptance of Service and Waiver of Responsive Pleading" but was not sealed as required by North Carolina Rule of Appellate Procedure 42(a). *See* N.C. R. App. P. 42(a) ("Items sealed in the trial tribunal remain under seal in the appellate courts."). We have therefore *sua sponte* sealed the Record.

7. The trial court noted the June 2021 court date resulted in the entry of the 3 June 2021 order requiring the parties to "obtain a psychiatric assessment based on each party's assertion that the other party had a serious mental health condition that would prevent that party from caring for the minor child."

8. Other than her general argument regarding subject matter jurisdiction under the UCCJEA, Mother made no arguments on appeal regarding the 23 October 2020 and 3 June 2021 orders.

whole proceeding is null and void, *i.e.*, as if it had never happened." (citations and quotation marks omitted)). Mother's entire argument on this issue is "[t]he Vance County trial court never ruled on Mother's motion to dismiss due to lack of subject matter jurisdiction with a North Carolina order and instead stamped and filed the New York order." Despite Mother's failure to cite any authority or make an argument regarding jurisdiction under the UCCJEA, we will address this issue since we have a duty to inquire as to subject matter jurisdiction even if not raised by any party. *See Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) ("[T]his Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." (citation omitted)).

The trial court addressed subject matter jurisdiction in the Custody Order. The trial court made findings of fact regarding the New York custody proceeding and the New York court's entry of its order declining to exercise jurisdiction. In the Custody Order, the trial court concluded as follows:

> 1. The Court has subject matter jurisdiction over this matter and personal jurisdiction over the parties.
>
> 2. The Court hereby reincorporates the Findings of Fact set forth in the foregoing paragraphs as if set forth fully herein.
>
> 3. In October, 2020, New York State, the birth state of the minor child, declined to exercise exclusive jurisdiction in favor of the "more appropriate forum" in North Carolina.
>
> 4. The minor child has resided in North Carolina since shortly after his birth. North Carolina is the minor child's home state.

The 23 October 2020 "Final Order on Petition for Modification of Order of Custody" entered in Suffolk County Family Court in New York shows the trial courts of both North Carolina and New York held a hearing on Mother's motions filed in New York, with Mother and Grandfather and counsel for both participating. The Suffolk County court entered an order declining "exclusive continuing jurisdiction in favor of the more appropriate forum in North Carolina" and directed the parties "to appear in and cooperate with the further proceedings in the North Carolina matter." Mother did not appeal this New York order, and it is binding upon the North Carolina courts. *See Travelers Ins. Co. v. Rushing*, 36 N.C. App. 226, 229, 243 S.E.2d 420, 422 (1978) (explaining that the defendant

cannot collaterally attack an order that she did not appeal). In addition, the trial court's findings show the trial court properly exercised subject matter jurisdiction under the UCCJEA based on the New York order.

III. Violations of Appellate Rules

[2] Mother's second issue in her brief challenges 38 of the trial court's 144 findings of fact and "additional findings" within 12 of its conclusions of law. Mother asserts "[t]he trial court made findings of fact unsupported by competent evidence." Mother "respectfully contends that all or a significant portion of the following findings of fact are not supported by competent evidence; additional analysis is presented in Appendix C, organized by topic." She then lists 38 findings of fact and 12 more findings "within Conclusions of Law." Appendix C includes a 27-page table with columns noting "Court's Text" for the findings or conclusions challenged and "Analysis" including her argument as to each item, all single spaced in sans serif font, possibly calibri.[9] The substance of Appendix C sets out detailed arguments as to each challenged finding of fact. North Carolina Rule of Appellate Procedure 28(d) requires this type of analysis and argument to be included in the body of the brief. *See* N.C. R. App. P. 28(d).

Mother's attempt to extend the word count of her principal brief by about twice the allowed limit is a violation of North Carolina Rule of Appellate Procedure 28(j), *see* N.C. R. App. P. 28(j), which is one of the "comprehensive set of nonjurisdictional requirements [ ] designed primarily to keep the appellate process 'flowing in an orderly manner.' " *Dogwood Dev. & Mgmt. Co., LLC, v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (citation omitted). Rule 28 of the North Carolina Rules of Appellate Procedure governs briefs filed before this Court, including word counts:

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9. (g) Formatting of Documents Filed with Appellate Courts. (1) . . . Documents shall be prepared using a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. The body of text shall be presented with double spacing between each line of text. Lines of text shall be no wider than 6 ½ inches, leaving a margin of approximately one inch on each side. The format of all documents presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

N.C. R. App. P. 26(g)(1).

> (j) A principal brief filed in the Court of Appeals may contain no more than 8,750 words. A reply brief filed in the Court of Appeals may contain no more than 3,750 words.
>
> > (1) Portions of Brief Included in Word Count. Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

N.C. R. App. P. 28(j).

Although appendixes to briefs do not count against the word limitations of the brief, an appellant cannot simply label an argument as an appendix to extend the word count for the body of the brief indefinitely. *See* N.C. R. App. P. 28(b)(6) ("(b) An appellant's brief shall contain . . . (6) 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. The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues. The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.").

The appendix has a purpose, as Rule 28(d) describes, and that purpose is not to extend the body of the brief. *See* N.C. R. App. P. 28(d). The purpose of the appendix is to include parts of the transcript, evidence, statutes, or other documents necessary or helpful to understand the "issue[s] presented in the brief" or, for the appellee, to address an issue raised in the opposing brief. *See id.* Mother's brief also includes two Appendixes which are proper appendixes as allowed by Rule 28(d) and Rule 30(e)(3); one appendix includes "portions of the transcript of the proceedings" and the other includes an unpublished opinion she cites in her brief. *See* N.C. R. App. P. 28(d); *see also* N.C. R. App. P. 30(e)(3). An appendix is not intended to present the issues in the brief as if it were actually part of the body of the brief, but that is exactly what Appendix C does. Allowing an appendix to be used to extend the argument portion

of the body of the brief indefinitely would defeat the entire purpose of the word limitations and formatting restrictions set out in Rule 28. *See* N.C. R. App. P. 28.

Rule 28(d) addresses both required and allowed appendixes to the appellant's principal brief:

> (d) Appendixes to Briefs. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).
>
> (1) When Appendixes to Appellant's Brief Are Required. Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:
>
> a. those portions of the transcript of proceedings which must be reproduced in order to understand any issue presented in the brief;
>
> b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;
>
> c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;
>
> d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement, the study of which are required to determine issues presented in the brief.
>
> (2) When Appendixes to Appellant's Brief Are Not Required. Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:
>
> a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced in the body of the brief;
>
> b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

> c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).
>
> . . . .
>
> (4) Format of Appendixes. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of copies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

N.C. R. App. P. 28(d).

As Mother's brief violates Rules 28(d) and 26(g), we must first consider whether this violation is a "substantial failure" to follow the appellate rules or a "gross violation" of the rules. *Dogwood*, 362 N.C. at 200-01, 657 S.E.2d at 366-67. If so, our Supreme Court has instructed that in our discretion, we should "fashion [ ] a remedy to encourage better compliance with the rules." *Id.* at 198, 657 S.E.2d at 365. But as always, "it is preferred that an appellate court address the merits of an appeal whenever possible." *Id.* at 198-99, 657 S.E.2d at 365-66 ("We stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal[.] *See, e.g.*, *Hicks v. Kenan*, 139 N.C. 337, 338, 51 S.E. 941, 941 (1905) (per curiam) (observing this Court's preference to hear merits of the appeal rather than dismiss for noncompliance with the rules); 5 Am. Jur. 2d *Appellate Review* § 804, at 540 (2007) ('It is preferred that an appellate court address the merits of an appeal whenever possible. An appellate court has a strong preference for deciding cases on their merits; and it is the task of an appellate court to resolve appeals on the merits if at all possible.' (footnotes omitted)); Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* 2 (1976) ('Appellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies.'). Rules 25 and 34, when viewed together, provide a framework for addressing violations of the nonjurisdictional requirements of the rules. Rule 25(b) states that 'the appellate court may impose a sanction when the court determines that a party or attorney or both *substantially* failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34[.]' Rule 34(a)(3) provides, among other things, that 'the appellate

court may impose a sanction when the court determines that a petition, motion, brief, record, or other paper filed in the appeal *grossly* violated appellate court rules.' Rule 34(b) enumerates as possible sanctions various types of monetary damages, dismissal, and 'any other sanction deemed just and proper.' " (emphasis in original) (citations, ellipses, and brackets omitted)).

We determine Mother's noncompliance with the appellate rules to be a substantial violation. In fashioning a remedy for this violation, we have conducted a "fact-specific inquiry into the particular circumstances" of this case, keeping in mind "the principle that the appellate rules should be enforced as uniformly as possible. Noncompliance with the rules falls along a continuum, and the sanction imposed should reflect the gravity of the violation." *Id.* at 199-200, 657 S.E.2d at 366.

This violation does not rise to the level of dismissal of the appeal, which is an "extreme sanction to be applied only when less drastic sanctions will not suffice." *Id.* at 200, 657 S.E.2d at 366 (citations, quotation marks, and ellipses omitted).

> In most situations when a party substantially or grossly violates nonjurisdictional requirements of the rules, the appellate court should impose a sanction other than dismissal and review the merits of the appeal. This systemic preference not only accords fundamental fairness to litigants but also serves to promote public confidence in the administration of justice in our appellate courts.

Id.

Mother's substantial violation of the appellate rules imposes a burden on both this Court and Grandfather, and we must also consider the need to treat all parties to appeals fairly and equally and to enforce the rules uniformly. The first and most immediate consequence of a party's improper extension of the body of an appellant's brief without seeking approval as allowed by the appellate rules, *see* N.C. R. App. P. 28, is obvious. That burden falls first upon the appellee, who incurs increased costs from responding to the entire brief, as he may not safely assume this Court will dismiss the appeal or simply ignore any additional improper argument; instead, he must pay his counsel to address all the appellant's arguments. And here, Grandfather unfortunately responded in like manner, adding to his brief on appeal a 31-page table including Appendix A, containing an "analysis of the 106 uncontested findings of fact supporting the court's conclusions" and the responses to the

challenged findings of fact and Appendix B, addressing "the unchallenged, and therefore binding, findings of fact that support the finding of Grandfather being awarded sole legal and physical custody" and the "trial court's Conclusions of Law Mother claims are unsupported by competent evidence." North Carolina Rule of Appellate Procedure 28(d)(3) sets out the requirements for the appellee's brief:

> (3) *When Appendixes to Appellee's Brief Are Required.* An appellee must reproduce appendixes to its brief in the following circumstances:
>
> a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.
>
> b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement as if it were the appellant with respect to each such new or additional issue.

N.C. R. App. P. 28(d)(3) (emphasis added).

Grandfather's Appendixes did not include any portions of the transcript or supplement and did not present any new or additional issues; they simply presented his arguments in response to Mother's arguments. Thus, Mother's substantial violation of the appellate rules led Grandfather to violate North Carolina Rule of Appellate Procedure 28(d) in like manner, as he attempted to address Mother's improperly extended arguments. *Id.*

Grandfather's response to Mother's violation of the appellate rules illustrates clearly why this Court must address rule violations and must at times sanction those who violate the rules: one party's violation of the rules may inspire the opposing party to respond in the same manner. But even if Grandfather had instead responded by filing a motion, such as a motion to strike part of Mother's brief or for some other sanction, he would still have to incur increased costs and may create additional delay in the appeal. Either way, this Court must spend more time

in reviewing the improperly extended briefs[10] and determining how to address the issues or the rule violations and the appropriate sanction for any violations, while this Court has other appeals in which the parties have dutifully followed the appellate rules and are awaiting rulings on their appeals. It may seem it would be easier for this Court to overlook Mother's substantial rule violations (and Grandfather's similar substantial violation) and to address each of her arguments regarding the findings of fact raised in the Appendix in detail – instead of using this Court's time and effort to address the rule violations – but that may encourage others to believe they have found a new way to extend their briefs without seeking permission of this Court.

As a sanction for Mother's substantial violation of the North Carolina Rules of Appellate Procedure, we could elect not to address Mother's argument regarding the findings of fact entirely just by striking Appendix C, but we recognize that some of Mother's "argument," so to speak, regarding the findings of fact is presented not only within Appendix C; it is also presented within her Statement of the Facts. Grandfather correctly notes in his Restatement of the Facts that

> [p]ursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, the appellant is required to provide a ***non-argumentative*** summary of material facts. Defendant-Appellant failed to follow this directive in her brief, and Plaintiff-Appellee makes this restatement of the facts, in compliance with the North Carolina Rules of Appellate Procedure.

(Emphasis in original.)

Mother's argumentative Statement of Facts is yet another violation of the appellate rules, but here, Grandfather responded in a way allowed by the appellate rules. *See* N.C. R. App. P. 28(b)(5) ("An appellant's brief shall contain . . . . (5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review[.]"); *see also* N.C. R. App. P. 28(c) ("[The appellee's brief] does not need to contain a statement of . . . the facts . . . unless the appellee disagrees with the appellant's statements and desires to make

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10. Here, Mother's brief including improper Appendixes is 73 pages and about 17,000 words. She also included appropriate Appendixes comprised of transcript pages and an unpublished case as required by Rule 30(e)(3). *See* N.C. Gen. Stat. § 30(e)(3). Grandfather's brief including improper Appendixes is 83 pages and about 14,000 words.

a restatement[.]"). Mother's statement of the facts is primarily based on her own testimony and evidence presented in the light most favorable to her and most disfavorable to Grandfather. Of course, an appellate advocate should seek to highlight the facts favorable to their client's position, but the *argument* should be in the "Argument" section of the brief, not in the Statement of Facts. *See* N.C. R. App. P. 28(b)(5)-(6).

Thus, as a sanction for Mother's substantial appellate rule violations, pursuant to Rules 25 and 34, in our discretion, we will not address or consider Mother's arguments presented in Appendix C. *See* N.C. R. App. P. 25(b) (stating upon a substantial failure to comply with the appellate rules, "The [C]ourt may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals"); *see also* N.C. R. App. P. 34(b)(3) ("(b) A court of the appellate division may impose one or more of the following sanctions: . . . (3) any other sanction deemed just and proper."). We will address Mother's challenges to the findings of fact and conclusions of law only to the limited extent they are referenced in the body of the brief, including the Statement of Facts, but we will not address each one in detail. In determining this sanction, we have also considered Grandfather's substantial violation of the appellate rules in extending the body of his brief by attaching an improper appendix in response to Mother's improper appendix, but because he was trying to respond to Mother's brief, and because his brief otherwise complies with the Appellate Rules, we will not sanction Grandfather. However, we admonish counsel for both parties to comply with the Rules of Appellate Procedure in the future and note that if the appellant violates a rule, this does not give the appellee license to violate the rules in response.

Overall, Mother argues the existence of evidence tending to conflict with the trial court's findings of fact or quibbles with the exact wording of a finding, but it is well established that a finding of fact must be upheld if there is competent evidence to support it.

> The standard of review when the trial court sits without a jury is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Unchallenged findings of fact are binding on appeal. Whether the trial court's findings of fact support its conclusions of law is reviewable *de novo*. If the trial court's

> uncontested findings of fact support its conclusions of law, we must affirm the trial court's order.

See Scoggin v. Scoggin, 250 N.C. App. 115, 117-18, 791 S.E.2d. 524, 526 (2016) (citations, quotation marks, ellipses, and brackets omitted).

The trial court has the duty to consider the weight and credibility of the evidence, and we may not substitute our judgment for that of the trial court. *See Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 340 (1995) ("As fact finder, the trial court is the judge of the credibility of the witnesses who testify. The trial court determines what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom."). Mother has failed to demonstrate any of the trial court's challenged findings of fact were unsupported by competent evidence.

IV. Modification of Custody or Initial Custody Determination

[3] Mother next contends that "[t]he trial court erred by concluding that the temporary New York custody order 'became more of a permanent custody agreement in that [Mother] took no court action to regain custody of the minor child[.]' " Mother argues that the Stipulation was a temporary order but "[i]f the court truly believed that the New York order converted to permanent, it should have unambiguously stated that, rather than labeling it 'more of a permanent agreement,' and conducted a substantial-change analysis per N.C. Gen. Stat. §50-13.7 (2021) before considering the modification." In other words, Mother first contends the Stipulation should properly be considered as a temporary order, but *if* the trial court considered it a permanent order, it erred by treating it as a permanent order and then modifying custody without conducting a substantial change analysis. Mother's argument concludes by noting "[p]erhaps the qualifier 'more of a' indicates the trial court did not fully intend to conclude the New York order converted to permanent, explaining why it did not treat it as such."

Although it would be to Grandfather's benefit to agree with Mother that the trial court treated the Stipulation as a temporary order, he instead argues the trial court did treat it as a permanent order but did not err by doing so. He argues that "it is not contested that the June 2019 New York temporary agreement was intended to be a temporary custodial arrangement." But because of "passage of time and the lack of action by Mother, the trial court correctly held that the June 2019 New York temporary agreement became more of a permanent agreement." Grandfather has taken a different position on appeal than he did before the trial court, but he then argues why the trial court did not err by treating the Stipulation as permanent, even though it did not actually characterize the Stipulation as a permanent order.

As to Grandfather's argument, we note that neither party argued at the hearing that the Stipulation should be considered as a permanent order or that the trial court should consider modification based upon a substantial change in circumstances since entry of the Stipulation. Grandfather did not file a motion seeking modification of the Stipulation; he filed a complaint seeking an initial determination of permanent custody. In other words, Grandfather argues a theory on appeal he did not raise before the trial court, but "[o]ur Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotation marks omitted).

We review the trial court's characterization of the Stipulation as a temporary or permanent order *de novo*:

> [W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo.
>
> As this Court has previously held, an order is temporary if either (1) it is entered without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.

Smith v. Barbour, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) (citations, quotation marks, and brackets omitted).

Neither the title of an order nor the intentions of the parties or court at the time of entry of the order controls whether an order is treated as temporary or permanent, as a temporary order may become permanent after a reasonable passage of time. *See id.* ("[T]he trial court's designation of an order as 'temporary' or 'permanent' is not binding on an appellate court." (citation omitted)); *see also LaValley v. LaValley*, 151 N.C. App. 290, 292-93, 564 S.E.2d 913, 915 (2002) ("[The order] was, however, converted into a final order when neither party requested the calendaring of the matter for a hearing within a reasonable time after entry of the [o]rder." (footnotes omitted)).

First, as Mother's argument recognizes, it is not apparent that the trial court treated the Stipulation as a permanent order, so we must consider what, if anything, the trial court concluded about whether the Stipulation was permanent or temporary. The Custody Order does not address this issue directly, but overall, the Custody Order's findings and

conclusions treat the determination of custody as an initial ruling on permanent custody and did not treat the Stipulation as a permanent order. The Custody Order tacitly treated the Stipulation as a temporary order, just as it treated its own 3 June 2021 Temporary Order as a temporary order. Neither party filed a motion in the North Carolina action to modify the Stipulation and both parties' pleadings treated the custody issue before the trial court as an initial determination following a temporary emergency order entered in New York. Although we recognize those pleadings do not necessarily control the issue, we also note neither party argued at the hearing that the Stipulation should be considered as a permanent order or that the trial court should consider modification based upon a substantial change in circumstances since entry of the Stipulation.

Mother's primary argument at trial was that as a natural parent, she had a constitutional right to custody unless she was found by clear and convincing evidence to be unfit as a parent or she had acted inconsistently with her rights as a parent. And in keeping with the parties' arguments at the hearing, the only mention of a "permanent agreement" in the Custody Order is included in one of the trial court's conclusions addressing how Mother had acted inconsistently with her constitutionally protected rights as a parent. Specifically, the trial court concluded:

> 9. Based on clear and convincing evidence, since [Sam's] birth, . . . *[M]other has acted inconsistently with her constitutionally protected status as a parent* by, including but not limited to, the following, in that:
>
> a. Since [Sam's] birth, [Mother] has been employed but has provided no child support to [Grandfather] despite [Mother's] ability to provide some monetary support.
>
> b. The June 2019 New York temporary agreement became more of a permanent agreement in that [Mother] took no court action to regain custody of [Sam] in the New York court or in any other court until [Grandfather] filed this action for custody;
>
> c. [Mother] also did not timely act under the terms and conditions of the temporary agreement to rectify her home, but expected [Grandfather] to pay for the remediation or repairs to her home in New York (the home he'd helped her to buy);
>
> d. During her visits on the phone or in person with [Sam], [Mother] has made very little effort to establish a

> parent/child bond with [Sam], and, instead, has focused primarily on memorializing visits and calls in the form of photos and videos and in lambasting [Grandfather] for his care of [Sam] while [Sam] is present.

(Emphasis added.)

The rest of Conclusion No. 9 includes twelve more subparagraphs. In summary, these subparagraphs address Mother's profanity and screaming during phone calls to Grandfather; her failure to spend quality time with Sam when visiting in North Carolina; her failure to consult with Sam's medical providers and to participate in Sam's medical and psychological care; Mother's consistent and repeated rejection of Sam's diagnoses made by qualified medical professionals; her failure to truthfully answer Grandfather's complaint by "admitting" the child's father was "unknown" while she did know the identity of the child's biological father; her "disregard of the truth" which included the potential to affect the health of the child; and her intent to remain in New York and not to move to be closer to Sam.

Considering the words "more of a permanent agreement" in context, Mother is correct: the trial court did *not* conclude the Stipulation was a permanent order or that it should be treated as such due to passage of time. Instead, the trial court's statement that the "June 2019 New York temporary agreement became *more of a permanent agreement*" because Mother took no action to regain custody was not a conclusion that the trial court was treating the Stipulation as a permanent order. (Emphasis added.) Instead, the trial court was simply describing Mother's failure to take action to regain custody either in New York or North Carolina until after Grandfather filed for custody here. Thus, we need not address the part of Mother's argument that the trial court erred by treating the Stipulation as a permanent order further. We will not address Grandfather's argument that the trial court correctly treated the Stipulation as a permanent order because that is not what the trial court determined and because neither party presented this argument to the trial court. The trial court treated the Stipulation as a temporary order, and the trial court did not err by treating it as a temporary order.

There is no dispute that the Stipulation entered in New York about 2 weeks after Sam's birth was intended to be temporary. It was entered to address an urgent situation upon his birth: Mother's home was not safe for a baby; there were serious concerns regarding Mother's mental health; and Grandfather was the only other available person to care for Sam, but Grandfather lives in North Carolina. As a non-parent, he needed the ability and authority to take Sam to North Carolina and to

make decisions regarding Sam's medical care and other needs. The Stipulation did not determine all issues. The Stipulation set out specific requirements for Mother to be able to regain custody of Sam and to ensure Mother would be able to care for Sam safely; she was required to remediate the mold in her home and to have a mental health evaluation and follow treatment recommendations. The only factor favoring treating the Stipulation as a permanent order was that it did not set a date for another hearing, although the terms of the Stipulation clearly anticipated further hearings to review Mother's progress and compliance.[11]

After *de novo* review, we conclude the trial court properly considered the Stipulation was a temporary order and the Stipulation did not convert to a permanent order based on the passage of one year. However, we also note that even if we treated the Stipulation as a permanent order, the result would be the same. The trial court's extensive and detailed findings of fact set out many substantial changes in circumstances affecting the best interest of the minor child, even if it does not use those exact words. Sam was less than 3 weeks old when the Stipulation was entered; at the time of the hearing, he was age three. The substantial changes in circumstances affecting his best interests are so obvious in the trial court's 144 findings of fact we will not belabor this point further. *See Shipman v. Shipman*, 357 N.C. 471, 479, 586 S.E.2d 250, 256 (2003) ("[T]he effects of the substantial changes in circumstances on the minor child in the present case are self-evident, given the nature and cumulative effect of those changes as characterized by the trial court in its findings of fact.").

V. Mother's Constitutionally Protected Rights as a Parent

[4] Mother's last argument is that "[t]he trial court erred by conducting a best interests of the child analysis to determine custody when mother has not acted inconsistently with her constitutionally protected status

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11. We also note the Stipulation was entered under New York law and provided it should be "*construed in accordance with and shall in all respects be governed by the Laws of New York now or hereafter in effect, without giving effect to the choice of law provisions thereof, and regardless of where the parties, or either of them, in fact reside.*" (Emphasis added.) Although it is clearly a temporary custody order, it is different in many respects from North Carolina temporary orders entered under North Carolina General Statute Chapter 50. *See generally* N.C. Gen. Stat. Ch. 50 (2023). New York and North Carolina have substantial differences in court processes and procedures, especially in Family Court. *See generally* N.Y. Legis. 686 (2023). We recognize the possibility that New York statutes or rules of the Suffolk County Family Court may set out or anticipate additional proceedings even though the Stipulation did not specifically set a court date, but as neither party made this argument to the trial court or addressed it on appeal, we will not address it either.

as a parent and is not unfit." "A trial court's determination that a parent has acted inconsistently with his or her constitutionally protected status as the parent is subject to de novo review[.]" *In re B.R.W.*, 381 N.C. 61, 77, 871 S.E.2d 764, 775 (2022) (citation omitted).

We first note that the trial court's 144 findings of fact made by "clear and convincing evidence" are all binding on this Court. *See Scoggin*, 250 N.C. App. at 117-18, 791 S.E.2d. at 526. Most of the findings were not challenged on appeal, and Mother has not shown merit in her challenges to the rest of the findings, as discussed above. Most of Mother's argument focuses on her efforts to improve her situation and her view of the evidence. For example, she argues she

> has diligently worked toward [Sam's] return. The trial court found that, per the terms of the temporary New York order, Mother completed the psychological examination and that Mother "had professionals in to clear the mold" and spent over $10,000 on remediation to make her home safe for [Sam's] return, but it still "took a long time to get the mold totally removed."

Mother is correct that the order does include some findings favorable to her, such as the findings about ways she complied with the Stipulation. In fact, the trial court did not find Mother was unfit as a parent but concluded she "is a fit and proper person to have visitation" with Sam. But overall, the findings show Mother's contact with Sam was very limited, although Grandfather did not prevent Mother from visiting or participating in Sam's medical visits and care. Instead, he "paid for the majority of [Mother's] flights from New York to North Carolina in the first few months." He also provided information regarding Sam's medical providers, but Mother refused to communicate with them.

Sam's medical needs were an important factor in this case. The trial court made extensive findings regarding Sam's medical issues, including a hospitalization at about eighteen months old. Sam had "developmental problems including muscles in the right foot and hip," delays in his "speech development" and "issues with his hands." By April 2022, Sam was diagnosed with "level III of autism" for which he was receiving "daily therapy" in addition to "physical therapy twice a week, occupational once a week and speech therapy once a week." Although Mother was informed about these medical needs and had more than a year to arrange for a transition of care to New York, Mother "presented no plan for any kind of therapy for [Sam]." Mother also "has no childcare arrangements for [Sam] while she works because she plans to take"

him with her to work. "[Mother] made one visit with [Grandfather] to [Sam's] pediatrician in December, 2019. She looked up the doctor's credentials and did not like them." She did not participate in Sam's care or communicate with Sam's medical providers although Grandfather provided information for all the providers on Our Family Wizard. Mother provided no financial support for Sam, although she was employed. In contrast, Grandfather provided for all Sam's needs and took Sam to "approximately 120 medical appointments" in the two years preceding the hearing.

The trial court also made many findings addressing Mother's increasingly hostile behavior toward Grandfather and that her angry outbursts sometimes were in Sam's presence. The trial court made detailed findings regarding Mother's "numerous calls to [Grandfather] in which she screamed at him, used a lot of profanity directed toward [Grandfather] and repeated the profanity over again multiple times in each call. On at least two occasions, [Sam] was present and became upset during the calls."

Mother had some visits in New York with Sam but had never taken him to her home, even after the mold remediation was done, because "she only wants him there when he permanently comes to live with her." Despite Sam's autism and difficulty adjusting to changes in his environment, Mother "refused to take into consideration any affect that a new place to live or to stay overnight would have on [Sam] and has proposed no plan of transition for [Sam] if she is awarded custody." Overall, the findings indicate Mother was entirely unprepared to care for a child with Sam's extensive developmental and medical needs, nor had she made any effort to address these issues.

We will not repeat the extensive findings the trial court relied on to conclude Mother had acted inconsistently with her constitutionally protected rights as a parent, but the trial court relied primarily on the facts noted above in our discussion of Conclusion of Law No. 9. In addition, the trial court made extensive findings regarding Grandfather's care for Sam, his efforts to assist Mother, and his close and loving relationship with Sam.

As our Supreme Court directed in *In re B.R.W.*, 381 N.C. at 82-84, 871 S.E.2d at 779-80 (citations, quotation marks, and brackets omitted), the trial court must examine the facts of each case to determine if a parent has acted in a manner inconsistent with her rights as a parent:

> [U]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy, but other types of conduct, which must be

> viewed on a case-by-case basis, can rise to this level so as to be inconsistent with the protected status of natural parents. For that reason, there is no bright line rule beyond which a parent's conduct meets this standard; instead, we examine each case individually in light of all of the relevant facts and circumstances and the applicable legal precedent. *Boseman*, 364 N.C. at 549, 704 S.E.2d 494. *See also Estroff v. Chatterjee*, 190 N.C. App. 61, 64, 660 S.E.2d 73 (2008) (acknowledging that no litmus test or set of factors can determine whether this standard has been met.). In conducting the required analysis, evidence of a parent's conduct should be viewed cumulatively.
>
> . . . .
>
> Finally, we reiterated in *Owenby* that a parent's failure to maintain personal contact with the child or failure to resume custody when able could amount to conduct inconsistent with the protected parental interests.
>
> In *Price*, we directed trial courts, in evaluating cases involving nonparental custodial arrangements, to consider the degree of custodial, personal, and financial contact the parent maintained with the child after the parent left the child in the nonparent's care.
>
> . . . .
>
> Finally, in *Speagle*, we held that, when a trial court resolves the issue of custody as between parents and nonparents, any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding.

The trial court's extensive factual findings support its conclusion that Mother acted inconsistently with her constitutionally protected rights as a parent and the trial court therefore correctly considered the best interests of the child in awarding custody to Grandfather.

VI. Conclusion

As we determine the trial court properly exercised jurisdiction under the UCCJEA, its findings are supported by competent evidence, and the findings are sufficient to conclude Mother acted inconsistently

with her protected status as a parent, we affirm the trial court's Custody Order.

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

IN THE MATTER OF A.D.H.

No. COA23-168

Filed 3 September 2024

1. Appeal and Error—preservation of issues—juvenile petition—order resolving father's motions—department of social services' issues automatically preserved

In a juvenile abuse and neglect matter, in which a county department of social services (DSS) appealed from the trial court's order ruling on several of the father's motions—including the court's decision to dismiss the juvenile petition—although DSS did not object during the father's arguments at hearing or during the trial court's rendering of its rulings, issues raised by DSS regarding the preclusive effect of prior orders on the juvenile petition were automatically preserved for appeal because DSS was clearly challenging whether the trial court's decision to grant the father's motions was supported by its findings of fact and conclusions of law.

2. Collateral Estoppel and Res Judicata—juvenile abuse and neglect proceeding—preclusive effect of factual determination in prior orders—application of collateral estoppel

In an appeal by the Carteret County Department of Social Services seeking review of the trial court's order granting the father's motion to dismiss the juvenile petition (which had alleged that the minor child was abused, neglected, and dependent), where in two prior orders entered by the trial court—a permanent child custody order ("CCO") and an order dismissing an interference petition ("IPO") filed by the Craven County Department of Social Services—allegations of sexual abuse of the minor child by her father over a particular period of time were determined to be unfounded, the trial court properly invoked collateral estoppel—which governed rather than res judicata—to bar some of the factual allegations in

the instant juvenile petition. Where the burdens of proof applicable in the CCO and IPO determinations were lower than and the same as, respectively, the burden of proof in the juvenile petition at issue here, both of those prior orders precluded a contrary finding to the same factual allegations. The trial court erred, however, in determining that all of the current petition's factual allegations were barred, since some of the allegations concerned abuse in the time period after the CCO and IPO were entered.

3. Child Abuse, Dependency, and Neglect—abuse and neglect—preclusive effect of prior orders—some allegations remaining—motion to dismiss improperly granted

In a juvenile abuse and neglect matter, in which some, but not all, of the allegations of abuse of the minor child by her father were precluded by principles of collateral estoppel—because they covered the same time period as allegations that were determined to be unfounded in two prior orders of the trial court—the remaining allegations were sufficient to state a claim of abuse. Therefore, the trial court erred by granting the father's Rule 12(b)(6) motion to dismiss the juvenile petition. However, since some of the father's other pending motions potentially could result in the striking of some or all of the petition, the court's dismissal order was vacated rather than reversed. The matter was remanded for consideration of whether, after resolution of all of the motions, any allegations remained for purposes of Rule 12(b)(6).

Appeal by Petitioner from order entered 19 September 2022 by Judge W. David McFadyen III in Carteret County District Court. Heard in the Court of Appeals 22 January 2024.

Bill Ward & Kirby Smith, P.A., by Kirby H. Smith, III, for petitioner-appellant Carteret County Department of Social Services.

Matthew D. Wunsche for guardian ad litem.

Schulz Stephenson Law, by Sundee G. Stephenson and Bradley N. Schulz, for respondent-appellee father.

No brief for respondent-appellee mother.

MURPHY, Judge.

Petitioner-appellee Carteret County Department of Social Services ("Petitioner") appeals from an order granting various motions filed by respondent-father ("Father") and dismissing the juvenile petition. For the reasons below, we vacate the trial court's order and remand for further proceedings.

BACKGROUND

A. Prior Proceedings

A.D.H. ("Alice")[1] was born to Father and respondent-mother ("Mother") in 2013. In February 2021, Mother filed a complaint in Carteret County District Court seeking custody of Alice. On or about 9 March 2021, the trial court entered a temporary custody order granting Mother and Father joint legal custody of Alice, with Mother having primary physical custody and Father having visitation. Father's visitation included overnight visits and a "two weeks on/two weeks off" schedule during Alice's summer vacation.

In March 2021, Alice began making statements to schoolmates and her school guidance counselor that Father had sexually abused her. These reports were ultimately relayed to Petitioner then forwarded to the Craven County Department of Social Services ("Craven County DSS") due to a purported conflict. Craven County DSS opened an investigation into the alleged abuse and arranged a trauma screen with the Child Advocacy Center ("CAC"), a Child Medical Evaluation ("CME"), and a Child and Family Evaluation ("CFE") for Alice. By November 2021, the Ashe County Sheriff's Office had also opened an investigation into Father's conduct.

On 5 April 2022, the trial court entered a permanent child custody order ("CCO") in the custody dispute finding any allegations of abuse were unfounded. It found that "after two (2) investigations by the Ashe County Sheriff's [Office] it was determined that there was not sufficient evidence to charge [Father] with any wrongdoing." Additionally, Alice had made no disclosures about sexual abuse during the CAC trauma screen, CME, or CFE arranged by Craven County DSS. Furthermore, "[a]ll professionals involved in [the custody] matter[,]" including Craven County social workers, Ashe County detectives, and the CFE evaluator, "had concerns that [Mother] was coaching the minor child and feeding into a false narrative with regards to" the allegations against Father. The trial court found there had been additional reports of abuse since

1. We use a pseudonym to protect the juvenile's identity and for ease of reading.

March 2021, but none of the reports had been substantiated. Instead, Mother appeared to be creating a false narrative around Father's alleged abuse of Alice in an attempt to obtain full custody of Alice by (1) taking Alice to a substance abuse counselor who "was not qualified to counsel the minor child as she was not even a licensed clinical mental health counselor, had a lack of training to interview the child, and was quite possibly indorsing a false narrative when counseling the child"; (2) "misrepresent[ing] the findings of DSS to various professionals"; and (3) giving untruthful testimony at the custody hearing. The trial court ultimately found "[F]ather did not abuse the minor child in any way. The Court does find as fact that the Defendant father did not engage in inappropriate parenting or activities with the minor child." The trial court ordered, *inter alia*, that Father be granted primary legal and physical custody of Alice and prohibited anyone except Alice's current, qualified therapist from discussing any past allegations with Alice.

On 17 June 2022, Craven County DSS filed an "Interference Petition Pursuant to [N.C.G.S.] § 7B-303" alleging Father was obstructing or interfering with its investigation. The interference petition alleged that, on 28 March 2022, there was another report that Father abused Alice. This report was made to Petitioner and referred to Craven County DSS. The interference petition alleged Alice was recommended another CME, but Father was refusing to allow Alice to participate in the examination. Craven County DSS moved for the trial court to order that Father cease obstructing its investigation and that Craven County DSS be allowed to conduct home studies, interviews, and medical examinations as necessary for its investigation.

On or about 15 July 2022, *nunc pro tunc* 17 June 2022, the trial court entered an order dismissing the interference petition ("IPO"). The trial court found counsel for Craven County DSS "stated to the Court that DSS could complete its[] investigation without requiring a medical evaluation of the child and without requiring further home visits at the Respondent father's residence[,] [but] [t]hey did, however, need a child and family evaluation" completed by someone other than the initial evaluator. The court concluded "[g]ood cause exists to grant Respondent father's Motion to Dismiss, with prejudice[,]" and dismissed the interference petition, broadly reiterating much of what had already been said in the CCO.

B. Current Proceeding

On 29 August 2022, Petitioner filed a juvenile petition alleging Alice was an abused, neglected, and dependent juvenile. The juvenile petition

acknowledged the ongoing civil custody dispute and interference proceeding but did not discuss any of the prior orders in detail or delineate which allegations were found noncredible. The allegations in the juvenile petition recited at length verbatim statements made by Alice to various reporters that she was repeatedly sexually abused by Father. These specific statements are not necessary to resolution of this appeal and are not discussed in detail.

The petition alleged Alice made statements before entry of the CCO and IPO in March 2021, May 2021, September 2021, October 2021, and March 2022, as well as statements after entry of the CCO and IPO. Most recently, Petitioner received a report in July 2022 that, while at a sleepover with a friend, Alice disclosed sexual abuse by Father. Thereafter, one of Petitioner's social workers, Kelly Dorman, interviewed Alice at her school on 29 August 2022. Alice made additional disclosures of abuse at this interview. However, the timeline of alleged abuse was not clear from Alice's statements. Alice stated that the abuse could have occurred as far back as two years in the past or may have still been ongoing. The juvenile petition ultimately alleged Alice was abused and neglected due to sexual abuse by Father and dependent because neither Father nor Mother were able to provide for Alice's care or supervision or had appropriate alternative childcare arrangements.

On 29 August 2022, the trial court entered an order granting Petitioner nonsecure custody of Alice.

On 31 August 2022, Father filed various motions to dismiss, motions *in limine*, motions to sanction DSS officials or hold the officials in contempt, and a response to the juvenile petition. The two relevant motions to dismiss asserted the juvenile petition should be dismissed (1) pursuant to Rule of Civil Procedure 12(b)(6) for failure to state a claim and (2) pursuant to the doctrines of *res judicata* and collateral estoppel. The Rule 12(b)(6) motion specifically asserted the juvenile petition failed to state a claim because "[t]he claims made in the Petition are a restatement of the claims previously made and litigated in" the CCO and IPO and, therefore, Petitioner was barred from relitigating these claims in the juvenile petition. The preclusion motion similarly asserted the CCO, IPO, and a 15 July 2022 temporary emergency custody order entered in the custody matter, including all findings of fact and conclusions of law that Father had not abused Alice, were binding on the trial court and warranted dismissal of the juvenile petition with prejudice. Father also filed one motion to hold Social Worker Dorman in contempt ("Contempt Motion") because she interviewed Alice on 29 August 2022 with full knowledge of the provisions of the CCO prohibiting anyone but

Alice's therapists from discussing the prior allegations with Alice. One of Father's motions *in limine* requested Father be allowed to examine Dorman under oath regarding circumstances surrounding the nonsecure custody order, juvenile petition, and "the events occurring specifically as they relate to the minor child . . . since the entry of" the nonsecure custody order on 29 August 2022.

On 1 September 2022, the trial court held a hearing and allowed Father to examine Dorman. On 19 September 2022, the trial court entered a written order dismissing the juvenile petition ("Dismissal Order"). Based on Dorman's testimony, the trial court found she was aware of the CCO and IPO before she interviewed Alice, that the CCO found Father did not abuse Alice, and that "[n]o one, other than the child's current, qualified therapist" was permitted to discuss the previous allegations against Father with Alice. The trial court found that, "[b]ased upon the four corners of the Petition filed in this cause there are no colorable allegations of abuse, neglect or dependency that are alleged to have occurred subsequent to the" CCO and IPO, and the prior allegations against Father had been previously litigated and could not form the basis for the juvenile petition. The trial court granted Father's Rule 12(b)(6) motion, preclusion motion, and motion *in limine* to examine Dorman; declared "it was not necessary for the Court to hear, and rule, upon Respondent-father's other Motions in this matter"; and dismissed the juvenile petition with prejudice.

Petitioner appealed; and, on 13 May 2024, while the appeal was still pending, Mother waived her right to counsel before the trial court. On 29 May 2024, we entered an order providing Mother until 14 June 2024 to file an appellee brief, if desired. Mother did not file an appellee brief within the allotted time window.

ANALYSIS

On appeal, Petitioner presents four issues for our review: (1) whether Father gave Petitioner adequate notice of his motions to dismiss; (2) whether the trial court reviewed the juvenile petition under the correct standard when ruling on the Rule 12(b)(6) motion; (3) whether Petitioner was precluded by *res judicata* and collateral estoppel from litigating the issues in the juvenile petition; and (4) whether the trial court abused its discretion by granting one of Father's motions *in limine* and sanctioning Social Worker Dorman.

We need not address the first issue because the second and third issues are dispositive; the trial court erred as a matter of law in granting Father's motions, and we must vacate the dismissal order. We do

not address the fourth issue because the record indicates the trial court did not address Father's Contempt Motion or otherwise sanction Social Worker Dorman.[2]

A. Preservation and Motion to Dismiss Appeal

[1] We preliminarily address preservation of Petitioner's second and |third issues for appellate review. Father argues both in his brief and in a separate motion to dismiss Petitioner's appeal filed before us that Petitioner waived appellate review of the trial court's rulings on his motions because Petitioner did not object during Father's arguments on his motions or the trial court's rendering of its ruling on his motions. But, here, Petitioner's issues were automatically preserved for review because Petitioner is very clearly challenging whether the trial court's decision to grant Father's motions is supported by its findings of fact and conclusions of law regarding the preclusive effect of the prior orders on the juvenile petition. Such issues are automatically preserved for review. *See* N.C. R. App. P. 10(a)(1) ("Any such issue that . . . was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, . . . may be made the basis of an issue presented on appeal."); *see also Brown v. Lumbermens Mut. Cas. Co.*, 90 N.C. App. 464, 467-68 (1988) (citations omitted) ("[P]laintiffs' notice of appeal is sufficient to raise the limited issues of law relevant to our review of Rule 12(b)(6) motions and summary judgments. We will therefore . . . address plaintiffs' basic contention that the face of the record shows that neither LMCC nor GMC were entitled to judgment as a matter of law."), *aff'd*, 326 N.C. 387 (1990). Because the two remaining issues are preserved for review, we deny Father's motion to dismiss this appeal and reach the merits of Petitioner's arguments.

B. Motions to Dismiss

Both motions assert the doctrines of collateral estoppel and *res judicata* barred Petitioner from relitigating allegations of abuse in the juvenile petition that predate the CCO and IPO. A review of the record indicates the trial court determined, as a matter of law, that both the Rule 12(b)(6) motion and preclusion motion should be granted because the doctrines of collateral estoppel and *res judicata* operated to bar

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2. As discussed above, the district court did not rule on Father's motions other than the Rule 12(b)(6) Motion, preclusion motion, and motion *in limine* seeking to examine Social Worker Dorman. The district court did not address contempt in the dismissal order other than to note Father filed the Contempt Motion.

Petitioner from relitigating allegations in the juvenile petition that were litigated in both the CCO and IPO.[3] We first address the underlying issue of law, whether collateral estoppel or *res judicata* could form the basis for granting either motion to dismiss based on the findings and conclusions in the CCO, before more specifically addressing dismissal under Rule 12(b)(6).

1. Preclusion Motion

[2] Whether a court is barred by collateral estoppel or *res judicata* "is a question of law unrelated to any specific facts of a case. Questions of law are reviewed *de novo*." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, *disc. rev. denied*, 362 N.C. 679 (2008). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re K.S.*, 380 N.C. 60, 64 (2022) (marks and citations omitted).

Although the parties' dispute pertains to both collateral estoppel and *res judicata*, the present dispute is most squarely governed by collateral estoppel. Collateral estoppel prevents "the subsequent adjudication of a previously determined [factual] issue, even if the subsequent action is based on an entirely different claim." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15 (2004). "Under the doctrine of collateral estoppel, or issue preclusion, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Johnson v. Starboard Ass'n, Inc.*, 244 N.C. App. 619, 627 (2016) (marks omitted) (citing *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414 (1996)). "Collateral estoppel will apply when: (1) a prior suit resulted in a final judgment on the merits; (2) identical issues were involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 193 (2005) (marks omitted). For present purposes, we see no meaningful dispute that both the CCO and IPO were final judgments on the merits, contained at least some overlapping factual issues with the present juvenile petition, and were actually litigated and determined.

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3. Most of the trial court's findings of fact indicate it based its ruling as to Father's motions on the preclusive effect of the CCO. However, a review of the dismissal order indicates that the trial court also noted "there are no colorable allegations of abuse, neglect or dependency that are alleged to have occurred subsequent to" the IPO. Especially given the heavy discussion of the CCO in the IPO, we believe the trial court correctly considered the preclusive effect of both orders.

Moreover, for purposes of privity,[4] we note that both Carteret and Craven County DSS intervened in the custody action; and, as co-actors with respect to this family and arms of the State, we do not see a reason to treat them as analytically distinct with respect to the IPO.

The more meaningful dispute, we think, is whether collateral estoppel applies in this case given the discrepancy in the standard of review between the CCO and the present litigation. DSS argues, citing our holding in *In re K.A.*, that "collateral estoppel cannot apply where the proceedings involve a different burden of proof." *See In re K.A.*, 233 N.C. App. 119, 127 (2014) (citing *State v. Safrit*, 154 N.C. App. 727, 729 (2002), *disc. rev. denied*, 357 N.C. 65 (2003)). However, this was an overstatement—and oversimplification—of the existing law, directly contradicting long-established precedent and failing to fully recognize the conceptual underpinnings of collateral estoppel. North Carolina's appellate courts have, for nearly two centuries, recognized the availability of collateral estoppel as between a prior criminal proceeding and a subsequent civil proceeding, directly contradicting the idea that a mere difference in burdens of proof renders the doctrine inapplicable. *Mays v. Clanton*, 169 N.C. App. 239, 242 (2005) (citing *Burton v. City of Durham*, 118 N.C. App. 676, 680 (1995) and *Hill v. Winn–Dixie Charlotte, Inc.*, 100 N.C. App. 518 (1990)) ("[T]his Court has upheld collateral estoppel of an issue in a civil suit when that issue was previously established as an element in a criminal conviction."); *Griffis v. Sellars*, 20 N.C. 315, 315 (1838) ("In an action for a malicious prosecution, a verdict and judgment of conviction in a Court of competent jurisdiction[] . . . is conclusive evidence of probable cause, and precludes the plaintiff in the action for the malicious prosecution from showing the contrary."). These cases demonstrate that the actual principle animating the result

4. We note that the significance of privity as a component of collateral estoppel has been somewhat murky as applied by our Court, with some cases acknowledging privity as an essential element of collateral estoppel, *see Perryman v. Town of Summerfield*, 899 S.E.2d 884, 893 (N.C. Ct. App. 2024); *Green v. Carter*, 900 S.E.2d 108, 114 (N.C. Ct. App. 2024); *Johnson*, 244 N.C. App. at 627, and others omitting mention of it altogether, *see Collier v. Bryant*, 216 N.C. App. 419, 423 (2011); *Youse*, 171 N.C. App. at 193. The cause may be that, when our Supreme Court last spoke at length on the topic, it was unclear whether the concept of privity was subsumed into the requirement that "the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre*, 358 N.C. at 15, 35-37 (omitting privity from the basic definition of collateral estoppel while noting later in its analysis that privity is required for collateral estoppel to apply). Without further guidance, we do not intend for this opinion to resolve any outstanding ambiguity as to the role of privity in collateral estoppel cases, only to explain why we discuss privity when some of our other cases have not; we think it the better practice to err on the side of inclusion.

in *In re K.A.* was that collateral estoppel cannot apply to a proposition proven in a prior action when the subsequent action involves a *higher* standard of proof.

Nonetheless, even this statement falls short of explaining the whole of collateral estoppel. Our caselaw, when viewed holistically, demonstrates that collateral estoppel operates on a system of transitivity; a factual proposition is deemed true or false in the subsequent action if the truth value of the proposition in that action logically follows from the truth or falsehood of the same proposition in the prior action, bearing in mind the relative burdens of proof. Put differently, assume that the extent to which a given proposition is proven in a prior case is quantifiable as a number X; that the minimum confidence threshold at which any proposition is deemed proven in a prior case—in other words, the burden of proof—is quantifiable as a number A; and that the minimum confidence threshold at which any proposition is deemed proven in a subsequent action is quantifiable as a number B. In such a system, knowing the relationship between X and A, as well as the relationship between A and B, can—but does not always—necessarily imply a relationship between X and B.

Our caselaw bears this out. For example, the above-referenced holdings applying collateral estoppel in a prior criminal case to a subsequent civil case, *see Mays*, 169 N.C. App. at 242, *Griffis*, 20 N.C. at 315, are expressions of the principle that, if X equals or exceeds A and A exceeds B, then X must exceed B. The outcome of these holdings is an expression of the broader transitive relationship outlined above.

Our holding in *In re K.A.* is, taken in context, also an expression of this broader transitive relationship. In *K.A.*, the trial court declined to apply collateral estoppel where there was affirmative finding of abuse in a prior custody order. *In re K.A.*, 233 N.C. App. at 127. The subsequent action—a juvenile abuse, neglect, and dependency case—was subject to a higher standard of proof than the first. *Id.* In other words, if X equals or exceeds A but A is less than B, we cannot know the value of X relative to B.

Finally, in *Fox v. Johnson*, we demonstrated, consistent with the same transitive relationship, that the doctrine continues to apply when discussing a *failure* to meet a burden:

> It is well settled that "[a] dismissal under [North Carolina Rule of Civil Procedure] Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice." *Hoots v. Pryor*, 106

> N.C. App. 397, 404[] . . . (citations omitted), *disc. review denied*, 332 N.C. 345[] . . . (1992); *see also* [N.C.G.S.] § 1A-1, Rule 41(b) (2013). However, the federal court did not dismiss Plaintiffs' federal claims under North Carolina Rule 12(b)(6), but rather dismissed them pursuant to Federal Rule 12(b)(6). *See Fox*, 807 F.Supp.2d at 484. No North Carolina case law or statute that we have discovered directly addresses the question of whether a dismissal under Federal Rule 12(b)(6) operates as an adjudication on the merits so as to collaterally estop a plaintiff from re-litigating a claim or issue in our State's courts. Of course, if the evaluation of a claim in light of a motion to dismiss pursuant to Federal Rule 12(b)(6) were identical to the evaluation made in response to a motion under North Carolina Rule 12(b)(6), it would be clear that the federal court's dismissal had adjudicated and settled the same issue Plaintiffs raise in their state complaint. However, our review of the pertinent statutes and case law demonstrates that the standard under Federal Rule 12(b)(6), which the federal court here held Plaintiffs failed to meet, is a different, *higher* pleading standard than mandated under our own General Statutes. In other words, the fact that Plaintiffs' allegations of proximate cause in the federal complaint did not meet the pleading standard under Federal Rule 12(b)(6) does not *necessarily* mean that their allegations of proximate cause would have resulted in dismissal pursuant to North Carolina Rule 12(b)(6).

Fox v. Johnson, 243 N.C. App. 274, 285 (2015), *disc. rev. denied*, 368 N.C. 679 (2016). We see in *Fox* that, if X is less than A but A is greater than B, we cannot necessarily know whether X is also less than B or somewhere between B and A. *See also Hussey v. Cheek*, 31 N.C. App. 148, 149 (1976) ("When the burden of proof at the second trial is less than that at the first, the failure to carry that burden at the first trial cannot raise an estoppel to carrying the lesser burden at the second trial."); *Safrit*, 154 N.C. App. at 729 (holding that the prior failure to establish Defendant's existing convictions under a beyond a reasonable doubt standard did not preclude a subsequent finding that those convictions took place under the lower preponderance standard).

As it pertains to this case, "the applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence[,]" *Speagle v. Seitz*, 354 N.C. 525, 533 (2001) (citations omitted),

and "[t]he standard of proof for an adjudicatory order entered on a petition alleging abuse, neglect, or dependency in a juvenile matter[] . . . is 'clear and convincing evidence.' " *In re K.A.*, 233 N.C. App. at 127 (quoting N.C.G.S. § 7B-805 (2013)); *see also* N.C.G.S. § 7B-805 (2023) ("The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence."). "Clear and convincing evidence is [a] greater [standard] than the preponderance of the evidence standard required in most civil cases." *In re A.K.*, 178 N.C. App. 727, 730 (2006) (marks and citations omitted). Moreover, the proposition that the movant was required to prove in both cases was that Father abused Alice—a proposition which, under the preponderance standard, the trial court ruled had not been proven in the CCO. In other words, in keeping with the earlier model, we know that X (Father abused Alice) is less than A (preponderance of the evidence), and we know that A is less than B (clear and convincing evidence). Since we can necessarily deduce from this relationship that X must also be less than B, collateral estoppel applies to the issue of whether Father abused Alice. The doctrine therefore precludes a contrary finding in the present action, and the trial court properly invoked it as to the allegations of abuse against Father already covered by the CCO.

Any future litigants, of course, need not cite our holding in this case in algebraic terms; it is enough to say that, where a party fails to establish a fact in a prior case under a lower burden of proof, collateral estoppel applies to preclude a subsequent finding that the same fact has been established under a higher standard of proof.

Having established the preclusive effect of the CCO, we now turn to the preclusive effect of the IPO. This analysis is far simpler: The burdens of proof applicable to both the interference petition and the juvenile petition were clear and convincing evidence, *see* N.C.G.S. § 7B-805 (2023), so collateral estoppel naturally applies to the failure to prove abuse. As the IPO's conclusions that Father had not been shown to abuse Alice were determinative as to the allegations through those alleged in the interference petition, this means that, in addition to the preclusion of the allegations contained in the CCO, the IPO also precludes the allegations arising in the timeframe it alleged; namely, 28 March 2022. Thus, these issues were also correctly dismissed by the trial court as barred by collateral estoppel.

Nonetheless, to the extent the trial court held that *all* factual allegations in the juvenile petition were barred by collateral estoppel, thereby justifying its dismissal in the entirety, this ruling was too broad. Specifically, we note that the juvenile petition appears to further allege

instances of abuse taking place in July 2022, supported by evidence gathered through at least August of 2022. These allegations, which were not estopped by the earlier orders, render dismissal inappropriate. Accordingly, the trial court correctly ruled estopped most, but not all, of the factual issues in the juvenile petition; but, since factual issues pertaining to allegations after March of 2022 remain, the trial court erred in dismissing the entire petition.

2. Rule 12(b)(6) Motion

[3] The trial court also granted the Rule 12(b)(6) motion and found "there are no colorable allegations of abuse, neglect or dependency that are alleged to have occurred" after the CCO and IPO. As to a Rule 12(b)(6) motion to dismiss,

> this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted. We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.

In re K.G., 260 N.C. App. 373, 376 (2018) (citations omitted). Nevertheless,

> the review of an order granting a Rule 12(b)(6) motion to dismiss does not involve an assessment or review of the trial court's reasoning. Rather, the appellate court affirms or reverses the disposition of the trial court—the granting of the Rule 12(b)(6) motion to dismiss—based on the appellate court's review of whether the allegations of the complaint are sufficient to state a claim.

Taylor v. Bank of Am., N.A., 382 N.C. 677, 679 (2022). Therefore, we ordinarily ignore the trial court's rationale in granting a Rule 12(b)(6) motion to dismiss. But, here, because the trial court determined the juvenile petition failed to state a claim based on the idea that collateral estoppel and *res judicata* precluded Petitioner from asserting the entire spectrum of abuse allegations contained therein, we note that, to the extent the trial court's ruling on the Rule 12(b)(6) motion was based on collateral estoppel and *res judicata*,[5] it is erroneous, in part, for the same reasons as above. *See supra* Part B-1.

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5. As discussed above, while the preclusion motion discusses both *res judicata* and collateral estoppel, collateral estoppel is the more directly applicable doctrine.

As to whether the juvenile petition states a claim, Chapter 7B specifically provides that a valid petition must include "allegations of facts sufficient to invoke jurisdiction over the juvenile[,]" N.C.G.S. § 7B-402 (2023), including allegations that the juvenile is abused, neglected, or dependent. *See* N.C.G.S. § 7B-200 (2023) ("The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent."). An abused juvenile, neglected juvenile, and dependent juvenile are specifically defined in Chapter 7B. *See* N.C.G.S. § 7B-101 (2023) (defining abuse, neglect, and dependency). For purposes of the instant appeal, a juvenile whose parent commits a sex offense defined by Chapter 14 upon the juvenile is abused. *See* N.C.G.S. § 7B-101(1)(d) (2023). A neglected juvenile is one whose parent "[d]oes 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.G.S. § 7B-101(15)(a), (e) (2023). And a dependent juvenile is

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

N.C.G.S. § 7B-101(9) (2023).

Here, the juvenile petition contained sufficient allegations to state a claim that Alice was an abused, neglected, and dependent juvenile within the meaning of Chapter 7B despite the partially preclusive effect of the CCO and IPO. The petition alleged that Alice was abused and neglected because Father sexually abused Alice, and at least some of these alleged acts occurred after those already ruled upon in the CCO and IPO. The petition specifically alleged that Father committed an enumerated sex offense under Chapter 14 against Alice and that such abuse constituted improper supervision and created an injurious environment for Alice. The petition also alleged that Alice was dependent because neither of her parents were appropriate caregivers—Father was an inappropriate caregiver due to the allegations of sexual abuse, and Mother was an inappropriate caregiver due to the allegations that she had coached Alice to accuse Father of sexual abuse—and there was no other caregiver available on either side of Alice's family.

Considering all of the remaining factual allegations, the juvenile petition was sufficient to state a claim under Chapter 7B, even when excluding factually precluded subject matter. However, we further note that Father's pending motions before the trial court may—depending on the

relief granted, if any—result in the striking of some or all of the petition, which may, by extension, affect the appropriateness of any further Rule 12(b)(6) rulings on remand. In light of this potential, rather than reversing the dismissal order, we vacate the order and remand for consideration of whether, after resolution of all potentially relevant motions and in light of our holding, any allegations remain for purposes of Rule 12(b)(6).

CONCLUSION

The allegations in the juvenile petition were not fully barred by the doctrine of collateral estoppel, and the factually precluded portions of the juvenile petition did not themselves merit dismissal under Rule 12(b)(6). As our holding with respect to collateral estoppel unmoots some number of motions potentially impacting the materiality of the remaining factual allegations in the juvenile petition, the dismissal order is vacated and the case remanded for further proceedings.

VACATED AND REMANDED.

Judges COLLINS and HAMPSON concur.

IN THE MATTER OF R.H.

No. COA23-1060

Filed 3 September 2024

Termination of Parental Rights—neglect—failure to address domestic violence—likelihood of future neglect shown

The district court did not err in concluding that the statutory ground of neglect (N.C.G.S. § 7B-1111(a)(1)) existed to terminate a mother's parental rights to her minor child where there was a reasonable probability that the child, who had previously been removed from the mother's custody and adjudicated a neglected juvenile (primarily due to extensive domestic violence between his parents, such as the father punching the mother in the stomach while she was pregnant with the child), would experience a repetition of neglect if returned to the mother's care. That determination was supported by the findings and evidence, including that the mother was not credible in her denials that—in violation of her case plan and court orders—she remained in an ongoing relationship with the father and had taken the child to see him during each of three extended unsupervised overnight visits she was allowed in the weeks leading up to the termination hearing.

IN RE R.H.

[295 N.C. App. 494 (2024)]

Appeal by Respondent-Mother from order entered 24 August 2023 by Judge J. Rex Marvel in Mecklenburg County District Court. Heard in the Court of Appeals 28 May 2024.

Mecklenburg County Attorney's Office, by Senior Associate Attorney Kristina A. Graham, for petitioner-appellee Mecklenburg County Youth and Family Services.

Guardian ad Litem Program Staff Counsel Michelle FormyDuval Lynch for petitioner-appellee Guardian ad Litem.

Robinson & Lawing, LLP, by Christopher M. Watford, for respondent-appellant mother.

STADING, Judge.

Respondent-mother (Mother) appeals from the trial court's order terminating her parental rights to her minor child R.H. (Rory[1]). For the reasons below, we affirm.

I. Background

This case began on 25 February 2020, when Mecklenburg County Youth and Family Services (YFS) filed a petition alleging that newborn Rory was neglected and dependent. YFS claimed that it had been involved with the family since 2018, when four of Mother's children were taken into YFS custody and subsequently adjudicated neglected and dependent due to domestic violence between their parents, unstable housing, and inappropriate care and supervision. YFS alleged that Mother had not made progress in alleviating the conditions that led to the children's removal, and as a result, YFS petitioned to terminate Mother's parental rights to Rory's three half-siblings.

The fourth child taken into YFS custody in 2018 was the only previous child of Mother and respondent-father (Father). According to YFS, that child passed away in early 2019, and then Father did not engage in domestic violence services. Yet Mother and Father—who was married to another woman—continued to engage in a relationship rife with incidents of domestic violence. YFS alleged that, during the summer of 2019, there were at least four incidents of domestic violence, which led to Father being arrested and charged with assault

1. A pseudonym is used to protect the minor child's identity.

on a female, assault by strangulation, assault with a deadly weapon, and communicating threats.

Based on the allegations in the petition, YFS obtained nonsecure custody of Rory. YFS subsequently filed an amended neglect and dependency petition, which added an allegation that there was another domestic violence incident on 23 December 2023, during which Father grabbed pregnant Mother by the neck and punched her in the stomach. Father was charged with assault on a female and assault on an unborn child (Rory) because of this incident.

The petition, as amended, was heard on 7 July 2020. On 12 August 2020, the trial court entered an order adjudicating Rory as a neglected and dependent juvenile. The trial court ordered a safety plan to be put into place to work towards unsupervised visitation between Mother and Rory. Father was not to be informed of the location and times of any visitation, and Mother was ordered to report any domestic violence incidents to YFS. Rory remained in YFS custody.

The trial court entered a permanency planning order on 22 July 2021, establishing a primary plan of reunification with Mother and a secondary plan of adoption. In this order, the trial court found that Mother had made significant progress in the case involving her other children and was engaging in services and cooperating with YFS and the guardian ad litem (GAL) in Rory's case. Mother was awarded a mix of supervised and unsupervised visitation, and YFS was permitted to expand unsupervised visitation in its discretion.

In a July 2022 permanency planning order, the trial court changed Rory's primary permanent plan to adoption with a secondary plan of reunification. In this order, the trial court found that Mother had completed services and was cooperating with YFS and the GAL but that she was also acting inconsistently with Rory's health and safety by failing to consistently attend visitation, which had been changed to weekly supervised visitation in a prior permanency planning order. The trial court also found that there were incidents of domestic violence at Mother's home in 2022. Noting that Rory had been in foster care for twenty-seven months, the trial court ordered the GAL to file a termination petition.

The GAL petitioned to terminate Mother's and Father's parental rights on 21 November 2022. As for Mother, the GAL alleged four grounds for termination: neglect, willfully leaving Rory in foster care for more than twelve months without making reasonable progress to correct the conditions that led to his removal, willful failure to pay a reasonable portion of Rory's cost of care, and that Mother's parental rights

to another child had been involuntarily terminated and Mother lacks the ability or willingness to establish a safe home. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (9) (2023).

The termination petition was heard over four days in May and June 2023. Several witnesses testified about Mother's ongoing relationship with Father and the repeated incidents of domestic violence that occurred as part of that relationship. During her testimony, Mother admitted that she and Rory met with Father during an overnight trip to Myrtle Beach and at the Carolina Place Mall; these meetings occurred less than two weeks before the termination hearing began. Mother acknowledged that these meetings violated her case plan but claimed they were not preplanned or intentional.

On 24 August 2023, the trial court entered an order terminating Mother's parental rights.[2] The trial court concluded that all four termination grounds alleged by the GAL existed and that termination of Mother's rights was in Rory's best interest. Mother appeals.

II. Jurisdiction

This Court has jurisdiction to hear this appeal under N.C. Gen. Stat. §§ 7B-27(b) and 7B-1001(a)(7) (2023).

III. Analysis

On appeal, Mother challenges the four grounds for termination found by the trial court. This Court reviews the trial court's adjudication of termination grounds to determine "whether the trial court's conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence." *In re A.J.L.H.*, 384 N.C. 45, 53, 884 S.E.2d 687, 693 (2023) (citing *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019)). Any unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

We first consider whether the trial court properly found that Mother's parental rights were subject to termination based on neglect. A parent's rights may be terminated under this ground if that parent neglects their child such that the child meets the statutory definition of a "neglected juvenile." N.C. Gen. Stat. § 7B-1111(a)(1) (2023). A neglected

2. The trial court's order also terminated Father's parental rights. However, Father did not appeal.

juvenile includes a juvenile whose parent "[d]oes 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) (2023).

When a child has been out of their parent's custody for a significant time, "neglect may be established by a showing that the child was neglected on a previous occasion and the presence of the likelihood of future neglect by the parent if the child were to be returned to the parent's care." *In re J.D.O.*, 381 N.C. 799, 810, 874 S.E.2d 507, 517 (2022) (citation omitted). "When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re R.L.D.*, 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020) (citation omitted). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

Here, the trial court found and concluded that Mother had previously neglected Rory and that there was a probability of repetition of neglect in the future if Rory was returned to Mother's care. Mother does not dispute that Rory was previously adjudicated neglected. Still, she challenges many of the trial court's findings of fact[3] and its conclusion that there is a likelihood of repetition of neglect. "[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58-59.

Mother first contends that several portions of the trial court's finding of fact 10 are merely "recitations of witness testimony" and thus do not constitute proper findings:

> j. There was testimony the children suffered trauma from domestic violence and [Mother] suffered trauma and sought counseling to address domestic violence.
>
> . . . .

3. We note that YFS, although an appellee in this case, joins Mother in challenging many of the findings of fact made by the trial court in its termination order. Nonetheless, YFS maintains that terminating Mother's parental rights is ultimately proper. To the extent YFS' arguments could be construed as a concession of error, we observe that such concessions do not bind this Court. *See State v. Phifer*, 297 N.C. 216, 226, 254 S.E.2d 586, 591 (1979) ("This Court, however, is not bound by the State's concession. The general rule is that stipulations as to the law are of no validity." (citations omitted)).

> m. [A law enforcement officer] testified about being called to residence regarding [Father] allegedly breaking and entering and stealing gaming equipment.
>
> n. The Officer testified regarding responding to a domestic violence disturbance during which [Father] allegedly threw a tool at [Mother].
>
> o. [Another law enforcement officer] testified that on November 1, 2022 he determined that residence of [Mother] was also the residence of [Father] . . . .
>
> . . . .
>
> v. [Mother] testified that during the [three] extended unsupervised overnight visits she was given that started May 10, 2023, [] she took her children, including [Rory] to see [Father]. [Mother] testified she took [Rory] out of state to Myrtle Beach with [Father] the weekend of May 13, 2023. [Mother] testified she took [Rory] to a restaurant in South Carolina and a Walmart in South Carolina with [Father]. [Mother] testified that during the next extended weekend visit on May 19th, 2023, she took [Rory] to Carolina Place Mall in North Carolina with [Father].
>
> . . . .
>
> cc. [A social worker] testified that [Mother] makes risky decisions that puts her children at risk and there is no evidence that [Mother] will leave [Father].

Our Supreme Court has explained that "[t]here is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes[.]" *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (citations omitted). We agree with Mother that in paragraphs j., m., n., o., and cc., the trial court recited testimony without any indication that it evaluated the credibility of the relevant witness. Accordingly, we disregard those findings. *See id.*

With respect to paragraph v., the trial court made additional findings that reflected that it did not find Mother's testimony regarding the circumstances of her trip to Myrtle Beach and her meeting with Father at Carolina Place Mall to be credible. Mother challenges these findings as not supported by clear, cogent, and convincing evidence:

> y. [Father] has not made any progress on his case plan and has not visited [Rory] until theses [sic] visits where

> [Mother] brought [Rory] to him when he is alleged to have blackmailed [Mother].
>
> . . . .
>
> bb. [Mother] and [Father] are still in a relationship, [Father] has never worked a case plan and [Father] still excerpts [sic] power and control over [Mother].
>
> . . . .
>
> hh. Despite [Mother] claiming she and [Father] were no longer in a romantic relationship there were domestic violence incidents in May 2021, November 2022 and May 2023[.] [Mother] violated this Court's order and the YFS safety plan when she took [Rory] to [Father] out of state and against the orders of the Court.
>
> ii. The facts show the amount of control [Father] has over [Mother]. [Mother's] inappropriate decision making and willingness to hide the truth from the Court, YFS and GAL to conceal her continued relationship with [Father] even though it jeopardizes her case progress as well as the health and safety of any children in her care.
>
> jj. It is clear to the Court from the evidence that [Father] has perpetrated acts of domestic violence against [Mother], has not changed his behaviors, not engaged in his case plan, still contacts [Mother] and went on an unsanctioned vacation with her and [Rory] in May 2023.

Mother argues that there was insufficient evidence for the trial court to infer that she and Father were in an ongoing relationship or that she intentionally met with Father in Myrtle Beach or at the Carolina Place Mall, and that to the extent these findings imply or state otherwise, they are erroneous.

As for the meetings with Father in Myrtle Beach and at the Carolina Place Mall, Mother acknowledges that the meetings occurred. However, she argues that her testimony that the meetings were unplanned was uncontroverted, such that the trial court's findings that suggest the meetings were intentional are unsupported.

"In the context of termination of parental rights proceedings, the proper inquiry is often fact-dependent and the trial court, as a fact-finding court, is in the best position to determine the credibility of the witnesses before it and make findings of fact." *In re S.R.*, 384 N.C. 516, 517, 886

S.E.2d 166, 169 (2023) (citation omitted). Thus, the trial court "determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial court alone determines which inferences to draw and which to reject." *In re M.M.*, 272 N.C. App. 55, 69, 845 S.E.2d 888, 898 (2020) (citation and internal quotation marks omitted).

In this case, the trial court determined that Mother's claims that her recent meetings with Father were unplanned and unintentional were not credible. In addition to making a finding noting that "[t]here is a long history of [Mother] hiding information of domestic violence and the court has in prior orders questioned the mom's veracity," the trial court also expressed concerns about Mother's truthfulness during the termination hearing. Contrary to Mother's argument, the trial court was not required to uncritically accept her explanation for her multiple meetings with Father, including at a location hours away and out of state, shortly before the termination hearing. Given that Mother admitted that the meetings had occurred, the trial court could infer that the meetings were intentional and planned based on Mother's behavior throughout the history of this case. Accordingly, we reject Mother's challenges to the rial court's findings about these meetings.

As to the existence of her ongoing relationship with Father, Mother does not challenge the trial court's finding that on 22 December 2021, Mother gave birth to another child she had conceived with him. Moreover, during the termination hearing, multiple witnesses testified regarding Mother's ongoing relationship with Father throughout the history of this case. A police officer who responded to a domestic violence call at Mother's home on 1 November 2022 stated that he believed Father was living in the home because Father "showed us a lot of his belongings" there. In addition, the GAL supervisor testified to having seen Father's car at Mother's residence between May 2022 and November 2022. Finally, as noted previously, Mother took Rory on an out-of-state trip to meet with Father and then met with Father again at the Carolina Place Mall just days before the termination hearing began. Based on these facts and findings, the trial court could reasonably infer that Mother and Father remained in a relationship at the time of the termination hearing. *See In re M.M.*, 272 N.C. App. at 69, 845 S.E.2d at 898. Mother's challenges to these findings are therefore overruled.

The final two paragraphs of finding of fact 10 reflect the trial court's ultimate determination that there would be a repetition of neglect if Rory was returned to Mother's care:

> kk. [Mother] has engaged in all services offered. The question is whether her behavior changed. There is clear, cogent, and convincing evidence that [Mother's] behaviors have not changed based on her ongoing relationship with [Father]. [Father] continues to use power and control over [Mother] as evidenced by [Mother's] own testimony that [Father] is blackmailing her, yet [Mother] chose to have another child with [Father]. If this Court gave custody of [Rory] to [Mother] based on [Mother's] ongoing relationship with [Father], [Rory] will continue to be exposed to domestic violence. Severing this relation is important to [Rory's] safety and [Rory] is neglected in that there exists a reasonable probability the neglect will continue despite [Mother's] engaging in services, counseling, and signing safety plans as she continues to be in a relationship with her abuser even though it jeopardizes her relationship with her children.
>
> ll. The ground of neglect continues to exist and there is a reasonable probability that it will continue in the future. [Mother] has gone to parenting classes, has completed domestic violence education, is in therapy that is ongoing, and has completed certain other aspects of her case plan. However, the aspect about receiving domestic violence counseling and then incorporating the counseling into her decision-making has not been established. This is the main reason the child is in custody.

These findings reflect that the trial court gave due consideration to Mother's progress throughout the case, including completing many of her case plan goals. Thus, the trial court properly "consider[ed] evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re R.L.D.*, 375 N.C. at 841, 851 S.E.2d at 20. Even so, the trial court weighed this progress against Mother's inability to end her relationship with Father. As shown by the trial court's findings, Rory came into YFS custody just days after his birth because Father had violently assaulted Mother by punching her in the stomach while she was pregnant with Rory. During Rory's time in YFS' care, there were repeated domestic violence incidents between Mother and Father, but Mother refused to end the volatile relationship that was the primary basis for Rory's previous adjudication as a neglected juvenile. Despite knowing it violated her case plan, Mother was still bringing Rory to meet with Father regularly in the weeks leading up to the termination hearing. Based on Mother's failure to address

her issues with domestic violence, the trial court properly determined there was a probability of repetition of neglect in the future if Rory was returned to Mother's care. *See In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) ("A careful review of the record persuades us that the trial court's findings concerning respondent-father's failure to adequately address the issue of domestic violence have ample evidentiary support and are, standing alone, sufficient to support a determination that there was a likelihood of future neglect in the event that the children were returned to respondent-father's care."); *In re M.C.*, 374 N.C. 882, 889, 844 S.E.2d 564, 569 (2020) ("[R]espondent's refusal to acknowledge the effect of domestic violence on the children and her inability to sever her relationship with Walter, even during or immediately following his periods of incarceration, supports the trial court's determination that the neglect of the children would likely be repeated if they were returned to respondent's care.").

Accordingly, the trial court properly determined that Mother's parental rights were subject to termination based on neglect under N.C. Gen. Stat. § 7B-1111(a)(1) in that Rory was previously neglected and there was a likelihood of repetition of neglect if Rory was returned to Mother's care. Since we have concluded the neglect ground is adequately supported, we need not address Mother's remaining arguments regarding the other grounds for termination found by the trial court. *See In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019) ("[A] finding of only one ground is necessary to support a termination of parental rights[.]").

IV. Conclusion

There were sufficient findings of fact, supported by clear, cogent, and convincing evidence, to support the trial court's conclusion that Mother's parental rights could be terminated based on neglect. Mother does not challenge the trial court's determination that termination was in Rory's best interest. Accordingly, we affirm the termination order.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

KERSLAKE v. KERSLAKE

[295 N.C. App. 504 (2024)]

JASON FORREST KERSLAKE, PLAINTIFF
v.
VICKII MICHELLE KERSLAKE (TODD), DEFENDANT

No. COA23-995

Filed 3 September 2024

1. Divorce—equitable distribution—classification of post-separation support loan—acquired for improvements to marital asset—divisible debt

The trial court in an equitable distribution action did not err in classifying a post-separation support loan to the husband as divisible debt where competent, credible evidence showed that the husband used the loan proceeds to pay for repairs to the marital home—an undisputed marital asset—after a detached garage on the property caused a run-off leak into the basement. The wife had been living in the home for a year post-separation and admitted that the detached garage was a fixture of the house.

2. Divorce—equitable distribution—classification of debt—incurred by each spouse to purchase marital property

In an equitable distribution action, where both the husband and the wife had obtained loans in order to acquire an undeveloped parcel of land (previously owned by the husband and his former spouse) out of foreclosure, the trial court properly classified both parties' loans as marital debt and therefore did not err in distributing both loans to the wife as a marital debt.

3. Divorce—equitable distribution—classification of property—gifts—vehicles bought for children with marital funds

In an equitable distribution action involving spouses who each had children from previous marriages, where the husband's testimony regarding the use of marital funds to buy vehicles for the parties' respective children—together with the undisputed delivery of those vehicles to the children—provided competent evidence of donative intent by both parties, the trial court did not err by classifying the vehicles as gifts and distributing them to the children.

4. Divorce—equitable distribution—classification of property—scaffolding acquired before marriage

The trial court in an equitable distribution action erred in classifying $7,800 worth of scaffolding as a marital asset and in including it as part of the value of the marital estate, where competent

evidence showed that the husband had purchased the scaffolding years before the parties got married and without any financial contribution from the wife.

5. Divorce—equitable distribution—classification of debt—incurred on date of separation—judgment against husband's business

The trial court in an equitable distribution action erred in classifying a judgment entered against the husband's business as a marital debt, crediting the husband for paying off the debt, then using the judgment as a factor to award an unequal distribution in the husband's favor. The judgment was entered on the date of separation, not before, and was related only to the husband's business (classified as his separate property) and not to any existing marital debt.

6. Divorce—equitable distribution—credits for mortgage payments for the marital home—made post-separation

In an equitable distribution action, where the trial court ultimately distributed the marital home and the mortgage debt attached to it to the husband, the court did not abuse its discretion when it credited the husband with a reduced mortgage principal for the ten months that he made mortgage payments while the wife was living in the home as its sole occupant post-separation. However, where the wife had also made payments on the mortgage and property taxes for part of her occupancy, the court erred in charging the wife rent for remaining in the marital home post-separation and in failing to credit her for any part of the mortgage and property tax payments that came from her separate funds.

7. Divorce—equitable distribution—distributive award—in addition to unequal distribution—sufficiency of findings

In an appeal from an equitable distribution order, the wife failed to show that the trial court abused its discretion by ordering an additional distributive award to the husband after awarding him more than eighty-one percent of the marital estate. The court entered considerable and detailed findings regarding the distributional factors set forth in N.C.G.S. § 50-20(c), and therefore there was no basis for the wife's assertion that the court had failed to make any findings supporting its decision.

8. Divorce—equitable distribution—unequal distribution—vacated and remanded

In light of its holdings to vacate an equitable distribution order in part and remand the matter for further proceedings, the Court

of Appeals also vacated the trial court's unequal distribution of the marital estate—distributing more than eighty-one percent of the estate to the husband—and directed the trial court to enter a new judgment after consideration of its new conclusions.

Appeal by defendant from judgment entered 14 April 2023 by Judge Donna Forga in Haywood County District Court. Heard in the Court of Appeals 14 August 2024.

Emily Sutton Dezio, PA, by Emily S. Dezio, for the plaintiff-appellee.

Connell & Gelb PLLC, by Michelle D. Connell, for the defendant-appellant.

TYSON, Judge.

Vickii Kerslake Todd ("Wife") appeals from equitable distribution judgment. We affirm in part, reverse in part, and remand.

I. Background

Wife and Jason Forrest Kerslake ("Husband") were married on 30 July 2016 and separated three- and one-half years later on 21 January 2020. No children were born of the marriage. Both parties are parents of children from previous marriages.

Husband was previously married to Rebecca Kerslake Thomason. Husband and Thomason divorced in June 2016. Husband and Thomason owned a single-family home located at 620 Red Maple Drive in Waynesville. Thomason quitclaimed her interest by deed to Husband on 20 September 2019. The same day, Husband quitclaimed an interest to other property by deed as tenant by the entirety to Wife.

Husband and Thomason also owned an undeveloped 1.62-acre lot located on Covered Bridge Trail. The parcel was foreclosed as collateral for unpaid debt, and Husband and Wife acquired the lot out of foreclosure on 18 December 2017. Wife obtained a loan to acquire the property and Husband acquired a loan against their 2024 Spectre Cat boat to pay other costs associated with the acquisition of the foreclosed property.

Following separation, Wife remained in the Red Maple Drive property until leaving for vacation on 1 February 2021. Wife paid the *ad valorem* property taxes on this property in 2019 and 2020. Husband paid the mortgage payments until December 2020. Wife paid the mortgage payments for December 2020 and January 2021. Husband resumed paying the mortgage on 1 February 2021.

Wife filed a complaint for equitable distribution on 5 February 2020. An equitable distribution trial was held on 20-22 March 2023. The trial court entered an equitable distribution judgment on 14 April 2023. Wife appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Standard of Review

Trial courts are accorded discretion when distributing marital property, and "the exercise of that discretion will not be disturbed in the absence of clear abuse." *McNeely v. McNeely*, 195 N.C. App. 705, 709, 673 S.E.2d 778, 781 (2009) (citation and quotations omitted). "A ruling committed to the trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "Once the trial court decides that an unequal division of the marital property would be equitable, its decision will only be reversed for an abuse of discretion." *Albritton v. Albritton*, 109 N.C. App. 36, 42, 426 S.E.2d 80, 84 (1993) (citation omitted).

"[C]lassification of property in an equitable distribution proceeding requires the application of legal principles," and is therefore subject to *de novo* review. *Romulus v. Romulus*, 215 N.C. App. 495, 500, 715 S.E.2d 308, 312 (2011). A trial court's conclusions of law are reviewed *de novo*. *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citation omitted).

IV. Issues

Wife argues the trial court erred by: (1) classifying a post-separation loan to Husband as a divisible debt; (2) including Husband's separate property as part of the value of the marital estate; (3) distributing Husband's separate foreclosure debt to Wife as a marital debt; (4) finding that a judgment against Husband's business was a marital debt that existed on the date of separation, crediting Husband for paying off the debt, then using this judgment as a factor to award an unequal distribution to Husband; (5) distributing marital property to children; (6) charging Wife rent for remaining in the marital residence post-date of separation then distributing Husband the residence; (7) ordering an additional distributive award after awarding Husband in excess of 81% of the marital estate; and, (8) ordering an unequal distribution of the marital estate without basis for the award.

V. Classification of Post-Separation Support

[1] Wife argues the trial court erred by classifying a post-separation support loan to Husband as a divisible debt when he used the loan proceeds to improve the marital residence that was distributed to him. In equitable distribution actions, the trial court follows a three-step analytical framework: "(1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property." *Mugno*, 205 N.C. App. at 277, 695 S.E.2d at 498.

Our General Assembly has defined marital property as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property[.]" N.C. Gen. Stat. § 50-20(b)(1) (2023).

The General Assembly further defined divisible property, in relevant part, as "[a]ll appreciation and diminution in value of marital property and divisible property of the parties . . . , except that appreciation or diminution in value which is the result of post-separation actions or activities of a spouse shall not be treated as divisible property[,]" and "passive increases and passive decreases in marital debt[.]" N.C. Gen. Stat. §§ 50-20(b)(4)(a),(d) (2023).

Marital debt is "incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). "[A]ny debt incurred by one or both of the spouses after the date of separation to pay off a marital debt existing on the date of separation is properly classified as a marital debt." *Id.*

The trial court made the following finding of fact:

> The court received competent, credible evidence that the detached garage was causing a run-off leak into the basement of the house. The Plaintiff obtained a loan after the date of separation to have the garage repaired and run-off water re-directed. The plaintiff acquired a loan in the total amount of $18,215.55 which the court considers divisible property.

Competent evidence supports the finding of fact that the detached garage was causing water damage to the house. The house is an undisputed marital asset. Wife admitted the carport was a fixture of the house.

Husband acquired the post-separation debt to remedy the source of the water damage and prevent further damage to a marital asset.

This Court in *Sluder* upheld a trial court's classification of a debt acquired after the date of separation as marital debt. *Sluder v. Sluder*, 264 N.C. App. 461, 465, 826 S.E.2d 242, 245 (2019). The husband in *Sluder* testified he had "refinanced the parties' existing mortgage due to high interest rates and because the parties could not reach a decision on the property." *Id*. at 465, 826 S.E.2d at 245.

Here, Wife had been staying in the house for a year post-separation, and, upon Husband's return, he discovered ongoing water damage and acted to prevent further damage to the marital asset. The trial court relied upon competent, credible evidence regarding the source of the damage to the marital asset and the costs undertaken to remedy it. Wife's argument is overruled. The trial court's order classifying the loan as divisible property is affirmed.

VI. Foreclosure Debt

[2] Wife argues the trial court erred by distributing Husband's separate foreclosure debt to Wife as a marital debt.

A. Standard of Review

A trial court's determination regarding whether property is marital or separate should not be disturbed provided competent evidence supports the findings. *See Riggs v. Riggs*, 124 N.C. App. 647, 649, 478 S.E.2d 211, 212 (1996) (citation omitted). An equitable distribution judgment "will not be disturbed absent a clear abuse of discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citation omitted).

B. Analysis

Marital debt is "incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet*, 113 N.C. App. at 536, 439 S.E.2d at 210.

Here, Husband and Wife purchased the property out of foreclosure during their marriage and both incurred debt to do so. The debt incurred was correctly classified as marital debt. The trial court's order distributing the foreclosure debt to Wife as a marital debt is affirmed.

VII. Distributing Marital Property to Children

[3] Wife argues the trial court erred by distributing marital property to children, who were not a party to the proceeding, and occurred without the donative intent of both parties.

In *Berens v. Berens*, this Court examined gifts to minor children, holding:

> [p]roperty that was acquired but then given away to some third party during the marriage–including a gift to the married couple's minor children–is not subject to equitable distribution . . . . In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery. These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery[.]

Berens v. Berens, 260 N.C. App. 467, 469, 818 S.E.2d 155, 157-58 (2018) (citations and quotation marks omitted).

This Court in *Berens* held money contributed to the parties' minor children's 529 Savings Plans was not a gift because the parties did not deliver an ownership interest to their children. *Id.* at 470, 818 S.E.2d at 158.

Here, all three children, who were adults at the time the parties separated, presently possessed and used the vehicles in different states. Husband's testimony regarding the use of marital funds used in purchasing vehicles for both Husband and Wife's respective children, together with the delivery of the vehicles to the children, provides competent evidence of donative intent to not disturb the trial court's decision and judgment. Wife's argument is overruled.

VIII. Scaffolding in Marital Estate

[4] Wife argues the trial court erred in classifying $7,800 worth of scaffolding as a marital asset because it was acquired by Husband before the marriage. Only marital property is subject to equitable distribution under N.C. Gen. Stat. § 50-20(b) (2023). *Chandler v. Chandler*, 108 N.C. App. 66, 68, 422 S.E.2d 587, 589 (1992). Marital property refers to "real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties." N.C. Gen Stat. § 50-20(b)(1). Property acquired by either spouse before marriage is separate property. N.C. Gen. Stat. § 50-20(b)(2) (2023).

Defendant cites *Wade v. Wade* in support of the trial court's authority to transfer title of property when it was necessary for an equitable distribution. 72 N.C. App. 372, 382-83, 325 S.E.2d 260, 270 (1985). In *Wade*, the asset in question, a house, was characterized as partly marital due to the substantial contribution of the defendant to its construction. *Id.* at 380, 325 S.E.2d at 268. Because the house was classified as partly

marital property, it was subject to equitable distribution, even though the land it was built upon was the plaintiff's separate property. *Id*. at 382-83, 325 S.E.2d at 270.

Here, Wife made no investment in the scaffolding. It cannot be properly classified as marital or partly marital property. *Id*. As Husband's separate property, it is not subject to equitable distribution. The uncontested evidence shows Husband acquired the scaffolding years prior to his marriage to Wife, making and retaining it as his separate property. The trial court erred in classifying the scaffolding as marital property and distributing it to Wife.

IX. Business Debt

[5] Wife argues the trial court erred in classifying a judgment against Husband's business as a marital debt. Wife asserts the debt existed on the date of Husband and Wife's separation. The trial court credited Husband for paying off the debt and then used this judgment as a factor to award an unequal distribution to Husband.

A marital debt is "one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet*, 113 N.C. App. at 536, 439 S.E.2d at 210. A debt incurred on the date of separation, not before, only qualifies as a marital debt if it is incurred by one or both spouses to pay off an existing marital debt. *Id*.

The judgment against Husband's business was entered on the date of separation. Husband's business is his separate property and is not a marital asset. The judgment does not constitute a marital debt. Despite Husband's assertion that Wife made herself "part and parcel" of his business, the debt was not incurred before the date of separation. The debt was unrelated to any existing marital debt, excluding it from being classified as marital debt. The debt was improperly denominated as marital debt in the judgment for equitable distribution and is properly classified as Husband's separate debt on remand.

X. Marital Residence Rent

[6] Wife argues the trial court erred in charging her rent for remaining in the residence after the date of separation, paying the *ad valorem* taxes, and then distributing Husband the residence with a reduced mortgage principal following her mortgage payments.

A spouse is entitled to consideration in equitable distribution proceedings for any post-separation payments made for the benefit of the

marital estate, as well as for post-separation use of the marital property by the other spouse. *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002) (citations omitted).

If the property is distributed to the spouse, who had the post-separation use of it, or who made post-separation payments relating to its maintenance, as a general proposition, no entitlement to a credit or a distributional factor is due. The trial court may weigh the equities in a particular case and find, in its discretion, a credit or distributional factor would be appropriate under the circumstances. *Id.* at 732, 561 S.E.2d at 577.

A spouse to whom the marital debt is not distributed, but who nonetheless makes some payment on the debt from separate funds after separation and before equitable distribution, is entitled to either direct reimbursement by the other spouse or a proportionate increase in the share of the equitable distribution award or marital properties. *Loving v. Loving*, 118 N.C. App. 501, 505-06, 455 S.E.2d 885, 888 (1995). The form and manner of compensation rests within the trial court's discretion. *Id.*

The court is required "to credit a former spouse 'with at least the amount by which he decreased the principal owed' on marital debt by using his separate funds." *McLean v. McLean*, 88 N.C. App. 285, 293, 363 S.E.2d 95, 100 (1987). "[I]f a spouse used separate funds to benefit the marital estate, those payments may be credited to the payor when distributing the marital estate." *Mosiello v. Mosiello*, 285 N.C. App. 468, 476, 878 S.E.2d 171, 178 (2022).

Here, Husband was distributed the marital home and paid the mortgage for ten months while Wife solely occupied it post-separation. Husband is entitled to credit for Wife's post-separation use of the property. Husband used income earned after the date of separation to make the payments. It was within the trial court's discretion to award Husband credit for the mortgage payments. Wife has not shown it was arbitrary or unreasonable for the trial court to credit Husband with a reduced mortgage principal for the ten months he made payments while Wife solely occupied the marital residence post-separation.

Wife also asserts she made payments on the mortgage and property taxes for part of her occupancy. Because the mortgage debt was not distributed to her, Wife is entitled to credit for these payments, if made with her separate funds. There is no indication the trial court gave any consideration to Wife's purported payments. If on remand the trial court determines Wife's payments were made using her separate funds,

it should credit Wife the equivalent amount either through direct reimbursement or through an increase in her share of the marital estate.

XI. Distributive Award

[7] Wife argues the trial court erred by ordering an additional distributive award after awarding Husband in excess of 81% of the marital estate.

A. Standard of Review

"[T]his Court reviews the trial court's actual distribution decision for abuse of discretion." *Mugno*, 205 N.C. App. at 276, 695 S.E.2d at 498 (citation omitted). An equitable distribution judgment "will not be disturbed absent a clear abuse of discretion." *Wiencek-Adams*, 331 N.C. at 691, 417 S.E.2d at 451.

B. Analysis

The North Carolina General Statutes define "distributive award" as:

> Payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

N.C. Gen. Stat. § 50-20(b)(3) (2023).

The statute further states "[t]here shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c) (2023). "[I]t shall be presumed in every action that an in-kind distribution of marital property or divisible property is equitable," however, "[t]his presumption may be rebutted by the greater weight of the evidence[.]" N.C. Gen. Stat. § 50-20(e) (2023).

"[I]f the trial court determines the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908. Should the trial court determine the presumption of an in-kind distribution has been rebutted, the statutes instruct the court to "provide for a distributive award in order to achieve equity between the parties[.]" N.C. Gen. Stat. § 50-20(e).

Wife asserts "the trial court does not make any findings of fact to support that an in-kind distribution has been rebutted nor does i[t] make any findings of fact to support the payment of a distributive award." This assertion is unsupported and misplaced.

In *Hill v. Sanderson*, the trial court made numerous "findings corresponding with . . . the twelve distributional factors set forth in N.C. Gen. Stat. § 50-20(c)." *Hill v. Sanderson*, 244 N.C. App. 219, 240, 781 S.E.2d 29, 44 (2015). This Court "conclude[d] the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered." *Id.* at 241, 781 S.E.2d at 44.

Here, the trial court made considerable and detailed findings regarding the distributional factors set forth in N.C. Gen. Stat. § 50-20(c). Wife has failed to carry or meet the substantial burden of demonstrating the trial court abused its discretion by acting in a manner that is "so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 224, 781 S.E.2d at 34 (citation omitted). Wife's argument is overruled.

XII. Unequal Distribution

[8] Wife argues the trial court erroneously ordered an unequal distribution of the marital estate. In light of this Court's holdings to vacate in part and remand for further proceedings, the trial court's equitable distribution award is vacated and this cause remanded for the exercise of the trial court's discretion and entry of a judgment after consideration of the conclusions and mandate herein.

XIII. Conclusion

We affirm the trial court's findings and conclusions to classify the post-separation loan as marital debt, to distribute the foreclosure debt to Wife, to classify vehicles as the property of Husband and Wife's respective children, to credit Husband for the mortgage payments on the marital residence, and the distributive award to Husband.

We reverse the trial court's classification of Husband's scaffolding as a part of the marital estate, the classification of Husband's business as a marital asset, and the court's failure to credit Wife for her mortgage and *ad valorem* taxes payments, if any, paid from her separate funds on the marital residence.

We vacate the equitable distribution award and remand for further consideration and entry of a new order consistent therewith. In its discretion the trial court may take additional evidence and consider additional factors. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, VACATED AND REMANDED.

Judges STADING and THOMPSON concur.

REYNOLDS v. BURKS

[295 N.C. App. 515 (2024)]

WILLIAM WAYNE REYNOLDS, PLAINTIFF
v.
ALLEN COLE BURKS, M.D., INDIVIDUALLY, AND SOHINI GHOSH, M.D., INDIVIDUALLY, DEFENDANTS

No. COA24-75

Filed 3 September 2024

Venue—motion to change venue—N.C.G.S. § 1-77—no error—motion to reconsider—no abuse of discretion

In a medical malpractice case filed in Pender County and arising from allegedly negligent care provided to a Pender County resident while he was admitted to UNC Hospitals in Orange County, the trial court did not err in denying motions for change of venue filed by two physicians (defendants) who sought a change in venue pursuant to N.C.G.S. § 1-77 (requiring a case brought against a public officer to be tried in the county where the cause of action arose) based on their argument that they were employees of UNC Hospitals, a state-created entity. Defendants, in their answers to the complaint, had denied allegations that they had employment or agency relationships with UNC Hospitals and, moreover, failed to offer any affidavits, sworn testimony, or other evidence establishing such relationships at the motion hearing. Additionally, the denial of defendants' request for further hearing or reconsideration (after their motions for change of venue were denied) was not an abuse of discretion given that reconsideration is not a vehicle to identify facts or legal arguments that could have been, but were not, raised when the original motion was pending.

Appeal by Defendants from Orders entered 13 September 2023 and 11 October 2023 by Judge Tiffany Powers in Pender County Superior Court. Heard in the Court of Appeals 12 June 2024.

Edwards Kirby, LLP, by Mary Kathryn Kurth and David F. Kirby, for Plaintiff-Appellee.

Gordon Rees Scully Mansukhani, LLP, by Samuel G. Thompson, Jr., for Defendant-Appellants.

HAMPSON, Judge.

Factual and Procedural Background

Allen Cole Burks, M.D. (Dr. Burks) and Sohini Ghosh, M.D. (Dr. Ghosh) (collectively, Defendants) appeal from an Order denying their respective Motions to Change Venue pursuant to N.C. Gen. Stat. §§ 1-77 and 1-83 and a subsequent Order denying their request for findings of fact. The Record before us tends to reflect the following:

On 12 January 2023, William Wayne Reynolds (Plaintiff)—a resident of Pender County—filed a Complaint in Pender County Superior Court against Defendants. The Complaint alleged medical negligence on the part of Defendants for treatment Plaintiff received while admitted at the University of North Carolina Medical Center in Chapel Hill, North Carolina.

With respect to Dr. Ghosh, Plaintiff's Complaint alleged upon information and belief, at all times relevant to Plaintiff's action, Dr. Ghosh:

A. was a third-year pulmonology fellow at UNC Hospitals;

B. was a fellow in interventional pulmonology at the School of Medicine of the University of North Carolina;

C. was acting as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina; and

D. was acting as an employee, agent and/or apparent agent of UNC Hospitals.

Similarly, with respect to Dr. Burks, Plaintiff alleged upon information and belief, at all times relevant to Plaintiff's action, Dr. Burks:

A. was an attending physician at UNC Hospitals;

B. was acting as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina; and

C. was acting as an employee, agent and/or apparent agent of UNC Hospitals.

On 5 April 2023, Defendants each filed an Answer to the Complaint. In their Answers, with respect to Dr. Ghosh, each Defendant:

A. denied she was a third-year pulmonology fellow at UNC Hospitals;

B. denied she was a fellow in interventional pulmonology at the School of Medicine of the University of North Carolina;

C. objected and moved to strike the allegation Dr. Ghosh was acting as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina or in the alternative alleged lack of knowledge or information sufficient to form a belief as to the truth of the allegation; and

D. objected and moved to strike the allegation Dr. Ghosh was acting as an employee, agent and/or apparent agent of UNC Hospitals or in the alternative alleged lack of knowledge or information sufficient to form a belief as to the truth of the allegation.

With respect to Dr. Burks, each Defendant:

A. denied he was an attending physician at UNC Hospitals;

B. objected and moved to strike the allegation Dr. Burks was acting as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina or in the alternative alleged lack of knowledge or information sufficient to form a belief as to the truth of the allegations; and

C. objected and moved to strike the allegation Dr. Burks was acting as an employee, agent and/or apparent agent of UNC Hospitals or in the alternative alleged lack of knowledge or information sufficient to form a belief as to the truth of the allegation.

In their Answers, both Defendants also moved to change venue to Orange County Superior Court under N.C. Gen. Stat. § 1-77 on the basis that this was the county the care occurred and where UNC Hospital—a state-created hospital—and the School of Medicine are located. Alternatively, both Defendants moved for a change of venue under N.C. Gen. Stat. § 1-83 based on convenience of the witnesses.

Defendants' Motions to Change Venue were heard by the trial court on 5 September 2023. At the hearing, Plaintiff and Defendants each presented arguments of counsel. Defendants contended they were entitled to a change of venue under Section 1-77, which provides a case "must be

tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial" where the action is "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office[.]" N.C. Gen. Stat. § 1-77 (2023). Defendants contended they were employees of UNC Hospitals—and thus covered by the statute—and the action arose from the medical care they provided in Orange County. Defendants, however, presented no evidence or affidavits to support their position, instead relying on trial court orders entered in other cases.

Later in the day on 5 September 2023, the trial court issued its rendered ruling via email. The trial court informed the parties it was "denying the Motion[s] to Change Venue." The trial court expressly indicated "I am not making a finding that the Doctors are not covered under NCGS 1-77, but I am denying the Motion[s] on both grounds."

On 13 September 2023, the trial court entered its Order Denying Defendants' Motions to Change Venue. The Order determined: "The Court makes no finding that Dr. Burks or Dr. Ghosh are not covered under N.C. Gen. Stat. [§] 1-77, but based upon what was presented to the Court, the motions to change venue pursuant to N.C. Gen. Stat. §§ 1-77 and 1-83 are both denied." The trial court ordered the matter to proceed in Pender County.

On 25 September 2023, Defendants filed a "Motion to be Heard on Findings Made by the Court Following Defendants' Motion to Transfer Venue and Alternative Motion for Reconsideration of the Court's Denial of Defendants' Request for an Opportunity to be Heard on Findings Made by the Court Following Defendants' Motion to Transfer Venue." On 11 October 2023, the trial court entered an Order denying Defendants' request for further hearing or reconsideration.

The same day—11 October 2023—Defendants filed Notice of Appeal from the trial court's Order Denying Defendants' Motions to Change Venue. The following day—12 October 2023—Defendants filed Notice of Appeal from the trial court's Order denying their Motion for further hearing or reconsideration.

Appellate Jurisdiction

The trial court's Orders in this case are interlocutory orders. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "Generally, there is no right of immediate appeal from

interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an appeal is permitted "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Harris & Hilton, P.A. v. Rassette*, 252 N.C. App. 280, 282, 798 S.E.2d 154, 156 (2017) (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)).

This Court has previously held "[t]he denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper." *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (citations omitted). *See also Hawley v. Hobgood*, 174 N.C. App. 606, 608, 622 S.E.2d 117, 119 (2005) ("Motions for change of venue because the county designated is not proper affect a substantial right and are immediately appealable." (citations omitted)); *Odom v. Clark*, 192 N.C. App. 190, 195, 668 S.E.2d 33, 36 (2008) ("[B]ecause the grant or denial of venue established by statute is deemed a substantial right, it is immediately appealable." (citation omitted)).

This Court has previously held an interlocutory order denying a motion to change venue brought under N.C. Gen. Stat. § 1-77 is immediately appealable. Here, Defendants center their argument on the trial court's denial of their Motions under Section 1-77.[1] To the extent the trial court denied Defendants' Motions under this statute, Defendants have a right to an immediate appeal.[2]

Issues

The issues on appeal are whether the trial court: (I) erred by denying Defendants' Motions to Change Venue based on the record before it; and (II) abused its discretion by denying reconsideration of its decision.

Analysis

I. Change of Venue

N.C. Gen. Stat. § 1-83 governs changes of venue in civil actions. Relevant to Defendants' appeal, it provides:

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1. Defendants assert they are reserving their right to appeal from the denial of their Motions to Change Venue based on convenience of the witnesses for appeal from a final judgment.

2. Defendants have also filed a Petition for Writ of Certiorari requesting this Court grant review. We dismiss the Petition for Writ of Certiorari as moot. Defendants' Motion for Leave to File a Reply in connection to Plaintiff's Response to their Petition is dismissed.

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of the parties or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83(1) (2023).

"Despite the use of the word 'may,' it is well established that 'the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.' " *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012) (quoting *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975)). "A determination of venue under N.C. Gen. Stat. § 1-83(1) is, therefore, a question of law that we review *de novo*." *Id.* (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and quotation marks omitted).

Defendants contend venue in this case is governed—and mandated—by N.C. Gen. Stat. § 1-77. Under N.C. Gen. Stat. § 1-77, a case "must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial" where the action is "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office[.]" N.C. Gen. Stat. § 1-77 (2023). Defendants assert they constitute "public officers" or "persons especially appointed" under the statute because of their alleged employment relationships with UNC Hospitals. As such, Defendants argue venue was improper in Pender County and only proper in Orange County where their alleged negligence took place.

Here, however, the trial court expressly stated in its Order Denying Defendants' Motions to Change Venue: "The Court makes no finding that Dr. Burks or Dr. Ghosh are not covered under N.C. Gen. Stat. [§] 1-77[.]" Instead, the trial court ruled "based upon what was presented to the

Court, the motions to change venue pursuant to N.C. Gen. Stat. §§ 1-77 and 1-83 are both denied."

Indeed, Defendants presented nothing to the trial court that established they were either "public officials" or "persons especially appointed." Defendants point to the allegations in Plaintiff's Complaint alleging an employment or agency relationship between Defendants and UNC Hospitals and School of Medicine. However, their argument completely ignores the fact they either denied or objected to and moved to strike each of those material allegations. *See Jackson v. Love*, 82 N.C. 405, 408 (1880) ("The denial [of an allegation in a pleading] destroys the force of an allegation and puts the controverted fact in issue."). Further, there is no indication Defendants obtained any ruling on their objections or motions to strike. Moreover, in the alternative, Defendants claimed they lacked knowledge or information sufficient to form a belief as to the truth of the pertinent allegations in Plaintiff's Complaint. Thus, the pleadings do not conclusively establish Defendants' relationship with UNC Hospitals or the School of Medicine.

Not only do the pleadings not resolve the issue, but Defendants also presented no evidence to support a determination they constituted public officials or persons especially appointed. Defendants presented no affidavits, sworn testimony, or other exhibits, which might support findings establishing the nature of their relationship with UNC Hospitals or the School of Medicine. Rather, Defendants rely solely on the arguments of counsel. However, "[i]t is axiomatic that the arguments of counsel are not evidence." *State v. Bare*, 197 N.C. App. 461, 476, 677 S.E.2d 518, 529 (2009) (citation and quotation marks omitted); *see also Harter v. Eggleston*, 272 N.C. App. 579, 584, 847 S.E.2d 444, 448 (2020) ("It is long established that the arguments of counsel are not evidence." (citation and quotation marks omitted)). In turn, arguments of counsel do not support findings of fact. *See Crews v. Paysour*, 261 N.C. App. 557, 561, 821 S.E.2d 469, 472 (2018) (discussions between counsel and trial court did not constitute evidence and did not support findings of fact in the absence of an evidentiary hearing or stipulations by the parties).

As such, there was nothing on the record before the trial court that would have permitted the trial court to make findings regarding the relationship of Defendants to UNC Hospitals or the School of Medicine—let alone determine whether Defendants constituted public officials or persons especially appointed as contemplated under N.C. Gen. Stat. § 1-77. Thus, on this Record, there is no basis to determine venue is mandated by application of N.C. Gen. Stat. § 1-77. Therefore, venue was not improper in Pender County where Plaintiff resides. *See* N.C. Gen. Stat.

§ 1-82 (2023) ("In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement"). Consequently, the trial court did not err in denying Defendants' Motions to Change Venue based on the materials presented to the trial court.

II. Reconsideration

Ancillary to Defendants' argument regarding the trial court's denial of their Motions to Change Venue, Defendants further argue the trial court erred by failing to allow them to be heard further on the Motion or to reconsider and revisit its Order. Defendants' arguments are without merit.

Defendants' Motion asked the trial court to reconsider its ruling and to allow Defendants to be heard further and reconsider the text of its Order Denying Defendants' Motions to Change Venue. We review a denial of a motion to reconsider only for an abuse of discretion. *See Jackson v. Culbreth*, 199 N.C. App. 531, 538, 681 S.E.2d 813, 818 (2009) (noting that this Court reviews a denial of a motion for reconsideration for abuse of discretion).

"A motion for reconsideration is not a vehicle to identify facts or legal arguments that could have been, but were not, raised at the time the relevant motion was pending." *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 923 (8th Cir. 2015). "The limited use of a motion to reconsider serves to ensure that parties are thorough and accurate in their original pleadings and arguments presented to the Court. To allow motions to reconsider offhandedly or routinely would result in an unending motions practice." *Wiseman v. First Citizens Bank & Tr. Co.*, 215 F.R.D. 507, 509 (W.D.N.C. 2003) (citation omitted).

Here, Defendants' Motion was an attempt to identify facts or further arguments that could have been made to the trial court while their Motions to Change Venue were pending. Moreover, to the extent Defendants now couch this as a request for the trial court to make findings of fact, Defendants' Motion was untimely because it was filed after entry of the trial court's underlying Order. *J.M. Dev. Grp. v. Glover*, 151 N.C. App. 584, 586, 566 S.E.2d 128, 130 (2002) ("A request [for findings] is untimely if made after the entry of a trial court's order."). In any event, as noted above, there was no evidence on which the trial court could make findings of fact.

Thus, the trial court was not required to revisit or reconsider its ruling on Defendants' Motions to Change Venue. Therefore, the trial

court did not abuse its discretion in denying Defendants' Motion to be Heard on Findings Made by the Court Following Defendants' Motion to Transfer Venue and Alternative Motion for Reconsideration of the Court's Denial of Defendants' Request to be Heard on Findings Made by the Court Following Defendants' Motion to Transfer Venue. Consequently, Defendants' arguments are meritless.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Orders are properly affirmed.

AFFIRMED.

Chief Judge DILLON and Judge WOOD concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER GALBREATH, DEFENDANT

No. COA24-48

Filed 3 September 2024

Jury—juror misconduct—sharing outside research with other jurors—statutory rape trial—trial court's investigation—no prejudice

In a prosecution for statutory rape and other sexual offenses involving defendant's minor daughter, the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on juror misconduct, where the court was informed that one of the jurors ("Juror Four") may have conducted outside research on child development and shared her findings with other jurors. After removing Juror Four for cause and examining each juror individually, the court found that nobody had heard Juror Four mention outside research, although some jurors did hear her express sympathy for the victim before another juror quickly cut her off. After replacing Juror Four with an alternate, the court instructed the jury not to discuss the case until deliberations began and not to conduct outside research. Finally, the court properly found that defendant suffered no prejudice, since each juror testified that they could remain impartial despite hearing Juror Four's sympathetic comments about

the victim, and because the jurors' exposure (if any) to outside information during their interactions with Juror Four was minimal.

Appeal by Defendant from Judgments entered 1 September 2022 by Judge Thomas H. Lock in Wake County Superior Court. Heard in the Court of Appeals 12 June 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ellen Newby, for the State.

Christopher J. Heaney for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Defendant appeals from his convictions for two counts of Statutory Rape of a Child by an Adult, three counts of Statutory Sex Offense with a Child by an Adult, and two counts of Indecent Liberties with a Child. The record reflects the following:

In 2007 G.M. was born to her mother and Defendant, who were not in a relationship but worked together and were friends. Until she was in the sixth grade, G.M. and Defendant primarily interacted on birthdays and holidays.

In November 2018, G.M. began living with Defendant. She slept on a pad on a bedroom floor with him. One night, G.M. woke up with her hand on Defendant's penis. She reported this to her grandmother, who lived in the home with Defendant and G.M., but was told to go back to sleep. After this, Defendant began regularly forcing G.M. to perform oral sex on him at night. He would also drive her to a location in the woods where he forced her to perform oral and vaginal sex. He continued raping her orally, vaginally, and anally in the home, on at least one occasion to the point of injury, and did not stop after G.M. told him she was hurt. Defendant gave G.M. alcohol and forced her to take emergency contraception when her menstruation was late, telling her that if she got pregnant he would go to prison for a long time. He would also get drunk and tell G.M. that she "deserved to be raped."

In August 2019, G.M. called the police after Defendant struck her. She was taken to a hospital and reported the sexual abuse. Defendant was indicted for two counts of Statutory Rape of a Child by an Adult, three counts of Statutory Sex Offense with a Child by an Adult, and two

counts of Indecent Liberties with a Child. The case came on for jury trial in August 2022.

At trial, G.M. testified to the above. During the State's case, one of the bailiffs reported to the trial court that one of the jurors, Juror Number Four, appeared to have torn pages out of her notepad and taken them with her when the court recessed for the day. The district attorney's legal assistant also reported that one of the State's witnesses had overheard Juror Four talking with other jurors about research she had done. That witness testified:

> I heard someone who had a red jury tag on saying something about development. I thought she said maybe child or psychological development, but I heard the word "development" very clearly. And so I told Ms. Byrum that. And I said it a little more decidedly when I told Ms. Byrum about it, but I know I heard the word "development," and I thought I heard the word "psychological child development" when I heard it, so I mentioned it to Ms. Shekita's assistant.

She identified Juror Four as having made the comments and did not hear any additional conversation.

The trial court questioned Juror Four, who denied having any conversation as described by the witness and claimed that she only tore blank pages out of her notepad. She testified that she was struggling to keep up with testimony and had taken the pages to write down notes in the jury room. The trial court reopened voir dire, and both the State and counsel for the defense challenged Juror Four for cause. The trial court sustained the challenge and removed Juror Four.

The defense moved for a mistrial based on Juror Number Four's conduct. The trial court examined each juror individually.

Jurors One, Three, Six, Seven, and Nine and Alternate Juror Two did not hear any statements by other jurors about the evidence in the case or issues involved.

Several of the other jurors testified that Juror Four had spoken to them or they had overheard her speaking. Juror Two heard Juror Four make some statements the previous day, but did not know what she had said, and said that another juror stopped Juror Four from continuing to speak. Juror Five testified that Juror Four attempted to talk to him, but he couldn't recall what she had started to say and he stopped her from finishing. Juror Eight testified that Juror Four attempted to make a statement on the first day of the trial but that another juror told her to

stop talking: "She started to say something about little girl, and the other girl told her to stop talking, and that was -- that was it." Juror Ten testified that Juror Four had "said something to the effect of I feel very bad for that girl," and Juror Ten told her they were not allowed to talk about the case. Juror Eleven also heard Juror Four speak about G.M.'s testimony and how she felt after hearing it. Juror Twelve also heard Juror Four "remarking about her personal feelings about the information she had heard in the courtroom," describing G.M.'s testimony as "awful." Alternate Juror One testified that he only heard one other juror say that it was difficult to hear the evidence and testimony presented.

No juror stated that Juror Four had spoken about child development or conducting outside research. Each juror, when asked, responded that they could continue to serve as a fair and impartial juror.

After the trial court had examined the jurors, Defendant renewed his motion for a mistrial. The trial court found that no juror had heard any comments from Juror Four regarding child development or outside research she had conducted. It found that some had heard her comment on the difficult nature of G.M.'s testimony, but that each juror who had heard her remarks reported that she was quickly cut off. It also found that the jurors were not impacted by Juror Four's conduct and could serve as fair and impartial jurors and denied the motion for a mistrial.

The trial court seated the first alternate in place of Juror Number Four, and instructed the jury not to have any conversations about the case until deliberations began and not to consider outside resources or conduct outside research.

The trial continued and the jury found Defendant guilty of all charges. The trial court sentenced Defendant to three consecutive sentences of 300 to 420 months' imprisonment, and a concurrent sentence of 21 to 35 months. Defendant gave oral notice of appeal.

Issue

The sole issue on appeal is whether the trial court erred in denying Defendant's motion for a mistrial based on juror misconduct.

Analysis

We review the trial court's denial of a motion for mistrial for abuse of discretion. *State v. Burgess*, 271 N.C. App. 302, 305, 843 S.E.2d 706, 710 (2020). A trial court abuses its discretion when its 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).

Due process guarantees defendants a panel of impartial jurors, and the trial court has a duty to ensure the jurors "remain impartial and uninfluenced by outside persons." *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1985). When allegations of juror misconduct are made, the trial court must make "such investigations as may be appropriate" to determine if misconduct has occurred and if the defendant has been prejudiced. *State v. Drake*, 31 N.C. App. 187, 191, 229 S.E.2d 51, 54 (1976). "The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991). The trial court's ruling is given deference because questions of juror misconduct and its effect depend on facts and circumstances specific to the case. *Drake*, 31 N.C. App. at 190, 229 S.E.2d at 54.

When investigating possible juror misconduct, the trial court is vested with the "discretion to determine the procedure and scope of the inquiry." *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996). Because the trial court is in the best position to examine the facts and circumstances, we give great weight to its determination of whether juror misconduct occurred and whether to declare a mistrial. *State v. Boyd*, 207 N.C. App. 632, 640, 701 S.E.2d 255, 260 (2010). "[A] mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Jones*, 241 N.C. App. 132, 138, 772 S.E.2d 470, 475 (2015).

In sum, where the trial court has made a "careful, thorough" investigation and concluded the conduct has not prejudiced the jury on any key issue, we have generally declined to find it abused its discretion. *Drake*, 31 N.C. App. at 191, 229 S.E. 2d at 53.

In this case, the trial court was informed Juror Four may have conducted outside research and shared that information with other jurors, based on the prosecutor's legal assistant's testimony that she overheard Juror Four say the word "development" and possibly "psychological child development." The trial court examined Juror Four and excused her. It then questioned each remaining juror and alternate individually. None of the jurors testified that they had heard Juror Four speak about outside research she had done or child development. Of the jurors who heard Juror Four speak, several could not specify what she had said, or testified that she was stopped from speaking before communicating any information. Three jurors heard her remark on her sympathy for G.M., and one heard her say the testimony was "hard to hear." During the examinations, the trial court allowed counsel for the State and Defendant to ask the jurors additional questions. Each juror stated they

could remain fair and impartial. The trial court allowed the trial to continue, instructing the jurors not to have any conversation about the case until deliberations began and not to consider outside information or do their own research.

The trial court's investigation was appropriate and sufficient. In *State v. Taylor*, for example, the trial court investigated a report by a juror that their vehicle was followed by a person from the gallery when court recessed the previous day. 362 N.C. 514, 537, 669 S.E.2d 239, 260 (2008). Our Supreme Court held that the trial court's investigation, consisting of examining the affected juror, examining another juror who had witnessed the alleged incident, and rebuking the audience member, was sufficient. As in *Taylor*, the trial court here "thoroughly question[ed] all parties involved in or affected by the incident," it "received assurances . . . of impartiality" from each juror, and it concluded that Defendant had not been prejudiced. *Id.* at 538, 669 S.E.2d at 260. We cannot identify, nor does Defendant propose, any way in which the trial court's investigation was deficient.

Instead, Defendant argues that the trial court's ruling was an abuse of discretion: (1) because its findings of fact were unsupported by the jurors' testimony; and (2) because it erred in concluding that Defendant did not suffer prejudice. We disagree. A trial court does not abuse its discretion when its decision on a motion for mistrial is based on its findings of fact and those findings are supported by evidence. *State v. Smith*, 320 N.C. 404, 418-19, 358 S.E.2d 329, 337 (1987).

Defendant argues the trial court found that "only two or three of the jurors heard [Juror Four's] comments," but that finding was unsupported because five of the jurors testified to hearing Juror Four comment on the case. He also takes issue with the finding that the comments were made only "yesterday" (Tuesday), arguing there was testimony Juror Four had also made comments on Monday, the first day of trial. However, the trial court actually found:

> that two or three of the jurors reported to the Court, upon questioning, that [Juror Four] yesterday in the jury room did made some statement concerning the testimony of the alleged victim in this case and in particular commenting on the – how difficult it may have been for this young lady to testify.

Of the jurors who testified that Juror Four spoke, most did not recall the substance of her comments. Only Jurors Ten, Eleven, and Twelve testified they had heard Juror Four talk about G.M.'s testimony, and

each stated the comments had been made on Tuesday. Alternate Juror One additionally testified to hearing another juror, possibly Juror Four, state that the testimony was "hard to hear." To the extent the trial court's finding as to the exact number of jurors who overheard Juror Four or the days on which this occurred were unsupported, these facts do not undermine its conclusions: that (1) no outside research into child development had been communicated to the other jurors and (2) each juror could remain impartial after Juror Four had expressed sympathy for G.M. following her testimony.

Defendant also argues the trial court abused its discretion in concluding that Defendant was not prejudiced. Defendant contends that, because G.M.'s testimony was crucial to the case, Juror Four's expression of sympathy after hearing the testimony irreparably tainted the jury.

"The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings." *Drake*, 31 N.C. App. at 191, 229 S.E.2d at 54. Where the trial court's investigation was sufficient, we rarely disturb trial court rulings on juror misconduct.

The testimony of the jurors showed that their exposure to outside information was minimal, if any, and each testified that they could remain impartial. The extent of the jury's exposure to outside information was Juror Four's expression of sympathy for G.M. after hearing her testimony. There is "no evidence tending to show the jurors were incapable of impartiality or were in fact partial in rendering their verdict." *Taylor*, 362 N.C. at 538, 669 S.E.2d at 260. The trial court did not abuse its discretion in ruling Defendant had not been prejudiced.

Thus, the trial court properly discharged its duty to investigate possible juror misconduct. Therefore, the trial court did not abuse its discretion in ruling that Defendant had not been prejudiced by any alleged juror misconduct. Consequently, the trial court did not err in denying Defendant's motion for mistrial.

Conclusion

Accordingly, for the foregoing reasons, there was no error at trial and the Judgments are affirmed.

NO ERROR.

Judges MURPHY and WOOD concur.

STATE OF NORTH CAROLINA
v.
GREGORY HAHN, DEFENDANT

No. COA23-238

Filed 3 September 2024

Contempt—criminal—refusal to wear a mask—no contemptuous act—invalid local emergency order—no showing of willfulness

A trial court's judgment and order finding defendant—who, upon being called for jury service in Harnett County during the COVID-19 pandemic, refused to wear a face mask in the jury assembly room—in direct criminal contempt was reversed where: (1) defendant's refusal was not a contemptuous act because it neither interrupted court proceedings nor impaired the respect due the court's authority; (2) the emergency directives from the Chief Justice underlying the local emergency order had been revoked some four months previously, rendering the local order invalid; and (3) in any event, no findings or evidence indicated that defendant had willfully failed to comply with the local emergency order (which made mask wearing optional in "meeting rooms and similar areas" but permitted judges to require masks in their courtrooms) at the time he was found in contempt.

Judge GRIFFIN concurring in the result by separate opinion.

Appeal by Defendant from order entered 10 October 2022 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 29 August 2023.

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

Dobson Law Firm, PLLC, by Miranda Dues, for the defendant-appellant.

STADING, Judge.

Defendant Gregory Hahn appeals from the trial court's order finding him in criminal contempt. For the reasons set forth below, we reverse the trial court's order.

I. Background

In March 2020, the Chief Justice of the North Carolina Supreme Court entered an emergency order to address public health concerns over COVID-19. *See* Order of the Chief Justice Emergency Directives 1 to 2 (13 March 2020). Thereafter, additional emergency directives ("the emergency directives") were ordered by the Chief Justice for county courthouses, among them Emergency Directive 21, addressing the use of face coverings, and Emergency Directive 22, requiring a plan for the resumption of jury trials. *See* Order of the Chief Justice Issuing Emergency Directives 21 to 22 (16 July 2020). On 14 May 2021, the emergency directive "that pertains to face coverings in court facilities" was modified, and "that decision [was left] to the informed discretion of local court officials." Order of the Chief Justice Modifying Emergency Directive 21 (14 May 2021). The next month, the Chief Justice revoked all outstanding emergency directives. *See* Order of the Chief Justice Revocation of Emergency Directives (21 June 2021).

Citing the authority provided by the emergency directives, the Senior Resident Superior Court Judge of Superior Court District 11A (the "Senior Resident Superior Court Judge, trial court, or judge") entered an order mandating the use of face masks on 25 June 2020. Additionally, the Senior Resident Superior Court Judge approved a plan to resume jury trials stating that "[p]otential jurors will be notified before reaching the courthouse of the rules regarding social distancing and of other requirements and steps being taken for the protection of their health and that of courthouse personnel and trial participants." Claiming consistency with "the most recent recommendations of the Chief Justice," on 10 March 2022, the Senior Resident Superior Court Judge, entered a "Joint Order on Masks" ("the local emergency order") without an expiration date, that decreed:

> 1. Masks are optional in hallways, foyers, restrooms, meeting rooms and similar areas. Masks are encouraged for unvaccinated persons.
> 2. The presiding judge in each courtroom may decide, in their discretion, whether masks are required in their courtroom.
> 3. The ranking official is [sic] each courthouse agency (e.g., Clerk of Court, District Attorney, Guardian Ad Litem) shall determine, in their discretion, whether masks are required in their respective offices.
> 4. Any person who so chooses shall be permitted to wear a mask.

5. This order is subject to revision based on changing public health conditions and CDC guidance.

On 10 October 2022, as required by summons, Defendant reported for jury duty at the Harnett County Courthouse. He was directed to the jury assembly room along with other potential jurors to await orientation. While in this room, a courthouse employee asked Defendant to wear a mask, which he declined. The trial court was informed that Defendant would not wear a mask in the jury assembly room. After that, Defendant was removed from the jury assembly room during juror orientation and taken upstairs to a courtroom.

Once in the courtroom, the judge told Defendant that "it's a requirement [to wear a mask] in this courtroom where you're going to be a potential juror, and it's a requirement while you're seated with the other potential jurors downstairs in the jury assembly room." Defendant responded, "with all due respect, I will not be wearing a mask, sir." The judge informed Defendant, "if you decline to wear a mask, it's contempt of court, which is punishable by up to thirty days in the Harnett County jail or a 500 dollar fine." To which, Defendant replied, "yes sir." Then, the judge charged Defendant with direct criminal contempt of court and asked if he had anything to say. Defendant responded, "no, sir." The judge found Defendant in direct criminal contempt of court and summarily punished him by imposing a twenty-four-hour jail sentence.

On a standardized form provided by the Administrative Office of the Courts ("the contempt order"), the judge entered a finding of fact that Defendant "REFUSED TO WEAR A MASK AFTER BEING ORDERED TO DO SO [THREE] TIMES." The form's prepopulated text listed as additional findings that "during the proceeding [Defendant] willfully behaved in a contemptuous manner" and his "conduct interrupted the proceedings of the court and impaired the respect due its authority." Based on the findings in the contempt order, the judge concluded that Defendant was "in contempt of court." Subsequently, Defendant petitioned this Court for a writ of *certiorari*, which was granted on 23 January 2023.

II. Jurisdiction

Under N.C. Gen. Stat. §§ 5A-17 and 7A-27(b)(1), this Court has jurisdiction to hear Defendant's appeal of his contempt conviction. N.C. Gen. Stat. § 5A-17(a) (2023) ("A person found in criminal contempt may appeal . . . ."); *id.* § 7A-27(b)(1) ("[A]ppeal lies of right . . . [f]rom any final judgment of a superior court . . . .").

III. Analysis

The ability of a judge to maintain order is a necessary function underlying the administration of justice. And when appropriate, direct criminal contempt is a proper mechanism to facilitate order. Contempt of court is a well-established principle of our jurisprudence:

> [I]t is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court . . . the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions.

Ex parte Terry, 128 U.S. 289, 313, 9 S. Ct. 77, 83 (1888).

Inherent in this power is the ability of an entrusted public servant—the judge—to assess a criminal conviction to a citizen's record without the full gambit of protections provided by due process. The United States Supreme Court has explained this narrowly limited exception to due process requirements includes only:

> [C]harges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

In re Oliver, 333 U.S. 257, 275, 68 S. Ct. 499, 509 (1948). As such, it is incumbent upon judicial authorities exercising this power to use judicial restraint and act with well-reasoned discernment. *See In re Little*, 404 U.S. 553, 555, 92 S. Ct. 659, 660 (1972) ("Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.") (alteration in original). Safeguards are apparent in our criminal contempt statutes. *See In re Oldham*, 89 N.C. 23, 25 (1883) ("While the essential judicial functions are . . . protected . . . from legislative encroachment, it is equally manifest that subordinate thereto, the law-making power may designate the cases in which

the power to summarily punish for a contempt shall be exercised; may prescribe its nature and extent, and prohibit in others."). In conducting our review, we remain mindful of the competing interests vital to our system of justice and are guided by the relevant statutory and precedential authority.

Criminal contempt can be imposed for those grounds enumerated in N.C. Gen. Stat. § 5A-11 (2023). *See In re Odum*, 133 N.C. 250, 252, 45 S.E. 569, 570 (1903). For a judicial official to find direct criminal contempt, the contemptuous act must be committed within their sight or hearing or in immediate proximity to the room where proceedings are being held that is likely to interrupt or interfere with matters then before the court. N.C. Gen. Stat. § 5A-13(a) (2023); *see Nakell v. Att'y Gen.*, 15 F.3d 319, 323 (4th Cir. 1994). In response to direct criminal contempt, the presiding judicial official may summarily impose punishment "when necessary to restore order or maintain dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt." N.C. Gen. Stat. § 5A-14(a) (2023).

"[O]ur standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Wendorf*, 274 N.C. App. 480, 483, 852 S.E.2d 898, 902 (2020). "The trial court's conclusions of law drawn from the findings of fact are reviewable de novo." *Id.* Furthermore, "[a]s a contemnor is liable to be imprisoned the rule that a criminal statute should be strictly construed is applicable." *West v. West*, 199 N.C. 12, 15, 153 S.E. 600, 602 (1930).

A. Contemptuous Act

Defendant asserts that the trial court's findings of fact do not support its conclusion of law that his actions amounted to a contemptuous act. The trial court based its order on two sections of the criminal contempt statute: "(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings" and "(2) [w]illful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority." N.C. Gen. Stat. §§ 5A-11(a)(1), (2).

The North Carolina Supreme Court has long recognized that interruptions of court proceedings include "all cases of disorderly conduct, breaches of the peace, noise, or other disturbance near enough and designed and reasonably calculated to interrupt the proceedings of a court then engaged in the administration of the State's justice and the dispatch of business presently before it." *State v. Little*, 175 N.C. 743, 745,

94 S.E. 680, 680 (1917). More recently, this Court affirmed a finding of contempt when a "[d]efendant was inaudibly speaking throughout the trial, facing the witness stand, and made a hand gesture in the form of a gun while the witness was testifying, causing the interruption." *State v. Baker*, 260 N.C. App. 237, 242, 817 S.E.2d 907, 910 (2018). The United States Court of Appeals for the Fourth Circuit similarly upheld a contempt conviction when the contemnor interrupted ongoing proceedings by "refusing to sit down when ordered to do so, refusing to be quiet, being disruptive of the proceedings, unduly prolonging the proceedings, pandering to the audience and encouraging [the] defendant [in the underlying case] to be disruptive." *Nakell*, 15 F.3d at 321-22. This Court's precedents also recognize that "[o]ur trial court judges must be allowed to maintain order, respect and proper function in their courtrooms" because "[c]ourtroom decorum and function depends upon the respect shown by its officers and those in attendance." *State v. Randell*, 152 N.C. App. 469, 473, 567 S.E.2d 814, 817 (2002) (holding refusal to stand for adjournment of court or answer the judge's questions are contemptuous actions).

The present matter vastly differs from the cases cited by the State or referenced above. The record shows that the actions of Defendant—who was reporting for jury service—neither interrupted the trial court's proceedings nor impaired the respect due its authority. Defendant was not a participant in ongoing proceedings in a courtroom. Rather, he reported to the courthouse to perform his civic duty as a potential juror. Before Defendant's presence was required in the courtroom for jury service, the judge summoned Defendant from the jury assembly room to his courtroom. Defendant complied with this direction. Upon entering the courtroom, Defendant's act of not wearing a mask did not disrupt the trial court's proceedings. Even so, the judge ceased ongoing business in the courtroom upon learning that Defendant "declined to wear a mask" in another room on a separate floor of the courthouse. In response to the inquiries posed by the judge to Defendant, he replied "yes, sir" or "no sir." Throughout their exchange, Defendant was respectful to the trial court. After the judge's admonishment to Defendant that "I've ordered you to do something" and "it appears that you have refused to do it," he was found in criminal contempt. Contrary to the State's argument, we see no parallel between Defendant's actions in this matter and the actions of the contemnors in their referenced cases. We hold that Defendant's refusal to wear a face mask was not a contemptuous act. Thus, the trial court's finding that Defendant "behaved in a contemptuous manner" is not supported by competent evidence, and, in turn, does not support its conclusion of law. *See Wendorf*, 274 N.C. App. at 483, 852 S.E.2d at 902.

B. Lawful Order

The text of the trial court's order reflects that its ruling is based on N.C. Gen. Stat. § 5A-11(a)(1) and (2). Even so, the State argues for the applicability of N.C. Gen. Stat. § 5A-11(a)(3) or (7), reasoning that Defendant was in contempt for "[w]illful disobedience of . . . a court's lawful process, order, directive, or instruction" or "[w]illful . . . failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court." To resolve any doubt as to which subsection of the statute applies, we next consider whether Defendant was in contempt for willful disobedience of the trial court's lawful process, order, directive, or instruction pursuant to a valid local emergency order. Citing the rescinded 14 May 2021 emergency directive that deferred to the "discretion of local court officials," as well as the 10 March 2022 local emergency order mandating the use of face masks, the State maintains that "aside from . . . inherent authority to govern courtroom decorum," the trial court "possessed express discretionary authority to require masks." Order of the Chief Justice Modifying Emergency Directive 21 (14 May 2021).

The local emergency order was created under the authority provided by the emergency directives and purported to be "consistent with . . . the most recent recommendations of the Chief Justice." By statute, the Chief Justice of the North Carolina Supreme Court is explicitly permitted to:

> 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.

N.C. Gen. Stat. § 7A-39(b)(2) (2023). Beginning on 13 March 2020, citing this statute, emergency directives were issued by the Chief Justice. Order of the Chief Justice Emergency Directives 1 to 2 (13 March 2020). However, even emergency directives issued under this statutory authority "shall expire the sooner of the date stated in the order, or 30 days from issuance of the order, but [ ] 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)(2). In any event, on 21 June 2021, the Chief Justice revoked all previously issued emergency directives. Order of the Chief Justice Revocation of Emergency Directives (21 June 2021). This included the emergency directive deferring to the discretion of local court officials to address face coverings in court facilities. Order of the Chief Justice Modifying Emergency Directive 21 (14 May 2021).

The authority underlying the local emergency order at issue was revoked. Particularly troubling, unlike the emergency directives issued by the Chief Justice under N.C. Gen. Stat. § 7A-39(b)(2), the local emergency order contained no corresponding expiration date. If orders issued by the Chief Justice, necessitated by emergency, expire on the earlier event of a stated expiration date or thirty-day time limitation, then any such orders derived from this authority cannot exceed the same temporal restrictions provided by the General Assembly. Our review of the State's argument on these statutory grounds leads us to conclude that this particular administrative order was invalid. Citing *Walker v. Birmingham*, which affirmed a lower court's holding protestors in contempt for violating an injunction subsequently declared invalid, the State maintains that Defendant's actions were unlawful regardless of the local emergency order's validity. 388 U.S. 307, 320-21, 87 S. Ct. 1824, 1832 (1967). While this argument ignores the United States Supreme Court's clarification that "this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity," we nevertheless proceed to evaluate the willfulness of Defendant's actions. *Id.* at 315, 87 S. Ct. at 1829.

C. Willfulness

No matter the basis, to be found guilty of criminal contempt, "an individual must act willfully or with gross negligence." *State v. Okwara*, 223 N.C. App. 166, 170, 733 S.E.2d 576, 580 (2012). With contempt proceedings, for an act to be willful, "it must be done deliberately and purposefully in violation of law, and without authority, justification or excuse." *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987). Willfulness "has also been defined as more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *State v. Phair*, 193 N.C. App. 591, 594, 668 S.E.2d 110, 112 (2008) (internal quotation marks and citations omitted). Gross negligence "implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others." *Chriscoe*, 85 N.C. App. at 158, 354 S.E.2d at 291 (citation omitted). Without findings "that [the defendant] had knowledge that court was in session or that he had knowledge his conduct was interfering

with the regular conduct of business at a court session," there is not support for the conclusion that such conduct constitutes a willful interference with the orderly functioning of a session of court. *In re Hennis*, 276 N.C. 571, 573, 173 S.E.2d 785, 787 (1970).

Here, a misapplication of the local emergency order served as the impetus of the conflict. The text of the local emergency order plainly states that "[m]asks are optional in hallways, foyers, restrooms, meeting rooms and similar areas." Defendant had not violated the text of the local emergency order when confronted by an employee of the courthouse—not the judge, and he was in the jury assembly room—not the judge's courtroom. Even so, the judge compelled Defendant to enter the courtroom on another floor of the courthouse because the judge believed "it's a requirement [to wear a mask] while . . . in the jury assembly room." The judge also informed Defendant of the same requirement in his courtroom where Defendant was "going to be a potential juror." But the record is clear that Defendant had not yet been called to the courtroom for this reason. Instead, he was preemptively summoned before the judge to address the incorrect belief that mask-wearing was required in the jury assembly room as well as perceived future noncompliance in his courtroom. There are no findings, nor evidence in the record sufficient to support findings, that Defendant could have known his discussion with the courthouse employee in the jury assembly room might directly interrupt proceedings or interfere with the court's order or business. *See id.* In the absence of these findings, there is no support for the conclusion that Defendant's conduct amounted to willful interference with the orderly functioning of a court session. *See id.* Accordingly, our review of the State's argument shows that Defendant did not willfully fail to comply with any of the asserted statutory grounds for criminal contempt.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's judgment and order finding Defendant in direct criminal contempt of court.

REVERSED.

Judge WOOD concurs.

Judge GRIFFIN concurs in the result by separate opinion.

GRIFFIN, Judge, concurring in result.

Mr. Hahn appeals from a trial court order finding him in contempt of court. The majority holds the State failed to show that Mr. Hahn willfully failed to comply with any of the asserted statutory grounds for criminal contempt. I agree with the result. However, I would hold the trial court's findings fail to support the conclusion that Mr. Hahn's act was "likely to interrupt or interfere with matters then before the court[,]" as necessary to support a direct criminal contempt action. *See* N.C. Gen. Stat. § 5A-13 (2021).

On 10 October 2022, Mr. Hahn appeared at the Harnett County Courthouse in response to a summons for jury duty. He was not provided prior notice of the court's COVID-19 guidelines. There were no signs or publications posted directing him to wear a mask upon arrival at the courthouse. Mr. Hahn assembled with other potential jurors, both masked and unmasked, before being singled out by a clerk for not wearing a mask. Mr. Hahn declined to wear one when asked by a clerk. Judge Gilchrist summoned Mr. Hahn into his courtroom, interrupting an on-going proceeding, to examine him about wearing a mask. Mr. Hahn respectfully answered every question Judge Gilchrist presented to him. In fact, Mr. Hahn bookended his answers with "Sir." However, Mr. Hahn would not put on a mask as requested. Judge Gilchrist held him in direct criminal contempt and sentenced Mr. Hahn to twenty-four hours in jail. After sentencing but prior to being taken into custody, Mr. Hahn asked whether he would have the ability to contact his minor children. The trial judge stated he did not know about that. Notably, Mr. Hahn alleges Judge Gilchrist was not wearing a mask during the proceedings.

We review a criminal contempt order to determine " 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *State v. Wendorf*, 274 N.C. App. 480, 483, 852 S.E.2d 898, 902 (2020) (quoting *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008)). "Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *State v. Robinson*, 281 N.C. App. 614, 619, 868 S.E.2d 703, 708 (2022) (citation and internal marks omitted).

Section 5A-11 of the North Carolina General Statutes provides an exhaustive list of acts constituting criminal contempt. N.C. Gen. Stat. § 5A-11 (2023). Direct criminal contempt occurs when an "act [enumerated in section 5A-11]: (1) [i]s committed within the sight or hearing of a presiding judicial official; and (2) [i]s committed in, or in immediate

proximity to, the room where proceedings are being held before the court; and (3) [i]s likely to interrupt or interfere with matters then before the court." N.C. Gen. Stat. § 5A-13 (2023). "Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice." *State v. Simon*, 185 N.C. App. 247, 251, 648 S.E.2d 853, 855 (2007) (citation and internal marks omitted). While mindful that a trial court judge's ability to maintain order in their court room is paramount to the efficient administration of justice, *see State v. Randell*, 152 N.C. App. 469, 473, 567 S.E.2d 814, 817 (2002) ("Our trial court judges must be allowed to maintain order, respect and proper function in their courtrooms."), their discretion is not unfettered. Rather, "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion . . . [t]rial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *In re Little*, 404 U.S. 553, 555 (1972) (citations and internal marks omitted).

Here, the facts do not support a finding that Mr. Hahn's act was "likely to interrupt or interfere with matters then before the court." N.C. Gen. Stat. § 5A-13 (2023). For one, Mr. Hahn was not involved in any proceeding before the court when first admonished for failing to wear a mask. Rather, Mr. Hahn was present in an "assembly room" for potential jurors which could reasonably be construed to be a meeting room where masks were optional per the 10 March 2022 order. Moreover, Mr. Hahn's failure to wear a mask was unlikely to interrupt or interfere with any court business. The record fails to show evidence that Mr. Hahn took any affirmative action to impede a court proceeding. Instead, the record reflects that Judge Gilchrist stopped the proceedings in his courtroom to address Mr. Hahn. Simply put, the facts presented here reflect an offense to sensibilities, not an "obstruction to the administration of justice." *In re Little*, 404 U.S. at 555 (citation and internal marks omitted).

I would hold these facts alone do not support the conclusion that Mr. Hahn interfered with the administration of justice.

STATE v. LITTLE

[295 N.C. App. 541 (2024)]

STATE OF NORTH CAROLINA
v.
BRYANT R. LITTLE

No. COA23-410

Filed 3 September 2024

Search and Seizure—warrantless search of vehicle—probable cause—odor and appearance of marijuana

The trial court did not err by denying defendant's motion to suppress evidence of a firearm, bullets, alleged marijuana, and sandwich bags found during a warrantless search of defendant's vehicle after a lawful traffic stop. Officers had probable cause to search defendant's vehicle after detecting a strong odor of marijuana, viewing a significant amount of marijuana residue on the passenger side floorboard, and, after specifically asking defendant about marijuana, obtaining a response that the residue was from defendant's cousin. Contrary to defendant's argument, the recent liberalization of laws regarding hemp did not substantially alter the plain view doctrine with regard to marijuana, even if industrial hemp and marijuana look and smell the same. Here, based on the trial court's unchallenged findings of fact, the officers had a reasonable belief based on their observations and experience that the substance detected by odor and sight was marijuana.

Appeal by defendant from orders and judgments entered 13 July 2022 and 26 August 2022 by Judge Michael A. Stone in Superior Court, Hoke County. Heard in the Court of Appeals 20 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Martin T. McCracken, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STROUD, Judge.

Defendant appeals from the trial court's denial of his motion to suppress evidence of a firearm, bullets, alleged marijuana, and sandwich bags found during a roadside vehicular search. Defendant contends that the law enforcement officer's grounds for probable cause, the odor and appearance of marijuana, was insufficient to conduct a search of his vehicle. Thus, Defendant argues the evidence was obtained through

an unlawful warrantless search and all evidence obtained should have been suppressed. We hold that the trial court did not err when it denied Defendant's motion to suppress, as probable cause existed to search Defendant's vehicle without a warrant.

I. Factual and Procedural Background

On 12 May 2020, Hoke County Sheriff's Deputy Daniel Barron observed a Ford F-150 truck "cross the center line and travel left of center at least on three separate occasions." Deputy Barron executed a traffic stop on the vehicle. The trial court made the following findings of fact as to the traffic stop and search:

> 3. That Barron approached the driver's side of the F-150 and the driver's window was down. That Barron immediately smelled a strong and distinct odor of marijuana. Barron had over ten years of law enforcement experience and was familiar with the properties and odor of marijuana. That Barron requested the license of the driver and registration of the vehicle. The driver and sole occupant of the F-150 was the defendant, Bryant Little. The defendant could not produce registration for the F-150 and indicated to Barron that the vehicle was a rental.
>
> 4. That backup officers, Corporal Kavanaugh ("Kavanaugh") and Deputy Schell ("Schell") arrived to assist Barron. That both Barron and Schell observed in plain sight on the passenger floorboard of the F-150 extensive marijuana residue which almost completed [sic] covered the area. That the passenger side window was not tinted, nor had any obstructions to obstruct the plain view of the officers.
>
> 5. That Kavanaugh specifically asked the defendant about marijuana and defendant responded by accusing the marijuana residue as being from a cousin. Upon further conversation with the defendant, that Kavanaugh learned that the defendant was on federal post release. The federal criminal judgment includes as a condition that the defendant be subject to warrantless searches. While this may not be relevant to these proceedings, this will be noted by the Court.
>
> 6. At no time did the defendant indicate that the substance observed in plain view all over the front floorboard of the F-150 was hemp or any other substance not

> under the subject matter of the North Carolina Controlled Substances Act or Chapter 90 of the North Carolina General Statutes.
>
> 7. Additionally, at no time did the defendant claim the substance was hemp or that he was legally entitled to possess the substance. Furthermore, there was no evidence that the controlled substance was hemp.

The officers conducted a full search of the vehicle while Corporal Kavanaugh observed and stayed with Defendant. Ultimately, the officers recovered a firearm; bullets; an open box of sandwich bags; a flip phone; a touch screen cell phone; and $10,600.00 in cash from Defendant's vehicle.

On or about 16 November 2020, Defendant was indicted for possession of a stolen firearm, carrying a concealed firearm, and possession of a firearm by a felon. On 16 May 2022, Defendant filed a motion to suppress all the evidence seized from the search of his vehicle following the traffic stop. Defendant argued that the officers conducted an unlawful search of his vehicle because the odor or appearance of marijuana, standing alone, after the legalization of hemp was insufficient to establish probable cause.

On 12 July 2022 the trial court conducted a hearing on Defendant's motion to suppress and denied the motion in open court that same day, giving a detailed rendition of its findings of fact and conclusions on the record. On 13 July 2022 and 2 August 2022, the trial court reduced its ruling to written orders.[1]

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1. We note that the trial court entered two orders denying Defendant's motion to suppress. The hearing was held on 12 July 2022. The trial court rendered a brief ruling denying the motion to suppress on 12 July 2022 and then rendered a detailed ruling on the record on 13 July 2022. The first written order was filed on 13 July 2022; Defendant then filed notice of appeal on 19 July 2022. The second order denying the motion to suppress was filed on 26 August 2022 but states it was "[e]ntered, this the 12th day of July 2022." The second order has more detailed findings of fact than the first order and was based directly upon the oral rendition of the ruling on 12 July 2022 except for the addition of the sentence regarding federal probation. Defendant contends that "[t]he trial court also drafted a second version of its suppression hearing Order, dated August 23, 2022, to which it added the following finding of fact:

> Upon further conversation with defendant, that Kavanaugh learned that the defendant was on federal post release. The federal criminal judgment includes a condition that the defendant be subject to warrantless searches. While this may not be relevant to these proceedings, this will be noted by the Court."

After the trial court's ruling on the motion to suppress, Defendant pled guilty to possession of a stolen firearm, carrying a concealed firearm, possession of a firearm by a felon, possession of marijuana paraphernalia, and driving left of center. Defendant reserved his right to appeal the denial of his suppression motion. On 13 July 2022, the trial court entered judgment on the charges of possession of a firearm by a felon, possession of a stolen firearm, carrying a concealed gun, and possession of marijuana paraphernalia. Defendant gave oral notice of appeal in open court on 13 July 2022 and later filed written notice of appeal from the trial court's order and judgments on 19 July 2022.

II. Standard of Review

Defendant does not challenge any of the trial court's findings of fact but argues only that "the trial court in his case erred when it drew the following conclusion of law from the facts presented at the suppression hearing: Under the totality of circumstances, the officers' smell and opinion regarding the substance being marijuana, law enforcement had probable cause to search defendant's vehicle."

> 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, as here, 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).

III. Motion to Suppress

Defendant's sole argument on appeal is that the trial court erred when it denied his motion to suppress the evidence found in his vehicle. Defendant contends that "[a]s our State Bureau of Investigation concluded in a memorandum addressing the impact of the Industrial

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The only material difference between the two orders is the sentence regarding federal probation. We agree with Defendant that the federal judgment did not provide part of the legal basis for this search, as it was discovered during the course of the search and thus could not have been part of the basis for probable cause to conduct the search.

Hemp Act, it is simply 'impossible' to distinguish legal hemp from illegal marijuana by sight and smell alone." Thus, Defendant asserts that the trial court in his case erred when it concluded "under the totality of the circumstances, the Hoke County Sheriff's Office deputies had probable cause to search the defendant's vehicle, based on the plain view doctrine and the strong odor of marijuana."

We first note that Defendant did not specifically challenge the trial court's findings of fact as unsupported by competent evidence, so they are binding on appeal.[2] *See id.* Instead, Defendant contends the trial court should have made a finding of fact that hemp and marijuana are indistinguishable by smell or appearance and that this fact requires a conclusion that the officers did not have probable cause to conduct the search. Defendant's "Statement of Facts" section in his brief relies almost entirely upon the transcript and not the trial court's findings of fact. But as Defendant has not challenged the trial court's findings of fact as unsupported by competent evidence, our analysis will rely primarily on those findings. In any event, there is no material difference between the facts as discussed by Defendant and the trial court's findings of fact. Defendant's main argument is that the trial court should have made findings of fact specifically based upon the State Bureau of Investigation ("SBI") memo, particularly as to the inability of officers to distinguish between marijuana and hemp based only upon sight or smell and based upon that finding, the trial court's conclusion of law as to probable cause was error. We review the trial court's conclusion of law *de novo*. *See id.*

A. The Industrial Hemp Act

Defendant's arguments and the trial court's ruling require us to first address the state of the law in May 2020 as to industrial hemp. Under the Industrial Hemp Act adopted in 2015 and amended in part in 2016 and 2018, the General Assembly established "an agricultural pilot program for the cultivation of industrial hemp in the State" and "to provide for reporting on the program by growers and processors for agricultural or other research, and to pursue any federal permits or waivers necessary to allow industrial hemp to be grown in the State." N.C. Gen. Stat. § 106-568.50 (2019). "Industrial hemp" was defined as "[a]ll parts and varieties of the plant Cannabis sativa (L.), *cultivated or possessed by*

2. As noted above, the trial court entered two orders denying Defendant's motion to suppress. The second order has more detailed findings of fact than the first order and appears to be based directly upon the oral rendition of the ruling on 12 July 2022. The orders do not conflict in any material way. Neither party has raised any issue regarding the two orders, and none of the trial court's findings in either order are challenged, so we have relied upon facts from either order as needed.

a grower licensed by the Commission, whether growing or not, that contain 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. § 106-568.51(7) (2019). This legislation created a Commission "[t]o establish an industrial hemp research program to grow or cultivate industrial hemp in the State, to be directly managed and coordinated by State land grant universities." N.C. Gen. Stat. § 106-568.53(1) (2019). One of the duties of the commission was "[*t*]*o issue licenses* allowing a person, firm, or corporation to cultivate industrial hemp for research purposes to the extent allowed by federal law, upon proper application as the Commission may specify, and in accordance with G.S. 106-568.53A." N.C. Gen. Stat. § 106-568.53(2) (2019) (emphasis added). The Commission also was required to "adopt by reference or otherwise the federal regulations in effect regarding industrial hemp and any subsequent amendments to those regulations. No North Carolina rule, regulation, or statute shall be construed to authorize any person to violate any federal law or regulation." N.C. Gen. Stat. § 106-568.53 (2019). The Industrial Hemp Act also established civil penalties and criminal offenses for certain violations of the Act. *See* N.C. Gen. Stat. § 106-568.56 (2019) ("Civil penalty"); *see also* N.C. Gen. Stat. § 106-568.57 (2019) ("Criminal penalties").

In short, under North Carolina law in May 2020, the possession, cultivation, or transportation of industrial hemp was legal under some circumstances, but it was not entirely "legalized"; industrial hemp was still heavily regulated and required a license. *See generally* N.C. Gen. Stat. Ch. 106, art. 50e (2015). To be legal, in addition to having a "delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis," the industrial hemp was required to be grown or possessed by a person licensed by the Commission to grow industrial hemp. N.C. Gen. Stat. § 106-568.51(7); *see* N.C. Gen. Stat. § 106-568.53(2) (discussing licensing requirements). Therefore, possession of industrial hemp was possibly legal in May 2020, but it was also possibly illegal, depending upon the circumstances. *See id.*

B. The SBI Memo

Defendant's main argument relies heavily upon an SBI memo ("Memo") issued in 2019. The Memo has been noted in prior cases of this Court and has been the source of much argument in this case and others. Defendant here even asked the trial court to take judicial notice of this Memo, which the trial court correctly refused to do and Defendant has not challenged that ruling on appeal. Ultimately, the trial court did allow Defendant to introduce the Memo as evidence. The Memo is undated

and unsigned but appears to be on letterhead of the North Carolina SBI. As described in *State v. Parker* and discussed at the hearing in this case,

> The memo was published by the SBI in 2019 in response to then-pending Senate Bill 315—legislation which sought to clarify whether the possession of hemp is also legal within the state. S.B. 315 was eventually signed by the Governor and enacted on 12 June 2020, though the final version of the law did not clarify the legality of hemp possession.

277 N.C. App. 531, 540, 860 S.E.2d 21, 28 (2021). The purpose of the Memo was to address various issues and questions for law enforcement raised by Senate Bill 315 which was filed on 20 March 2019 and to suggest "Possible Solutions" to some of those issues. State Bureau of Investigation, Industrial Hemp/CBD Issues (2019). The Memo stated a concern that ***"[t]he unintended consequence upon passage of this bill is that marijuana will be legalized in NC because law enforcement cannot distinguish between hemp and marijuana and prosecutors could not prove the difference in court."*** *Id.* (emphasis in original).

Defendant's argument focuses on the portion of the Memo which states:

> There is no easy way for law enforcement to distinguish between industrial hemp and marijuana. There is currently no field test which distinguishes the difference.
>
> Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant. In order for a law enforcement officer to seize an item to have it analyzed, the officer must have probable cause that the item being seized is evidence of a crime. The *proposed legislation* makes possession of hemp in any form legal. Therefore, in the future when a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp.

Id. (emphasis added).

Defendant also contends this Court addressed the Memo in *Parker* and *State v. Teague*, 286 N.C. App. 160, 879 S.E.2d 881 (2022), stating "[i]n this case at trial, Defendant offered an SBI Memorandum addressing the continued viability of identifying marijuana by sight and smell in light of the Industrial Hemp Act. This is the same SBI Memorandum presented to this Court in *Parker* and *Teague*." *Parker* did address the Memo, and *Teague*[3] cited to *Parker*, but neither *Parker* nor *Teague* accorded the Memo the status of binding law. *See Parker*, 277 N.C. App. at 538, 860 S.E.2d at 27; *see also Teague*, 286 N.C. App. at 166, 879 S.E.2d at 888. In *Parker*, the defendant argued that based on the Memo, there was a material conflict in the evidence presented at the suppression hearing and the trial court was required to make findings of fact resolving this conflict. *See Parker*, 277 N.C. App. at 538, 860 S.E.2d at 27. This Court disagreed:

> Defendant appears to argue that a material conflict existed because of the SBI memo that he introduced at the hearing (which discussed the similarities between legal hemp and marijuana), asserting that this memo introduced a conflict regarding whether the odor of marijuana was sufficient to support probable cause.
>
> We disagree. Although the memo did perhaps call into question the State's legal theory regarding whether Officer Peeler's perception of the scent of marijuana provided probable cause to search the vehicle, this conflict was not a material issue of *fact*. Thus, because (1) Defendant introduced no evidence creating a material conflict in the evidence supporting the probable cause determination; and (2) the trial court issued a ruling from the bench to explain its rationale, we hold that the trial

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3. In *Teague*, this Court did not address the Memo directly but noted the defendant's arguments based on *Parker*:

> 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, . . . 860 S.E.2d 21, *disc. review denied*, 378 N.C. 366, 860 S.E.2d 917 (2021).

State v. Teague, 286 N.C. App. 160, 166, 879 S.E.2d 881, 888 (2022).

> court was not required to enter a written order when denying Defendant's motion to suppress.

Id. (emphasis in original).

Thus, *Parker* noted the existence and content of the Memo but concluded it did not create a material conflict in the facts in that case. *Id.*

C. Plain View Doctrine

The Fourth Amendment of the United States Constitution, as well as Article 1, Section 20 of the North Carolina Constitution, prohibits unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. "Typically, a warrant is required to conduct a search unless a specific exception applies." *Parker*, 277 N.C. App. at 539, 860 S.E.2d at 28 (citations omitted). One exception is the "motor vehicle exception," which states that the "search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search." *Id.* (citation omitted). "Probable cause is generally defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty of an unlawful act." *Id.* (citation omitted). Under the motor vehicle exception, probable cause exists 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. (citation omitted).

Under the plain view doctrine, if a law enforcement officer who has conducted a legal stop of a vehicle or is in a location where he has a right to be observes contraband or other incriminating evidence in plain view, he has probable cause to proceed with a search and seize the item. *See State v. Grice*, 367 N.C. 753, 756-57, 767 S.E.2d 312, 316 (2015) ("While the general rule is that warrantless seizures are unconstitutional, a warrantless seizure of an item may be justified as reasonable under the plain view doctrine, so long as three elements are met: First, 'that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed'; second, that the evidence's 'incriminating character was "immediately apparent" '; and third, that the officer had 'a lawful right of access to the object itself.' " (citations,

quotation marks, ellipses, and brackets omitted)). In the context of marijuana, the "plain view" doctrine is often referred to as the plain smell doctrine, as an officer may smell the contraband even if he can't see it. *See State v. Parker*, 285 N.C. App. 610, 628, 878 S.E.2d 661, 675 (2022) ("[T]his Court has previously explained plain smell of *drugs* by an officer is evidence to conclude there is probable cause for a search. *Downing*, 169 N.C. App. at 796, 613 S.E.2d at 39 (emphasis added). In *Downing*, the drug the officers smelled was cocaine, not marijuana. *Id*. And as Defendant recognizes, we have caselaw holding the smell of marijuana alone provides probable cause." (citation and brackets omitted)). Here, the officers both saw and smelled what they believed to be marijuana in Defendant's car.

The United States Supreme Court has held that "officers may rely on a distinctive odor as a physical fact indicative of possible crime[.]" *Taylor v. United States*, 286 U.S. 1, 6, 76 L. Ed. 951, 953 (1932). For an odor to establish probable cause, the law enforcement officer must be qualified to recognize the odor and the odor is "sufficiently distinctive to identify a forbidden substance." *Johnson v. United States*, 333 U.S. 10, 13, 92 L. Ed. 436, 440 (1948). Further, our Supreme Court held that the smell of marijuana gives officers the probable cause to search an automobile. *See State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) ("[The Court of Appeals] further correctly concluded that the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug."). But these cases were all decided before the legalization of industrial hemp, so they were based upon the distinctive odor and appearance of marijuana without any consideration of the delta-9 tetrahydrocannabinol concentration in the substance. With the legalization of industrial hemp, which according to the Memo smells and looks just like marijuana, Defendant argues it could not be "immediately apparent" to the officers that the substance in the car was marijuana, which is illegal, because it might be hemp.

In *Coolidge v. New Hampshire*, the United States Supreme Court described the plain view doctrine as applying when it is "immediately apparent" to the officers that the item is contraband or incriminating to the accused based upon their knowledge at the time of the search:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit,

> search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, *the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges*.

403 U.S. 443, 466, 29 L. Ed. 2d 564, 583 (1971) (emphasis added) (citations omitted).

In *Texas v. Brown*, 460 U.S. 730, 741, 75 L. Ed. 2d 502, 513 (1983), the United States Supreme Court noted that courts have interpreted the words "immediately apparent" to mean that "the officer must be possessed of near certainty as to the seizable nature of the items." However, the Court then noted the "use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Id.* But the standard of certainty in this instance is no different than in other cases dealing with probable cause:

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief, that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required. Moreover, our observation in *United States v. Cortez*, 449 U.S. 411, 418, (1981), regarding particularized suspicion, is equally applicable to the probable-cause requirement:
>
> > The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and

> weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Id. at 742, 75 L. Ed. 2d at 514 (citations omitted).

D. Discussion

Defendant argues that the law enforcement officers lacked probable cause to perform the warrantless search of his car because after the legalization of industrial hemp, the identification of marijuana by smell and plain view is not possible and probable cause cannot rely only upon the officers' beliefs based on sight and smell. Defendant points to the recent cases, such as *Parker*, raising arguments regarding an officer's inability to differentiate between marijuana, an illegal substance, and industrial hemp.

Here, the trial court's order relied upon the "totality of the circumstances" including the officers' beliefs that they smelled or saw marijuana. Defendant contends that the trial court was required by the Memo to make a finding of fact that the officers could not have the ability to distinguish between marijuana and industrial hemp based on smell and appearance and therefore the trial court's conclusion cannot be supported as a matter of law. However, even if the trial court did not consider the Memo, the evidence from the officers was consistent with the Memo. At least two of the officers were aware that hemp and marijuana look and smell the same, and the other had experience only with marijuana.

As to the smell and appearance of marijuana in the car, Deputy Barron testified that he was familiar in his law enforcement career with marijuana, both smoked or raw, and it has "a very distinct smell. It stinks real bad." He testified he did not have any experience with hemp and had "never had . . . any contact with hemp" or training in detecting hemp. Corporal Kavanaugh testified that he asked Defendant "multiple times about the odor of marijuana, the smell, and the marijuana residue" and Defendant did not mention or "bring up the idea of hemp as being the cause or source of the odor of marijuana[.]" Deputy Schell testified that he assisted with the search of the car and the "raw marijuana [smell] was very present in the vehicle." He was aware at the time of the search that hemp and marijuana "have the same appearance and the same odor" and he was aware of the SBI Memo although he was not sure if he saw the Memo before or after this traffic stop. Corporal Kavanaugh also testified that there was no way to distinguish between hemp and marijuana in a "roadside" test but that would have to be done in a "scientific laboratory."

He was also aware that "an individual would have to have a license" to "transport hemp" even if it is being done legally, and Defendant did not "produce some license . . . in regards to hemp" and did not mention hemp or claim that he was licensed to grow it or transport it.

Therefore, there was evidence before the trial court that all three officers smelled and saw what they believed to be marijuana based upon their training and experience. The trial court's findings of fact adequately addressed this evidence as it found that all three officers had smelled and seen what they believed to be marijuana, and ultimately, they were correct. Corporal Kavanaugh asked Defendant about the marijuana smell, and he did not claim it was hemp or that he was legally entitled to possess hemp but instead claimed it was "from a cousin." The trial court did not make a specific finding that hemp and marijuana are indistinguishable by smell or appearance, but even without the Memo, the evidence was not conflicting on this fact. And based upon the trial court's comments during the hearing, it is apparent that the trial court was well aware of this fact. But this fact does not end the inquiry as Defendant claims it should.

First, the trial court noted that "the 800-pound elephant in the room nobody's talking about" was the fact that "unless you are licensed and under the supervision of the Industrial Hemp Commission, it's still illegal." As discussed above, industrial hemp could be legally possessed and transported under the law in 2020, but not all possession of industrial hemp was legal. *See generally* N.C. Gen. Stat. Ch. 106, art. 50e (2019). Defendant did not claim the substance was hemp or that he had a permit for producing or transporting hemp. In this regard, hemp could be compared to medications for which a prescription is required. It is legal for a person to possess certain controlled substances with a valid prescription, but it would be illegal for a person to possess the same controlled substance without a valid prescription. A law enforcement officer may have probable cause to seize a bottle of pills in plain view if he reasonably believes the pills to be contraband or illegally possessed. For example, in *State v. Crews*, our Supreme Court affirmed the trial court's denial of the defendant's motion to suppress a bottle of amphetamines seized by police. 286 N.C. 41, 46, 209 S.E.2d 462, 465 (1974). In *Crews*, officers were legally in the defendant's home to serve an arrest warrant. *Id.* at 45, 209 S.E.2d at 465. The officers saw in plain view

> a clear, brown-tinted bottle about five inches high and two to three inches in diameter located on the front of the shelf above the clothes that were hanging in the closet. The bottle had no writing or labels on it. It appeared to

> Officer Spillman to contain pills of various colors. Officer Spillman took [the defendant], and the bottle to the police station. The bottle was found to contain several hundred amphetamines.

Id. at 43, 209 S.E.2d at 463. The Supreme Court affirmed the trial court's denial of the motion to suppress, stating

> Officer Spillman was legally in the apartment. He testified that he had had some training in drug detection, that he had seen amphetamine pills before, and that the pills in the bottle looked like amphetamines. He further testified that the size of the bottle, the large number of pills, and the fact that there [was] no prescription or label on the bottle, all led him to believe that they were amphetamines.
>
> 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[.]

Id. at 45, 209 S.E.2d at 465 (citations and ellipses omitted).

Although the Industrial Hemp Act made the possession of industrial hemp legal under some circumstances, the Act still regulated hemp. The technical difference between marijuana and industrial hemp is the tetrahydrocannabinol ("THC") content, which must be less than 0.3 percent in industrial hemp. N.C. Gen. Stat. § 106-568.51(7) (2019). This technical difference between hemp and marijuana is crucial for purposes of sufficient evidence for conviction of an offense:

> In a criminal case, the State must prove every element of a criminal offense beyond a reasonable doubt. In the context of a controlled substance case, the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. The North Carolina Supreme Court held in *Ward* that unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.

State v. Carter, 255 N.C. App. 104, 106-07, 803 S.E.2d 464, 466 (2017) (citations, quotation marks, and brackets omitted).

But the issue here is not whether the officers could identify the substance in Defendant's car as hemp or marijuana for purposes of proving the elements of a criminal offense beyond a reasonable doubt. The issue for purposes of probable cause for the search is only whether the officer, based upon his training and experience, had reasonable basis to believe there was a " 'practical, nontechnical' probability that incriminating evidence" would be found in the vehicle. *Brown*, 460 U.S. at 742, 75 L. Ed. 2d at 514 (citations omitted).

The requirement of the plain view doctrine at issue here is whether it may be "immediately apparent" that the item viewed – or smelled – is likely to be contraband. *Coolidge*, 403 U.S. at 466-67, 29 L. Ed. 2d at 583. "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. Hunter*, 286 N.C. App. 114, 117, 878 S.E.2d 676, 679 (2022) (citation omitted).

Even if industrial hemp and marijuana look and smell the same, the change in the legal status of industrial hemp does not substantially change the law on the plain view or plain smell doctrine as to marijuana. The issue is not whether the substance was marijuana or even whether the officer had a high degree of certainty that it was marijuana, but "whether the discovery under the circumstances would warrant a man of reasonable caution in believing that an offense has been committed or is in the process of being committed, and that the object is incriminating to the accused." *State v. Peck*, 54 N.C. App. 302, 307, 283 S.E.2d 383, 386 (1981) (citation omitted). In addition, even if the substance was hemp, the officer could still have probable cause based upon a reasonable belief that the hemp was illegally produced or possessed by Defendant without a license, just as the officers in *Crews* believed the pills in the unmarked bottle to be illegally possessed. *See Crews*, 286 N.C. at 45, 209 S.E.2d at 465. Either way, the odor and sight of what the officers reasonably believed to be marijuana gave them probable cause for the search. Probable cause did not require their belief that the substance was illegal marijuana be "correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Brown*, 460 U.S. at 742, 75 L. Ed. 2d at 514; *see also Teague*, 286 N.C. App. at 179, 879 S.E.2d at 896; *State v. Johnson*, 288 N.C. App. 441, 457-58, 886 S.E.2d 620, 632 (2023) (explaining that although smell alone was not the basis of probable cause in the case, "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" (emphasis in original) (citations and ellipses omitted)).

We conclude that despite the liberalization of laws regarding possession of industrial hemp, and even if marijuana and industrial hemp smell and look the same, the trial court did not err in concluding there was probable cause for the search of Defendant's vehicle based upon the officer's reasonable belief that the substance he smelled and saw in the vehicle was marijuana.

IV. Conclusion

We hold the trial court did not err in denying Defendant's motion to suppress the evidence seized after a lawful traffic stop and search based upon probable cause.

AFFIRMED.

Judges STADING and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
CORIANTE LAQUELLE PIERCE

No. COA23-348

Filed 3 September 2024

Constitutional Law—right to counsel—waiver—pro se waiver of indictment—knowing and voluntary—trial court's jurisdiction to enter judgment

Where defendant knowingly and voluntarily waived his right to assistance of appointed counsel—after an extensive colloquy conducted by the trial court regarding the consequences and responsibilities of proceeding pro se—and then signed a waiver of indictment and entered a plea agreement with the State (pursuant to which his three original indicted charges were dismissed in exchange for defendant pleading guilty to two crimes for which he had waived indictment), the trial court had subject matter jurisdiction to enter judgments against defendant. Defendant was previously appointed four attorneys in succession, which contributed to years of delay, and then was appointed standby counsel who was present at all remaining hearings and when defendant pleaded guilty. Assuming

without deciding that error occurred, any error was invited by defendant's actions.

Appeal by defendant from judgment entered 30 June 2021 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 14 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Appellate Defender's Office, by Glenn Gerding, and Assistant Appellate Defender Michele A. Goldman, for the defendant-appellant.

TYSON, Judge.

I. Background

Coriante Laquelle Pierce ("Defendant") was indicted by a grand jury for felony statutory rape of a 13/14/15-year-old minor, first-degree kidnapping, and indecent liberties with a child on 6 February 2017. From first appearance to trial date, Defendant was provided with five court-appointed attorneys to either represent him or to serve as standby counsel. Defendant knowingly and voluntarily exercised his Sixth Amendment right to proceed *pro se*. U.S. Const. amend. VI; N.C. Const. art I, §§ 19, 23. The court appointed Defendant's former appointed counsel as standby counsel. On 29 June 2021 in open court, Defendant and the assistant district attorney both signed a bill of information charging him with the three previously indicted crimes and two additional charges for crimes against nature and sexual battery.

The court had appointed Defendant four separate attorneys over the course of the litigation to represent him: Idrissa Smith, Ralph K. Fraiser, Jr., Matt Suczynski, and Sean Ravi Ramkaransingh. Attorney Ramkaransingh was appointed by the trial court as standby counsel after Defendant chose to represent himself. A fifth attorney, Daniel A. Meier, replaced Attorney Ramkaransingh as standby counsel on 30 July 2020. Defendant insisted on proceeding *pro se* on numerous occasions.

Defendant knowingly signed a Waiver of Indictment, agreeing for the case to be tried on the information, including the two charges for crimes against nature and sexual battery not included in the original charges and indictments. His standby counsel did not sign the attorney line on the Waiver of Indictment.

Defendant and the State entered into a plea agreement, wherein Defendant agreed to plead guilty only to the charges of crime against nature and sexual battery. The three original indicted charges were dismissed. Defendant was sentenced on 30 June 2021 to 8-19 months' imprisonment for crime against nature, 150 days for sexual battery, and was ordered to register as a sex offender.

Defendant purportedly signed and served a copy of his Notice of Appeal on 6 July 2021. The notice of appeal, however, was not file stamped until 15 July 2021, which exceeds the fourteen-day period permitted under N.C. R. App. P. 4(a)(2). Defendant seeks review through a petition for writ of *certiorari* ("PWC") and argues the trial court lacked subject matter jurisdiction.

II. Jurisdiction

Defendant acknowledges the inadequacy of his notice of appeal and petitions this Court to issue a writ of *certiorari* to invoke jurisdiction and authorize appellate review of his plea agreement.

"[A] writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1).

A defective notice of appeal "should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation and quotation marks omitted).

Here, the State has not advanced any allegations tending to show it has been delayed, misled, or prejudiced by Defendant's defective notice of appeal. Defendant's intent to appeal can be "fairly inferred" from his Notice of Appeal dated 6 July 2021, despite the 15 July 2021 file stamp. *Id.*

Defendant has lost his appeal of the judgment through "failure to take timely action[.]" N.C. R. App. P. 21(a)(1). The State has not shown prejudice by the defective notice. We allow Defendant's PWC, in the exercise of our discretion, and address whether the trial court possessed jurisdiction to enter judgment on Defendant's plea agreement.

III. Issue

Defendant argues the trial court lacked jurisdiction to enter judgments based upon Defendant's *pro se* guilty pleas to charges contained

in a Bill of Information. He asserts his Waiver of Indictment was invalid, as he was not represented by counsel.

A. Standard of Review

This Court reviews subject matter jurisdiction *de novo*. Under *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

B. Analysis

Defendant argues the trial court lacked jurisdiction because he was not represented by counsel when he waived grand jury indictment in violation of N.C. Gen. Stat. § 15A-642(b) and (c) (2023).

1. Sixth Amendment Right to Counsel

Both the Constitution of the United States and the North Carolina Constitution recognize a criminal defendant's right to assistance of counsel. U.S. Const. amend. VI; N.C. Const. art I, §§ 19, 23. *See also Powell v. Alabama*, 287 U.S. 45, 66, 77 L. Ed. 158, 169 (1932); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977) (citations omitted); *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000).

Criminal defendants also have the absolute right to waive counsel, represent themselves, negotiate plea agreements, and handle their case without the assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172–73 (1972). "A defendant has only two choices—to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel." *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 477 (1992) (citations and quotation marks omitted).

2. *Pro Se* Waiver of Indictment

a. State v. Nixon

Defendant repeatedly cites *State v. Nixon*, wherein this Court vacated a criminal judgment because the defendant's Waiver of Indictment was not valid. *State v. Nixon*, 263 N.C. App. 676, 680, 823 S.E.2d 689, 693 (2019). The defendant in *Nixon* was represented by counsel, who had also signed the waiver. *Id.* at 679, 823 S.E.2d at 692. The waiver reviewed in *Nixon* was held to be invalid because no clear language waived the indictment in the signed Bill of Information, not because defendant was proceeding *pro se*. *Id.*

Here, the Bill of Information and Waiver of Indictment signed by Defendant was clear and unambiguous. Defendant knowingly and intentionally proceeded *pro se*, and the trial judge had explained the consequences and process in detail to Defendant. *Nixon* does not support Defendant's assertions. *Id.*

b. State v. Brown

Defendant also cites *State v. Brown*, wherein a defendant had waived an indictment for a charge of armed robbery, but not to the charge of accessory after the fact of armed robbery. *State v. Brown*, 21 N.C. App. 87, 88, 202 S.E.2d 798, 799 (1974). This Court vacated the judgment because the second indictment had not been waived. *Id.* at 89, 202 S.E.2d at 799. Here, Defendant signed a Waiver of Indictment for all charges. *Brown* is not controlling. *Id.*

c. State v. Futrelle

Defendant also cites *State v. Futrelle*, wherein this Court found the bill of information charging defendant with two offenses was invalid because the Waiver of Indictment was not signed by his attorney, as required per N.C. Gen. Stat. § 15A-642(c). *State v. Futrelle*, 266 N.C. App. 207, 208, 831 S.E.2d 99, 100 (2019). Defendant's case is distinguishable from the facts in *Futrelle*, because Defendant had chosen not to be represented by an attorney and had intentionally chosen to exercise his rights to proceed *pro se*. *Id.* at 209-10, 831 S.E.2d at 100–01; *Thomas*, 331 N.C. at 677, 417 S.E.2d at 477 ("There is no right to appear both *in propria persona* and by counsel.").

Though Defendant cites case law wherein a Waiver of Indictment was invalidated as defective or ineffective, his case is distinguishable because he had previously waived multiple appointed counsels and had elected to proceed *pro se*. Defendant knowingly chose to represent himself, instead of accepting representation from any of his four court-appointed attorneys.

Defendant had two conversations with the trial judge, which lasted "close to half an hour," about the consequences of waiving his right to counsel and the associated responsibilities. Even though Defendant elected to proceed *pro se*, the trial court also appointed standby counsel for Defendant.

d. N.C. Gen. Stat. § 15A-642(b)–(c)

Because no precedent holds a Waiver of Indictment was invalidated when a defendant insisted on proceeding *pro se*, as is his absolute Sixth

Amendment right to do. *Mems*, 281 N.C. at 670-71, 190 S.E.2d at 172. This Court reviews N.C. Gen. Stat. § 15A-642, to determine its applicability.

Defendant repeatedly insisted on discharging appointed counsel, was warned by the trial court of the consequences of representing himself and proceeding *pro se*, and was appointed standby counsel. Although the plain language of N.C. Gen. Stat. § 15A-642(b) and (c) protects those unrepresented, Defendant had knowingly and voluntarily waived and refused the assistance of appointed counsel. U.S. Const. amend. VI; N.C. Const. art. I, §§ 19, 23; N.C. Gen. Stat. § 15A-642(b)–(c).

Defendant's continued purported conflicts with multiple court-appointed attorneys continuously delayed the trial. The assistant district attorney argued Defendant "ha[d] routinely used the court-appointed counsel system to his benefit to attempt[ ] to delay this trial for years now." Defendant knowingly and voluntarily exercised his Sixth Amendment and State Constitutional rights to proceed *pro se*. U.S. Const. amend. VI.; N.C. Const. art. I, §§ 19, 23.

Defendant is not entitled to either a free attorney or an attorney of his choice. Our statutes clearly provide a court-appointed attorney is not free. *See* N.C. Gen. Stat. §§ 7A-455.1 and -458 (2023). In *State v. Moore*, this Court explained:

> Our Supreme Court has long held "the right to be defended by chosen counsel is not absolute." *McFadden*, 292 N.C. at 612, 234 S.E.2d at 745 (citation omitted). "[A]n indigent defendant does not have the right to have counsel of his choice to represent him." *State v. Anderson*, 350 N.C. 152, 167, 513 S.E.2d 296, 305 (1999) (citing *State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980)).

State v. Moore, 290 N.C. App. 610, 634, 893 S.E.2d 231, 247 (2023).

In *Moore*, "[d]efendant waived and forfeited his right to counsel through dilatory tactics and serious and egregious misconduct after being warned multiple times of the consequences of his behavior." *Id.* at 649, 893 S.E.2d at 256.

The trial judge advised Defendant he could fully waive his right to counsel and invoke his Sixth Amendment right. Defendant knowingly chose to invoke and exercise his Sixth Amendment right to accept a beneficial plea bargain in exchange for dismissal of his three indicted charges after a four-year delay. Defendant cannot "have it both ways."

Defendant's continued purported conflicts with court-appointed attorneys and Defendant's knowing and eventual choice to proceed *pro*

se delayed the trial for years. Courts and counsel cannot promote nor condone abuse of, and gamesmanship in, the appointed counsel system to allow defendants to waste scarce judicial resources, cause delays for their cases and other pending cases, increase the costs of the appointed attorney system to the taxpayers, or delay justice for the victims of crime. *Moore*, 290 N.C. App. at 649, 893 S.E.2d at 256.

The trial judge also inexplicably waived imposing counsel costs and fees on Defendant for the five attorneys appointed to either represent him or serve as his standby counsel. *See* N.C. Gen. Stat. § 7A-304 (2023).

Defendant's arguments are without merit. We overrule Defendant's argument that the trial court lacked subject matter jurisdiction to vacate the judgments entered consistent with his plea agreement.

C. Invited Error

Presuming, without deciding, the trial court committed prejudicial error by allowing Defendant to plead guilty for the two crimes for which he waived indictment, any such error was invited by Defendant. Defendant was represented by four court-appointed attorneys throughout the course of his case, and each time he demanded for the court to withdraw their appointment and to represent himself. The district attorney explained in the 24 May 2021 hearing:

> Every single attorney, he had a conflict with that attorney and it was his request that the attorney withdraw. And attorneys have said to the Court that there was an impasse between them and the client because [Defendant] wanted them to file things that were not of legal basis and would have been considered frivolous motions.

The trial court engaged in an extensive colloquy with Defendant about the consequences of his decision to proceed *pro se*, and that conversation lasted nearly half an hour. Defendant also had standby counsel appointed and present throughout the remaining hearings and when he pled guilty pursuant to his plea agreement.

Any purported error in the trial court's allowance of Defendant to sign the Waiver of Indictment while proceeding *pro se* is invited error. *See Sain v. Adams Auto Grp., Inc.*, 244 N.C. App. 657, 669, 781 S.E.2d 655, 663 (2016) (explaining invited error is defined as "a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining").

Further, N.C. Gen. Stat. § 15A-1443(c) (2023) provides "[a] defendant is not prejudiced by . . . error resulting from his own conduct." Defendant

created any purported error of proceeding unrepresented through his own demands when signing the Waiver of Indictment *after* he deliberately chose to proceed *pro se*. Any asserted error committed by the trial court in allowing Defendant to knowingly and voluntarily represent himself was invited error. Defendant's arguments are overruled.

IV. Conclusion

Defendant knowingly and voluntarily waived assistance of appointed counsel and chose to exercise his Sixth Amendment absolute right to represent himself after being appointed multiple counsels by the court. Defendant was informed of the risks and consequences of signing this waiver and proceeding *pro se*.

Defendant secured a beneficial plea agreement, which resulted in the dismissal of his three indicted charges. Appointed standby counsel was present at the time he signed the Waiver of Indictment.

Presuming, without deciding, the trial court committed error by allowing Defendant to plead guilty for the two crimes for which he waived indictment pursuant to a plea agreement, any such purported error was invited by Defendant. N.C. Gen. Stat § 15A-1443(c).

The trial court did not lack subject matter jurisdiction to enter judgments based upon Defendant's *pro se* guilty pleas. The judgment entered upon Defendant's knowing and voluntary guilty pleas is affirmed. *It is so ordered.*

AFFIRMED.

Judges STADING and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
KEDRICK DAQUANE THOMAS, DEFENDANT

No. COA23-210

Filed 3 September 2024

1. Constitutional Law—North Carolina—juror substitution after start of deliberations—new trial required

In a prosecution for second-degree murder and related charges, where the trial court substituted a juror with an alternate juror after deliberations began—without objection from defendant—and defendant was subsequently found guilty, defendant was entitled to a new trial pursuant to a prior binding appellate decision.

2. Search and Seizure—ankle monitor location data—accessed without warrant—no reasonable expectation of privacy

In a prosecution for second-degree murder and related charges, the trial court properly denied defendant's motion to suppress data from his ankle monitor, which was accessed by law enforcement without a search warrant after defendant was implicated in a fatal drive-by shooting. Where defendant was subject to electronic monitoring as a condition of post-release supervision (PRS) (pursuant to N.C.G.S. § 15A-1368.4), he did not have a reasonable expectation of privacy in the location data generated by his monitor, and access of that data did not constitute a search for Fourth Amendment purposes. Further, the controlling statute does not limit the law enforcement agencies or officers who may access data generated from electronic monitoring; here, although the officer who obtained the data was not defendant's supervising officer for PRS, he had authorization to access the data directly. Therefore, evidence collected from the ankle monitor could be presented by the State in defendant's new trial (which the appellate court granted on an unrelated basis).

Appeal by defendant from judgments entered 20 December 2021 and 23 February 2022 by Judge Keith O. Gregory in Superior Court, Wake County. Heard in the Court of Appeals 3 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

Marilyn G. Ozer for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments convicting him of one count of second-degree murder, one count of assault with a deadly weapon with intent to kill or seriously injure, and attaining the status of violent habitual felon. Because the Defendant was a supervisee on post-release supervision including electronic monitoring by an ankle monitor, he did not have a reasonable expectation of privacy as to the tracking data from his ankle monitor that would prevent a law enforcement officer authorized to access the data from doing so as part of the investigation of a crime, so the trial court did not err by denying his motion to suppress this evidence. But because an alternate juror was substituted for one of the original jurors after the jury had begun deliberations, albeit without objection from Defendant, we are required to grant Defendant a new trial based upon *State v. Chambers*, 292 N.C. App. 459, 461-62, 898 S.E.2d 86, 88 (2024).[1] Thus, we will not address his remaining issues presented on appeal as they may not arise at a new trial.

I. Background

The State's evidence tended to show that on the night of 8 November 2019, a shooting occurred at a convenience store on Bragg Street in Raleigh, North Carolina. Kimberly Holder, who was hanging out outside the store with a group of friends, was shot and killed; Ron Hyman was shot and seriously injured.[2]

Witnesses described a red Charger slowing down near the scene of the shooting immediately before the shooting and taking off immediately after. Video footage recordings of the scene showed a red Charger applying its brakes, as indicated by the car's brake lights, and slowing down as it approached the convenience store. The investigation by the Raleigh Police Department ("RPD") connected the red Charger to Ivette Uriostegui and her boyfriend, Stephon McQueen. Police also had a confidential source who reported Mr. McQueen and Defendant were connected to the shooting.

After researching "some background information" on Defendant, police learned that on the date of the shooting he was wearing a GPS

1. On 26 June 2024, the Supreme Court of North Carolina granted the State's petition for Writ of Supersedeas and for discretionary review of *Chambers*, but this Court remains bound by this precedent. *See State v. Chambers*, No. 56PA24 (N.C. June 26, 2024).

2. The State further alleged two other victims were shot, Bonnie Jones and Geann Onivagui; however, the State dismissed the charges related to Bonnie Jones and the jury found Defendant not guilty of the assault involving Geann Onivagui.

ankle monitor which catalogued his location. An employee of BI Incorporated, a company that is "contracted with the State of North Carolina to provide electronic monitoring services for Department of Juvenile Justice and the Department of Adult Probation and Parole[,]" testified the ankle monitor Defendant was wearing at the time of the shooting reported his location in sixty second intervals. The employee testified RPD has "two different levels of access." One level of access is described as a "data dump" in which a police department "criminal analyst gets a - - basically, the live file at the end of the day every day" which includes data on "every single client." The second level of access included "individual users that have their own individual log-ins. . . . They can retrieve records and view them." In 2019, about ten officers from RPD had this second level of access.

Sergeant Lane of RPD testified he ran Defendant's name through a database and found he was wearing the ankle monitor through Community Corrections, so Sergeant Lane "went into BI, typed the name in, and started looking at the points from that night." Sergeant Lane was one of the ten officers with access to BI's software. Defendant's ankle monitor showed he was travelling towards the scene of the shooting before it happened, was near the shooting at the time it happened, and was travelling away from the scene after it happened. Sergeant Lane did not have a search warrant before looking into the GPS information from Defendant's ankle monitor.

Police arrested Defendant on 14 November 2019. Defendant spoke to police officers and admitted he was on Bragg Street at the time of the shooting but claimed he was not in the red Charger. Defendant was ultimately indicted on or about 3 December 2019 for first-degree murder and three counts of assault with a deadly weapon with intent to kill or seriously injure. Defendant was also indicted on or about 26 October 2021 for attaining the status of a violent habitual felon.

Police arrested Mr. McQueen and Ms. Uriostegui in Texas on 15 November 2019. Mr. McQueen admitted to police he was the driver of the red Charger the night of the shooting, Ms. Uriostegui was in the front passenger seat, and Defendant was in the "rear of the vehicle as the only other occupant." Further, Mr. McQueen

> admitted to driving the vehicle down the Bragg Street area slowly, coming almost to a stop in front of the store, and that then numerous rounds were fired. And he looked around his back, he didn't know what was going on, and he observed [Defendant] firing the weapon from the interior of the car.

Mr. McQueen also indicated to police that Defendant had been robbed "several weeks" before the shooting and that there was a "rumor on the street that [Defendant] was snitching or giving up information on people" and Defendant was upset about both events.

On 3 December 2021, Defendant filed a motion to suppress the ankle monitor data. The motion to suppress alleged that "on November 14, 2018, the defendant was placed on probation for felony possession of cocaine in file number 18 CRS 208275 in Wake County, North Carolina" and that electronic monitoring was "included or added at a later date" as a special condition of probation. Defendant contended the controlling statute was North Carolina General Statute Section 15A-1343(b)(13), which did not allow police to access Defendant's ankle monitor data without a warrant and since the police did not have a warrant, the evidence should be suppressed under "the Fourth and Fourteenth Amendments of the United States Constitution" and "Article 1, 19, 23, and 27 of the North Carolina State Constitution." The trial court denied Defendant's motion to suppress.

Jury selection began on 6 December 2021. During jury selection, Juror number 8 informed the trial court that he had a vacation planned beginning on Sunday of the next week and would be able to sit for the jury if the trial ended before then. The State and Defendant both accepted Juror 8, who was then seated on the jury. During the trial, the trial court indicated it was possible the trial would not end as soon as previously thought and it may need to substitute an alternate for Juror 8. However, Juror 8 remained on the jury until they began deliberations on 17 December 2021. On 17 December 2021, during jury deliberations, the trial court received a note from the jury which read "[w]e have a hung jury situation at this point. After reviewing the evidence and discussing it thoroughly, we are not seeing any movement towards a decision." The trial court then suggested that it may have to release Juror 8 since the jury had not come to a decision before Juror 8 was scheduled to leave for a vacation; neither the State nor Defendant objected to the juror's release. The trial court ultimately released Juror 8 and replaced him with Alternate Juror 1, and the trial court instructed the jury that "the jury would now be required to start their deliberations over because the alternate juror was not privy to the previous deliberations. So you would be required to start the deliberations over." The jury then returned its verdicts on 20 December 2021, finding Defendant guilty of second-degree murder for the killing of Kimberly Holder and assault with a deadly weapon with intent to kill or seriously injure for the shooting of Ron Hyman.

Defendant's violent habitual felon proceeding began on 21 February 2022. Kimberly Holder's family was in the courtroom watching the proceedings, and one of the family members was wearing a shirt with the statement "Justice for Kim" and a picture of Ms. Holder on the front of the shirt. Defendant objected to the shirt and stated it could violate Defendant's due process rights. Defendant asked the trial court to require the shirt be worn inside out or covered up. The trial court found that only one person in the courtroom was wearing the shirt and ultimately denied Defendant's objection to the shirt as it was not prejudicial to Defendant. The next day, another family member was wearing the same shirt, Defendant renewed his objection, and the trial court again denied it.

The jury convicted Defendant as a violent habitual felon. Defendant was sentenced to two life sentences without the possibility of parole. Defendant gave oral notice of appeal in open court.

II. Issues on Appeal

Defendant makes four arguments on appeal. Defendant's first argument is that the trial court erred by denying his motion to suppress because "a Raleigh patrol officer accessed data from the ankle monitor worn by Defendant in violation of the constitutional prohibition against warrantless searches." (Capitalization altered.) Defendant's third issue presented on appeal is that "Defendant's state constitutional right to have his guilt determined by a properly constituted jury of twelve was violated when a juror was excused and replaced by an alternate after deliberations had begun and the jury had informed the court it was hung." (Capitalization altered.) Defendant also makes two additional arguments on appeal: that "the court erred by admitting testimony concerning an armed robbery in which Defendant was the victim and an undefined involvement in a murder[;]" and that "t-shirts bearing the photo of the victim worn in the courtroom and calling for justice violated Defendant's right to a fair trial by an impartial jury." (Capitalization altered.)

A. Substitution of Alternate Juror

[1] We will address Defendant's third issue first, as we are required by *Chambers* to grant Defendant a new trial based upon the substitution of an alternate juror after the jury had begun deliberations. *See Chambers*, 292 N.C. App. at 462, 898 S.E.2d at 88. Although North Carolina General Statute Section 15A-1215 was amended in 2021 to allow substitution of an alternate juror after deliberations have begun, on 20 February 2024 in *Chambers*, this Court held the 2021 amendment to North Carolina

General Statute Section 15A-1215 allowing a juror substitution after deliberations have begun was unconstitutional. *See id.* Although the Supreme Court of North Carolina has granted discretionary review of *Chambers*, this Court remains bound by *Chambers* and we are therefore required to grant Defendant's request for a new trial based upon the juror substitution. *See id.* Because we are required to grant Defendant a new trial, we need not address Defendant's arguments as to the testimony regarding his earlier bad acts or the t-shirts worn by the victim's family as these issues may not arise at the new trial. However, we will address the trial court's denial of Defendant's motion to suppress since that issue will arise at the new trial.

B. Motion to Suppress Defendant's Ankle Monitor Data

[2] Defendant first contends his rights under the Fourth Amendment of the United States Constitution were violated when Sergeant Lane obtained the data from his ankle monitor without first getting a search warrant.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Hamilton*, 262 N.C. App. 650, 654, 822 S.E.2d 548, 552 (2018) (citation omitted). Under the Fourth Amendment, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. It is well-established that in "considering whether a warrantless search was unreasonable, the inquiry focuses on whether an individual has manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable." *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015) (citation, quotation marks, brackets, and emphasis omitted). The United States Supreme Court has held that "a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady v. North Carolina*, 575 U.S. 306, 309, 191 L. Ed. 2d 459, 461-62 (2015).

But here, Defendant's argument does not arise from the attachment of the ankle monitor to his body; he does not contend it was unconstitutional for him to be subjected to electronic monitoring as a condition of post-release supervision ("PRS"). Instead, his argument is the State exceeded the scope of the search allowed by North Carolina General Statute Section 15A-1368.4 because the law enforcement officer who accessed the data from his ankle monitor was not his supervising officer under his PRS.

Defendant contends under North Carolina General Statute Section 15A-1343(b1)(3c), only officers from Defendant's probation or parole supervising agency could check the GPS data shown by Defendant's ankle monitor without first obtaining a search warrant, but officers with RPD could not do so. The State first contends that the record is not clear on whether Defendant was wearing an ankle monitor under North Carolina General Statute Section 15A-1343(b1)(3c) as a condition of probation or under North Carolina General Statute Section 15A-1368.4 as a condition of PRS. *Compare* N.C. Gen. Stat. § 15A-1343 (2023) ("Conditions of probation") *with* N.C. Gen. Stat. § 15A-1368.4 (2023) ("Conditions of post-release supervision").

The trial court did not enter a written order denying the motion to suppress and did not make any findings of fact on the record. Since there is no written order, we must first determine if there was any "material conflict in the evidence" relevant to Defendant's monitoring.

> In determining whether evidence should be suppressed, the trial court shall make findings of fact and conclusions of law which shall be included in the record. N.C.G.S. § 15A-974(b) (2013); *see also id.* § 15A-977(f) (2013) ("The judge must set forth in the record his findings of facts and conclusions of law."). A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. Although the statute's directive is in the imperative form, only a material conflict in the evidence – one that potentially affects the outcome of the suppression motion – must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing.

State v. Bartlett, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citations and quotation marks omitted).

Here, Defendant's argument on the motion to suppress was primarily a legal argument, but both Defendant and the State argue there are potential differences in the analysis of this argument depending upon whether Defendant's monitoring was conducted as a condition of probation or a condition of post-release supervision. Thus, there is one fact necessary for our review of the order on appeal since the statutes

addressing electronic monitoring for probation are different from electronic monitoring for PRS. Initially, there was some confusion at trial over the legal basis for Defendant's ankle monitoring, but ultimately there was no "material conflict" in the evidence; the evidence showed Defendant's monitoring was imposed under North Carolina General Statute Section 15A-1368.4 as a condition of post-release supervision.

In Defendant's motion to suppress, he alleged that "on November 14, 2018, the defendant was placed on probation for felony possession of cocaine in file number 18CR208275 in Wake County, North Carolina" and that electronic monitoring was "included or added at a later date" as a special condition of probation. On 3 December 2021, the trial court heard and ruled on about 21 various motions, including its initial ruling on the motion to suppress. At that hearing, the State noted the motion to suppress and informed the trial court that Defendant "was not on probation but he was actually on parole at the time." Defendant's attorney apparently agreed and informed the trial court,

> [t]his is post-supervision. He's not on - - he's not on standard conditions of probation, so it's a less sort of monitoring system and restrictions and it has sort of measures in place. So it's for curfew, make sure he's where he's supposed to be when he's supposed to be."

The trial court initially denied the motion to suppress based upon the fact that it was not "timely filed." But at another pretrial hearing on 6 December 2021, Defendant's counsel informed the trial court that at the previous hearing, the timeline given regarding the timing of the filing of the motion to suppress was incorrect. The State conceded this point, and the trial court then revisited the motion to suppress based upon Defendant's argument that the RPD officer's accessing the ankle monitor data was a search in violation of the Fourth Amendment on the basis of "this clearly being a search by law enforcement, not probation." Defendant requested an evidentiary hearing on the motion to suppress. Ultimately, the trial court again denied the motion to suppress without holding an evidentiary hearing on the basis that there was "no reasonable legal basis" to allow the motion. Defendant's counsel asked to be allowed to make a proffer of evidence regarding the motion to suppress after the State's presentation of testimony from Sergeant Lane and the trial court allowed this request.

During the trial, after Sergeant Lane's trial testimony and cross-examination, Defendant presented his proffer of evidence for purposes of the motion to suppress by questioning Sergeant Lane on voir

dire regarding his access to and search of the ankle monitor tracking data. The evidence on voir dire tended to show that Sergeant Lane was a patrol officer with RPD when he was called to the scene of the drive-by shooting on 8 November 2019. Afterwards, he did further investigation in the area and ultimately identified Defendant as a potential suspect. After checking the CJLEADS database for Defendant's name, he found that Defendant "had an active sentence that he had been released on, and actually was on post supervision – or post-release." Sergeant Lane did not consult with Defendant's probation officer but checked the Total Access data personally. Defendant renewed his motion after the proffer, and the trial court again denied the motion to suppress. The State did not present any evidence countering Sergeant Lane's testimony that Defendant was on PRS. In fact, the State had consistently argued from the first hearing on the motion to suppress that Defendant was on PRS and not probation. The trial court did not make any findings of fact on the record or enter a written order denying the motion to suppress.

In his brief on appeal, Defendant argues he "was on post-release supervision" in one section of his brief but in another section states Defendant "was wearing an ankle monitor pursuant to a special condition[ ] provision of N.C.[G.S.] § 15A-1343" and cites the language of North Carolina General Statute Section 15A-1343 – which deals with probation – in support of his argument. *See* N.C. Gen. Stat. § 15A-1343. But as we have determined there was no conflict in the evidence and Defendant was on PRS, we will address Defendant's arguments based only upon the basis of PRS under North Carolina General Statute Section 15A-1368.4.

In *State v. McCants*, this Court described the PRS program in detail:

> The post-release supervision program was created in the 1993 "Act to Provide for Structured Sentencing" ("Structured Sentencing Act") as Article 84A of Chapter 15A of the North Carolina General Statutes ("Article 84A"). 1993 North Carolina Laws Ch. 538, § 20.1. (H.B. 277). Post-release supervision is defined in Article 84A as:
>
> > The time for which a sentenced prisoner is released from prison before the termination of his maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and

> other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

N.C.G.S. § 15A-1368(a)(1) (emphasis added).

> Determinations regarding the imposition or violation of conditions of PRS or parole are made by the Commission, which was created by the Structured Sentencing Act: "There is hereby created a Post-Release Supervision and Parole Commission of the DAC4 of the DPS." N.C.G.S. § 143B-720(a) (2017); 1993 North Carolina Laws Ch. 538, § 20.1.5 The "general authority of the Commission is described in G.S. 143B-720." N.C.G.S. § 15A-1368(a)(3) (2017). The Commission "shall administer post-release supervision as provided in" Article 84A. N.C.G.S. § 15A-1368(b). The Commission consists of "four full-time members" "appointed by the Governor." N.C.G.S. § 143B-720(a) and (a2). Decisions concerning parole are determined by a majority vote of the Commission, however, "a three-member panel of the Commission may set the *terms and conditions* for a post-release supervisee *under G.S. 15A-1368.4* and may decide questions of violations thereunder, *including the issuance of warrants*." N.C.G.S. § 143B-721(d) (2017).

State v. McCants, 275 N.C. App. 801, 814-15, 854 S.E.2d 415, 426 (2020) (emphasis in original) (brackets and footnotes omitted).

A supervisee under post-release supervision is "[a] person released from incarceration and in the custody of the Division of Community Supervision and Reentry of the Department of Adult Correction and Post-Release Supervision and Parole Commission on post-release supervision."[3] N.C. Gen. Stat. § 15A-1368(a)(2) (2023). Various conditions may be imposed upon a supervisee in PRS, and "electronic monitoring" is one of the "controlling conditions" allowed by North Carolina General Statute Section 15A-1368.4(13). N.C. Gen. Stat. § 15A-1368.4(13). There is no evidence in this case of the exact conditions included in Defendant's

3. "(1) Post-release supervision or supervision. – The time for which a sentenced prisoner is released from prison before the termination of his maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education." N.C. Gen. Stat. § 15A-1368 (2023).

PRS, but there is no dispute Defendant was subject to electronic monitoring, and based upon Sergeant Lane's testimony, he was being monitored as a condition of PRS. In addition, in this case, Defendant has not challenged the Commission's authority to impose electronic monitoring as a condition of his PRS. *But cf. McCants*, 275 N.C. App. at 842, 854 S.E.2d at 443 ("The Commission therefore erred in imposing that unlawful condition in Defendant's case, and the Operation Arrow warrantless search of Defendant's premises lacked legal authority. Defendant's purported consent did not serve to justify the otherwise unlawful search, as Defendant was obligated by statute to consent to PRS and the conditions imposed. Defendant's compliance with his legal duty, by signing the PRS agreement and not attempting to refuse or hinder Chief Gibson from carrying out one of the conditions contained therein, was not true consent to search as contemplated by the Fourth Amendment or Art. I § 20 of the North Carolina Constitution, and it did not serve to render constitutional the otherwise unconstitutional warrantless search.").

Defendant argues that only his probation officer could have access to his ankle monitoring data, based upon North Carolina General Statute Section 15A-1368.4(e)(10), which provides that a supervisee must

> (10) Submit at reasonable times to warrantless searches by a post-release supervision officer of the supervisee's person and of the supervisee's vehicle and premises while the supervisee is present for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Division of Adult Correction and Juvenile Justice of the Department of Public Safety for the actual cost of drug testing and drug screening, if the results are positive.

N.C. Gen. Stat. § 15A-1368.4. But this subsection addresses searches of the supervisee's person, vehicle, or premises, not electronic monitoring. *See id.* Here, there was no search of Defendant's person, vehicle, or premises. Instead, the alleged unconstitutional search here arises solely from Sergeant Lane's accessing the data generated by Defendant's electronic monitoring. Electronic monitoring is not governed by North Carolina General Statute Section 15A-1368.4(e)(10); it is governed by North Carolina General Statute Section 15A-1368.4(e)(13), which allows the Commission to impose a condition requiring a supervisee to:

> (13) Remain in one or more specified places for a specified period or periods each day, and wear a device *that permits the defendant's compliance with the condition to be monitored electronically* and pay a fee of ninety dollars ($90.00) for the electronic monitoring device and a daily fee in an amount that reflects the actual cost of providing the electronic monitoring. The Commission may exempt a person from paying the fees only for a good cause. Fees collected under this subsection for the electronic monitoring device shall be transmitted to the State for deposit in the State's General Fund. The daily fees collected under this subsection shall be remitted to the Department of Public Safety to cover the costs of providing the electronic monitoring.

N.C. Gen. Stat. § 15A-1368.4(e)(13) (emphasis added).

As noted above, Defendant's brief includes arguments contending he was on probation instead of PRS although he addresses PRS as well, perhaps seeking to make sure all the bases were covered. The wording of the statute regarding electronic monitoring for purposes of probation is different from the PRS statute. The probation statute provides that "[t]he offender shall be required to wear a device which *permits the supervising agency to monitor* the offender's compliance with the condition electronically and to pay a fee for the device as specified in subsection (c2) of this section." N.C. Gen. Stat. § 15A-1343(b1)(3c). Although we express no opinion regarding access to data arising from electronic monitoring a person on probation, the difference in the language of the statute is notable as the probation statute states that the "supervising agency" monitors the defendant's compliance. *See id*. The PRS statute simply allows a supervisee "to be monitored electronically," without limiting which law enforcement agency or personnel may access data to review a supervisee's compliance with the condition that he "remain in one or more specified places." N.C. Gen. Stat. § 15A-1368.4(e)(13).

In addition, even within North Carolina General Statute Section 15A-1368.4, the language regarding warrantless searches of supervisees differs from the language regarding electronic monitoring. *See id*. North Carolina General Statute Section 15A-1368.4(e)(10) provides that the "post-release supervision officer" may conduct warrantless searches "at reasonable times" "of the supervisee's person and of the supervisee's vehicle and premises while the supervisee is present for purposes reasonably related to the post-release supervision." N.C. Gen. Stat. § 15A-1368.4(e)(10). But subsection (e)(13) does not limit the access

to electronic monitoring data to the supervisee's post-release supervision officer or any particular law enforcement agency. N.C. Gen. Stat. § 15A-1368.4(e)(13). Instead, a supervisee can be required to "remain in one or more specified places" at specific times and to "wear a device that permits the defendant's compliance with the condition *to be monitored electronically*[.]" *Id.* (emphasis added).

The evidence showed that the Department of Juvenile Justice and the Department of Adult Probation and Parole has contracted with BI Incorporated "to provide electronic monitoring services" for PRS and this information is made available to authorized officers within law enforcement agencies such as RPD. If the General Assembly wanted to impose the same restrictions and limitations on access to electronic monitoring data for purposes of probation, it could have done so. In fact, for PRS, the General Assembly did impose different limitations for searches of "the supervisee's person and of the supervisee's vehicle and premises" than for electronic monitoring as a condition of PRS. *See* N.C. Gen. Stat. § 15A-1368.4. The language of the statute governing warrantless searches of the person, vehicle, or premises is different from that governing electronic monitoring, and we must presume the statutes mean what they say. *See N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." (citation omitted)).

We also stress that we cannot address the exact conditions of Defendant's PRS because notably, Defendant did not provide either to the trial court or to this Court the judgment for his prior conviction under which he was imprisoned before being released on PRS or any documentation from the Post-Release Supervision and Parole Commission regarding the details of his PRS.[4] Under North Carolina General Statute Section 15A-1368.4, the Commission must set certain required conditions for each supervisee and may set additional required conditions, discretionary conditions, reintegrative conditions, and controlling conditions, depending upon the circumstances of the particular case. *See* N.C. Gen. Stat. § 15A-1368.4. Since Defendant has the duty to provide any information necessary for review of his arguments, we are addressing only the information provided by Defendant in this record. *See State*

4. In contrast, in *State v. McCants*, this Court addressed many details of the defendant's PRS and the specific conditions imposed as well as why particular conditions were imposed on the defendant, but here, this information was not in evidence. *See McCants*, 275 N.C. App. at 835-39, 854 S.E.2d at 438-41.

v. Alston, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete." (citation omitted)). According to the evidence presented in this case, Defendant was subject to electronic monitoring as a condition of his PRS. Defendant was required as a condition of his PRS to "[r]emain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically[.]" N.C. Gen. Stat. § 15A-1368.4(e)(13).

Thus, the question here is whether Defendant may have a reasonable expectation of privacy in the location data generated by his ankle monitor, where his monitoring was legally being conducted as a condition of PRS and the officer who accessed the location data was authorized to access the data directly, without going through another agency or officer. The State contends that to the extent Defendant believed he had an expectation of privacy as to his location data, particularly as to authorized law enforcement agencies, this belief is "unreasonable and not one that society is prepared to recognize as reasonable." Thus, the State contends "law enforcement's mere review of Defendant's location from his ankle monitor did not constitute a search."

The State is correct; under these circumstances, Sergeant Lane's accessing the ankle monitor data was not a "search" as defined by law. As the United States Supreme Court noted in *Kyllo*, most warrantless searches of a home are unreasonable and thus unconstitutional:

> On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. . . .
>
> In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog (persons, houses, papers, and effects) that the Fourth Amendment protects against unreasonable searches. We held that the Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he justifiably relied upon the privacy of the telephone booth. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society

> recognizes as reasonable. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a house is concerned—unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search[.]

Kyllo v. United States, 533 U.S. 27, 31-33, 150 L. Ed. 2d 94, 100-01 (2001) (emphasis in original) (citations, quotation marks, and brackets omitted).

As a general principle, a defendant on PRS has a lower expectation of privacy than a defendant who has either completed his sentence or is subject to lifetime satellite-based monitoring. *See State v. Carter*, 283 N.C. App. 61, 69, 872 S.E.2d 802, 807-08 (2022) ("An offender subject to post-release supervision has a diminished privacy expectation. *See Samson v. California*, 547 U.S. 843, 844, 126 S. Ct. 2193, 165 L. Ed. 2d 250, 254 (2006) ('An inmate electing to complete his sentence out of physical custody remains in the Department of Corrections' legal custody for the remainder of his term and must comply with the terms and conditions of his parole. The extent and reach of those conditions demonstrate that parolees have severely diminished privacy expectations by virtue of their status alone.'); *Hilton*, ('SBM is clearly constitutionally reasonable during a defendant's post-release supervision period.'); § 15A-1368.4(b1)(6) (mandating SBM as a condition of post-release supervision for recidivists). So SBM as a condition of Defendant's 60-month period post-release supervision is constitutional.")); *see also State v. Grady*, 259 N.C. App. 664, 670, 817 S.E.2d 18, 24 (2018) ("Supervised offenders include probationers and individuals under post-release supervision following active sentences in the custody of the Division of Adult Correction. These individuals 'are on the "continuum" of state-imposed punishments[,]' and their expectations of privacy are accordingly diminished. Unsupervised offenders, however, are statutorily required to submit to SBM, but are not otherwise subject to any direct supervision by State officers." (citation omitted)).

In support of his argument that only probation or parole officers can access a defendant's ankle monitor data without a warrant, Defendant

cites to caselaw which indicates law enforcement cannot conduct a warrantless search of a defendant's person, residence, or vehicle without the participation of the defendant's probation or parole officer and caselaw where a place was searched without statutory authorization. *See State v. Grant*, 40 N.C. App. 58, 60, 252 S.E.2d 98, 99 (1979) ("[T]he requirement that [the defendant] submit to a search by *any* law enforcement officer without a warrant is invalid." (emphasis added)); *see also U.S. v. Midgette*, 478 F.3d 616, 626 (2007) ("In sum, these North Carolina cases hold that police officers may conduct the warrantless search of a probationer – indeed may even suggest the search – so long as the search is authorized and directed by the probation officer."); *McCants*, 275 N.C. App. at 841, 854 S.E.2d at 442 ("We hold the trial court erred by denying Defendant's motion to suppress the firearm and other evidence found as the result of the 11 May 2017 warrantless search of the Home."). But these cases address specific provisions of the statute governing searches of the person, residence, or vehicle of defendants on probation, not electronic monitoring of supervisees on PRS. The expectation of privacy is lower for a supervisee on PRS, and any expectation that an authorized law enforcement agency would not be able to access location tracking data is clearly unreasonable where the PRS statute does not limit the law enforcement agencies or personnel who may access the electronic monitoring data.

Here, a manager from BI Incorporated, the agency which provides the electronic monitoring services for North Carolina, testified "authorized users" have access to the GPS data, and authorized users are "officers of the North Carolina Department of Probation and Parole, Juvenile Justice and . . . the Department of Public Safety has vetted certain law enforcement agencies to be able to view this information[,]" which includes a screening process through the Department of Public Safety. Defendant was subject to electronic monitoring under PRS, and Sergeant Lane had authorization from DPS to utilize ankle monitor data maintained by BI Incorporated. Sergeant Lane reviewed only GPS data; he did not search Defendant's home, vehicle, or person. As a supervisee under PRS under North Carolina General Statute Section 15A-1368.4, Defendant had a lower expectation of privacy than the offenders subject to lifetime SBM under the *Grady* caselaw who were "unsupervised" but still subject to *lifetime* satellite based-monitoring. *See Grady*, 259 N.C. App. at 670, 676, 817 S.E.2d at 24, 28.

Therefore, the trial court did not err by denying Defendant's motion to suppress and properly allowed the State to present evidence as to Defendant's ankle monitor at trial.

III. Conclusion

Since this Court recently held North Carolina General Statute Section 15A-1215(a) is unconstitutional, and we are bound by our precedent, we must grant Defendant a new trial as a juror was substituted after deliberations had begun. We further affirm the trial court's denial of Defendant's motion to suppress as to the data from his ankle monitor and this evidence may be used in the new trial. Finally, as we must grant a new trial, we need not address the evidentiary issues involving Defendant's prior bad acts and the shirts worn by the victim's family members during part of the trial as these issues may not arise at the new trial.

AFFIRMED AND NEW TRIAL.

Judges ZACHARY and MURPHY concur.

MICHAEL EDWARD TUMINSKI, Plaintiff
v.
KRISTEN ANN NORLIN, Defendant

No. COA24-15

Filed 3 September 2024

1. Process and Service—complaint and summons—absolute divorce—statutory requirements for service—presumption of valid service

In an action filed by a recently divorced husband, the trial court did not abuse its discretion in denying the husband's motion to set aside the judgment for absolute divorce entered earlier in a separate action filed by the wife, where the wife had complied with all of the statutory requirements for service of process under Civil Procedure Rule 4(j)(1)(c) and, therefore, the divorce judgment was not void for lack of personal jurisdiction. The wife served the complaint and summons by certified mail, return receipt requested, to the husband's personal mailbox at a United Parcel Service ("UPS") store, which the husband had contractually authorized to act as his agent for receiving service of process. The wife provided proof of service by filing an affidavit with the return receipt attached, which raised a presumption of valid service that the husband was unable to rebut on appeal.

2. Divorce—motion to set aside—divorce judgment entered in earlier action—improper collateral attack

In an action filed by a recently divorced husband, the trial court did not abuse its discretion in denying the husband's motion to set aside the judgment for absolute divorce entered earlier in a separate action filed by the wife, where the husband argued that the judgment was void because the parties had not been separated for a year prior to the wife's filing for divorce. A divorce judgment that is regular on its face but was obtained through false swearing is voidable, not void ab initio, and the proper procedure for challenging such a judgment is to file a motion in the cause in the divorce action rather than to file an independent action. Although an exception exists for parties in divorce cases who are not properly served with process, that exception was inapplicable here, and therefore the husband's collateral attack on the divorce judgment was improper.

3. Civil Procedure—order denying motion to set aside judgment—language resembling Rule 11—harmless

An order denying a husband's Rule 60(b) motion to set aside a judgment for absolute divorce (entered earlier in a separate action filed by the wife) was affirmed, where the order contained language resembling that of Rule 11 concerning the husband's purported bad faith. The wife had not filed a motion for Rule 11 sanctions and the order did not sanction the husband; thus, any defect arising from the challenged language in the order was harmless and non-prejudicial.

Appeal by plaintiff from judgment entered 14 March 2023 by Judge Joal H. Broun in Chatham County District Court. Heard in the Court of Appeals 14 August 2024.

Patrick Law PLLC, by Kristen A. Grieser, for the plaintiff-appellant.

Jackson Family Law, by Jill S. Jackson, for the defendant-appellee.

TYSON, Judge.

Michael E. Tuminski ("Plaintiff") appeals from an order denying Plaintiff's Rule 60(b) Motion to set aside judgment for divorce and for declaratory judgment. We affirm.

I. Background

Plaintiff and Kristen A. Norlin ("Defendant") were married on 26 May 2018 and separated two years later on 4 May 2020. The marriage

produced no children. Plaintiff began spending the night in a room located above a detached garage. Within the same month, Plaintiff acquired a boat and began living on both the boat and above the detached garage. Defendant began holding herself out as separated from Plaintiff to friends and co-workers.

Plaintiff and Defendant remained in contact while separated. The parties picked up Plaintiff's boat, spent Plaintiff's birthday, and spent Christmas holidays together. Plaintiff became stranded in Jacksonville, Florida. Defendant flew down to help him move his boat to Ft. Myers, Florida.

Between 4 May 2020 and Christmas 2020, the parties occasionally engaged in sexual relations. The parties did not reconcile their marital issues and Defendant did not intend to reconcile. Plaintiff completed his move to Ft. Myers, Florida in January 2021 and began to live on his boat full time.

In early July 2021, Defendant informed Plaintiff of her intent to file for divorce. Defendant filed a verified Complaint for Absolute Divorce in Chatham County on 23 July 2021 with assigned court file number 21-CVD-497.

The Complaint and Summons were served by certified mail, return receipt requested, to Plaintiff's personal mailbox located in the Ft. Myers United Parcel Service ("UPS") store. Plaintiff contracted with UPS and authorized it to act as Plaintiff's agent for receiving service of process. The return receipt was labeled as having been received by "BP/FP" and had "COVID-19" instead of a signature.

Plaintiff additionally received notice of the divorce hearing scheduled on 1 September 2021. Neither Plaintiff nor his counsel appeared for the hearing. The court granted Defendant's motion and entered a Judgment for Absolute Divorce. Plaintiff did not appeal this judgment entered in 21-CVD-497.

Plaintiff filed a new complaint and action under assigned court file number 22-CVD-380 on 31 May 2022 to set aside the Judgment for Absolute Divorce pursuant to Rules 4(j)(1) and 60(b)(4) of our Rules of Civil Procedure. The trial court denied Plaintiff's purported motions by order filed 30 July 2023 on 31 July 2023. Plaintiff appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

Plaintiff argues the trial court erred by denying his Rule 60(b) motion to set aside the judgment for an absolute divorce and by sanctioning him pursuant to Rule 11(b).

IV. Standard of Review

"[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, 195, 217 S.E.2d 532, 540 (1975). A judgment is "subject to reversal for abuse of discretion only upon a showing by [the appellant] that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted). The trial court's findings of fact are binding upon appeal if supported by competent evidence. *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998).

V. Plaintiff's Motion to Set Aside

A. Service of Process

[1] Plaintiff argues the trial court abused its discretion by denying his Rule 60(b) motion to set aside the earlier judgment entered in 21-CVD-497 as void due to a lack of personal jurisdiction caused by defective service of process. We disagree.

Our General Statutes allow a court to "reli[e]ve a party . . . from a final judgment, order, or proceeding" where "the judgment is void." N.C. Gen. Stat § 1A-1, Rule 60(b)(4) (2023). Personal jurisdiction over a defendant may only be obtained in two ways: (1) "the issuance of summons and service of process by one of the statutorily specified methods[;]" or (2) the defendant's voluntary appearance or consent to the court's jurisdiction. *Fender v. Deaton*, 130 N.C. App 657, 659, 503 S.E.2d 707, 708 (1998) (citation omitted); *Tobe-Williams v. New Hanover Cnty. Bd. of Educ.*, 234 N.C. App. 453, 461, 759 S.E.2d 680, 687 (2014) (citation omitted). "The law is well settled that without such jurisdiction, a judgment against [a] defendant is void." *Freeman v. Freeman*, 155 N.C. App. 603, 606-07, 573 S.E.2d 708, 711 (2002) (citation omitted).

Plaintiff failed to appear at the underlying trial court's hearing in 21-CVD-497, did not file a responsive pleading, nor did he contest the court's jurisdiction by other means. Effective service of process must be shown to enable the trial court to acquire personal jurisdiction over Plaintiff.

Defendant elected to complete service of process by serving the summons and the complaint through certified mail, return receipt

requested. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (2023) authorizes service of process "[b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee." Defendant properly addressed and sent the certified mail to Plaintiff and the mail was delivered to Defendant's personal mailbox, located in the Ft. Myers UPS store. Defendant provided proof of service by filing an affidavit in the court file, with the return receipt attached. *Id.*

Sufficiency of proof of service is controlled by N.C. Gen. Stat. § 1-75.10(a)(4) (2023). When service of process is completed by certified mail, the proof of service can be provided "by affidavit of the serving party averring":

> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(4) (2023).

"If the record demonstrates compliance with the statutory requirements for service of process, such compliance raises a presumption the service was valid." *Yves v. Tolentino*, 287 N.C. App. 688, 691, 884 S.E.2d 70, 72 (2023) (citing *Patton v. Vogel*, 267 N.C. App. 254, 258, 833 S.E.2d 198, 202 (2019)); N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2023).

Plaintiff purports to challenge the presumption and the trial court's conclusion the summons and complaint were received. The trial court's findings of fact in a denial of a Rule 60(b) motion are binding on appeal, if supported by competent evidence. *See Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998). Defendant's affidavit, with return receipt attached, constitutes competent evidence supporting the trial court's finding and conclusion of delivery to the addressee. *See State v. Bradley*, 282 N.C. App. 292, 296, 870 S.E.2d 297, 301 (2022) ("Competent evidence is evidence that is admissible or otherwise relevant.") (citation omitted).

The record demonstrates Defendant's compliance with the statutory requirements and the judgment entered was a default judgment.

Defendant's affidavit "raises a [rebuttable] presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]" N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2023).

Beyond this presumption and affidavit of service, Plaintiff admits to "receiving all of his mail at the UPS [personal mailbox,]" as he was living on a boat at the time, and "he signed a contract authorizing the UPS store to act as his agent for receiving service of process addressed to his UPS [personal mailbox.]"

The requirements of Rule 4(j)(1) for service of process were met and service of process was effective. The trial court correctly concluded it acquired personal jurisdiction over Plaintiff in the underlying absolute divorce action in 21-CVD-497. *Id.*

B. One Year Requirement for Divorce

[2] Plaintiff argues the trial court abused its discretion by denying his Rule 60(b) motion to set aside the underlying judgment for absolute divorce as void. He asserts the parties had not been separated for a year prior to Defendant's filing for divorce, despite allegations in Defendant's complaint and affidavit.

Under N.C. Gen. Stat. § 50-6 (2023), parties must be separated for at least a year prior to filing for absolute divorce. "A party may obtain relief from a final judgment pursuant to Rule 60(b)(4) of the Rules of Civil Procedure, if . . . the judgment is void *ab initio*." *Dunevant v. Dunevant*, 142 N.C. App. 169, 174, 542 S.E.2d 242, 245 (2001) (citation omitted).

Where a party contends a divorce judgment was obtained through false swearing and the judgment is otherwise regular on its face, the judgment is voidable, not void *ab initio*. *See Stoner v. Stoner*, 83 N.C. App. 523, 525, 350 S.E.2d 916, 918 (1986). The procedure to challenge such a divorce judgment is through a motion in the cause in the divorce action, 21-CVD-497, rather than asserting an independent action. Plaintiff's collateral attack on the divorce judgment through independent action in 22-CVD-380 is improper. *See Carpenter v. Carpenter*, 244 N.C. 286, 295, 93 S.E.2d 617, 625-26 (1956).

While an exception exists for a defendant to a divorce action, who is prevented from presenting his case by an improper service of process, such exception does not apply in this case where Plaintiff was properly served. *Compare id. with Henderson v. Henderson*, 232 N.C. 1, 9, 59 S.E.2d 227, 233-34 (1950).

As both the record and judgment are regular on their face and Plaintiff appointed an agent and admittedly received effective service of process through that agent, Plaintiff cannot collaterally attack the divorce judgment through independent action. *Id.* The trial court did not abuse its discretion by denying Plaintiff's Rule 60 motion. Plaintiff's argument is overruled.

VI. Rule 11 Language

[3] Plaintiff argues the trial court erred in including Rule 11 language in the order denying his Rule 60(b) motion. Defendant did not file a motion for Rule 11 sanctions, nor did the order sanction Plaintiff. Any language in the order concerning purported bad faith is harmless and non-prejudicial. *See* N.C. Gen. Stat. § 1A-1, Rule 61 (2023) ("No . . . error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right."). Plaintiff's argument is overruled.

VII. Conclusion

The trial court correctly denied Plaintiff's Rule 60 motion to set aside the prior absolute divorce decree in 21-CVD-497. Defendant did not file a motion for Rule 11 sanctions nor did the order sanction Plaintiff. Any language concerning Plaintiff's bad faith in the order was harmless and non-prejudicial. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges STADING and THOMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 SEPTEMBER 2024)

BRYAN v. FIREFLY MOUNTAIN PROPS., LLC No. 24-28	Haywood (20CVS894)	Dismissed
IN RE A.J. No. 24-141	Forsyth (21JT75-77)	Affirmed
IN RE G.R.R. No. 24-131	Forsyth (22JT89)	Affirmed
IN RE J.A. No. 24-161	Beaufort (20JT109)	Affirmed
REDEVELOPMENT COMM'N OF GREENSBORO v. MERIDIAN CONVENTIONS, LLC No. 23-941	Guilford (21CVS9622)	Affirmed
STATE v. BROOKS No. 23-1072	Pender (20CRS50629)	No Error
STATE v. BYNUM No. 23-1102	Mecklenburg (20CRS10046) (20CRS208153) (20CRS211153)	No Error
STATE v. DAVIS No. 23-953	Forsyth (22CRS361) (22CRS51576-77) (22CRS52480)	Affirmed
STATE v. DIAZ No. 24-104	Swain (21CRS387) (21CRS50326) (22CRS131)	No Error
STATE v. GIVENS No. 23-500	Iredell (21CRS51155) (21CRS752) (22CRS50197) (22CRS50865)	Vacated and Remanded
STATE v. HIGGS No. 24-45	Wake (20CR209675-910)	Vacated and Remanded
STATE v. KARAMIKIAN No. 23-895	Iredell (20CRS50955)	Dismissed

STATE v. MADDOX No. 24-148	Cleveland (20CRS54831) (22CRS18)	Affirmed
STATE v. McCOLLUM No. 23-1144	Rockingham (22CRS457-58) (22CRS51130-31)	Affirmed in Part, Vacated in Part, and Remanded for a new trial in 22 CRS 51130
STATE v. PARRY No. 24-229	Cherokee (17CRS50777) (17CRS50989)	Affirmed
STATE v. ROBINSON No. 24-290	Alamance (21CRS54417-19)	Dismissed
STATE v. SALDANA No. 24-9	Duplin (20CRS51229-30)	Affirmed
STATE v. SATTERFIELD No. 23-857	Person (21CRS50163) (22CRS132)	No Error
STATE v. SMITH No. 24-231	Pitt (22CRS1499) (22CRS1790)	Affirmed
STATE v. SUMMERS No. 24-317	Gaston (21CRS55086)	No Error
STATE v. THOMAS No. 23-558	Robeson (19CRS54864)	No Error
STATE v. VALENTINE No. 23-520	Forsyth (19CRS051876-79)	Affirmed
STATE v. WOMBLE No. 24-118	Moore (15CRS1840-41) (15CRS53116) (15CRS53120) (15CRS53404-07) (15CRS702982) (16CRS142) (16CRS50403)	Affirmed

DUKE UNIVERSITY HEALTH SYSTEM, INC., PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTHCARE PLANNING AND CERTIFICATE OF NEED SECTION, RESPONDENT
and
UNIVERSITY OF NORTH CAROLINA HOSPITALS AT CHAPEL HILL AND UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM, RESPONDENT-INTERVENORS

No. COA23-1070

Filed 17 September 2024

Hospitals and Other Medical Facilities—contested case—certificate of need application—approval without public hearing—no per se substantial prejudice—waiver of statutory right inapplicable

In a contested case regarding two university healthcare systems' competing applications to the Department of Health and Human Services (DHHS) for a certificate of need to develop 68 acute care beds, where the losing applicant (petitioner) challenged DHHS's decision to approve the competitor's application without conducting a public hearing as required under N.C.G.S. § 131E-185(a1)(2), the Office of Administrative Hearings (OAH) correctly held that DHHS failed to use proper procedure by disregarding the public hearing requirement, even despite DHHS's concerns relating to the COVID-19 pandemic at the time. Nevertheless, OAH's final decision was vacated on appeal because, contrary to OAH's holding, the failure to conduct a public hearing did not automatically result in per se substantial prejudice to petitioner in its contested case. Additionally, because the public hearing requirement was a statutory right that existed for the public's benefit, principles of waiver and estoppel did not preclude petitioner from challenging DHHS's departure from the requirement. The matter was remanded for further proceedings to determine if petitioner was indeed substantially prejudiced.

Appeal by Petitioner from final decision entered on 21 July 2023 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 14 August 2024.

Baker, Donelson, Bearman, Caldwell & Berkowitz, a Professional Corporation, by Iain M. Stauffer and William F. Maddrey, for petitioner-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for respondent-appellant.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, Noah H. Huffstetler, III, Candace S. Friel, and Nathaniel J. Pencook, for respondents-intervenors-appellants.

MURPHY, Judge.

The failure of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section ("the Agency") to conduct a public hearing pursuant to N.C.G.S. § 131E-185(a1)(2) does not automatically constitute substantial prejudice to a petitioner in a contested case before the Office of Administrative Hearings. Here, where the Office of Administrative Hearings reasoned in its final decision that the Agency's failure to conduct a public hearing constituted *per se* substantial prejudice to the petitioner before it, we must vacate that final decision.

BACKGROUND

Respondents University of North Carolina Hospitals at Chapel Hill, University of North Carolina Health Care System (collectively "UNC"), and the Agency appeal from a final decision of the Office of Administrative Hearings filed 21 July 2023. The decision pertained to a contested case between Petitioner Duke University Health System, Inc., and UNC to obtain a certificate of need to develop 68 acute care beds in the Durham/Caswell County service area pursuant to the 2022 State Medical Facilities Plan. The final decision, in relevant part, granted summary judgment in favor of Duke and vacated the underlying decision of the Agency conditionally approving UNC's certificate of need application, reasoning that (1) the Agency erred in failing to conduct a public hearing in accordance with N.C.G.S. § 131E-185(a1)(2),[1] notwithstanding any ongoing concerns relating to the COVID-19 pandemic at the time; and (2) the omission of a public hearing caused *per se* substantial prejudice to Duke within the meaning of N.C.G.S. § 150B-23(a).

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1. N.C.G.S. § 131E-185(a1)(2) provides that, "[n]o more than 20 days from the conclusion of the written comment period [provided in N.C.G.S. § 131E-185(a1)(1)], the [Agency] shall ensure that a public hearing is conducted at a place within the appropriate service area if . . . the proponent proposes to spend five million dollars ($5,000,000[.00]) or more[.]" N.C.G.S. § 131E-185(a1)(2) (2023). There is no dispute in this case that the proposed project met the $5,000,000.00 threshold at which N.C.G.S. § 131E-185(a1)(2) requires a public hearing.

ANALYSIS

N.C.G.S. § 150B-23(a) provides, in relevant part, that "[a] contested case shall be commenced . . . by filing a petition with the Office of Administrative Hearings and[] . . . shall be conducted by that Office." N.C.G.S. § 150B-23(a) (2023).

> A petition shall . . . state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency did any of the following:
>
> (1) Exceeded its authority or jurisdiction.
>
> (2) Acted erroneously.
>
> (3) Failed to use proper procedure.
>
> (4) Acted arbitrarily or capriciously.
>
> (5) Failed to act as required by law or rule.

Id. When reviewing alleged legal errors by the Office of Administrative Hearings on appeal, we employ de novo review. N.C.G.S. § 150B-51(b)-(c) (2023).

Here, where Duke argued before the Office of Administrative Hearings that the Agency failed to use proper procedure, it was also required to show that the Agency "deprived [it] of property, [] ordered [it] to pay a fine or civil penalty, or [] otherwise substantially prejudiced [its] rights" to establish to the Office of Administrative Hearings that reversible error occurred before the Agency. N.C.G.S. § 150B-23(a)(3) (2023). For the reasons discussed in two of our recent opinions, *Fletcher Hosp. Inc. v. N.C. Dep't of Health & Hum. Servs.*, *Div. of Health Serv. Regul.*, *Health Care Plan. & Certificate of Need Section*, 902 S.E.2d 1 (N.C. Ct. App. 2024) and *Henderson Cnty. Hosp. Corp. v. N.C. Dep't of Health & Hum. Servs.*, No. COA23-1037 (N.C. Ct. App. Aug. 6, 2024), although the Office of Administrative Hearings correctly held that the Agency failed to use proper procedure in omitting a public hearing despite any pandemic-related concerns, such an omission does not constitute substantial prejudice *per se* under N.C.G.S. § 150B-23(a).

Respondents also argue that waiver and estoppel prevented Duke from arguing before the ALJ that the Agency's failure to hold a hearing was improper, as Duke had itself utilized Agency proceedings without public hearings during the pandemic. However, our jurisdiction has long held that statutory rights in place for the benefit of the public—as opposed to for the personal benefit of the party—cannot be waived.

See, *e.g.*, *Sisk v. Perkins*, 264 N.C. 43, 46 (1965) ("Statutory provisions enacted for the benefit of a party litigant, as distinguished from those for the protection of the public, may be waived, expressly or by implication."); *Calaway v. Harris*, 229 N.C. 117, 119 (1948) ("Statutory provisions enacted for the benefit of a party litigant, as distinguished from those for the protection of the public, may be waived, expressly or by implication."); *Holloman v. Holloman*, 127 N.C. 15, 16 (1900) ("[T]he [c]ourts cannot dispense with the requirement to file the affidavit. That requirement is for the good of the public at large, and not for the convenience or benefit of the parties to the action."). Jurists and academics alike have critiqued agency proceedings on the basis that they suffer from problems of democratic legitimacy, and the public hearing requirement of N.C.G.S. § 131E-185(a1)(2) exists, at least in significant part, to legitimize aspects of the agency review process that might otherwise be democratically suspect. *Cf. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1929 n.13 (2020) (Thomas, J., concurring) ("[T]he notice and comment process at least attempts to provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process."). Public hearings under N.C.G.S. § 131E-185(a1)(2) are not, therefore, private benefits to their participants, but critical aspects of the agency review process that exist for public and systemic benefits.[2] Waiver therefore does not apply—and, for equivalent reasons, estoppel does not, either.

We therefore vacate the final decision and remand for further proceedings. *Fletcher*, 902 S.E.2d at 7. Our holding does not preclude a subsequent ruling that Duke was substantially prejudiced in the event more specific findings supporting such a ruling are found to exist on remand. *Id.* ("AdventHealth satisfied its burden of proof in showing Agency error, but it failed to forecast particularized evidence of substantial prejudice. Yet, our determination in this case should not be misconstrued. AdventHealth may ultimately satisfy its burden; it may not. The ALJ ruled on two specific issues that have been raised and briefed in this appeal: failure to conduct a public hearing under § 131E-185(a1)(2) and reversible error *per se*. We have resolved those specific issues. While this Court may address summary judgment on alternative grounds de novo, we deem this case an appropriate circumstance to remand for further proceedings not inconsistent with this opinion.").

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2. Indeed, one can imagine that the beneficial or detrimental effect of a public hearing for any particular party would be circumstantial rather than categorical.

CONCLUSION

Failure to conduct a public hearing as required by N.C.G.S. § 131E-185(a1)(2), despite constituting improper procedure for purposes of N.C.G.S. § 150B-23(a)(3), does not automatically result in substantial prejudice to a petitioner before the Office of Administrative Hearings. We therefore vacate the final decision in this case and remand for further proceedings.

VACATED AND REMANDED.

Judges COLLINS and FLOOD concur.

IN THE MATTER OF B.A.J.

No. COA24-254

Filed 17 September 2024

1. Termination of Parental Rights—neglect—failure to make reasonable progress—judicial notice—testimony from prior hearings

In a proceeding that resulted in the termination of respondent-mother's parental rights to her son on the statutory grounds of neglect and failure to make reasonable progress in correcting the conditions that led to the child's removal, the district court did not err in taking judicial notice of findings of fact made in prior orders—even though those findings were based on a lower evidentiary standard—where the court also considered evidence at the termination hearing, including testimony from the social worker assigned to the case, the guardian ad litem's report, and twenty exhibits related to respondent-mother's progress on her case plan.

2. Termination of Parental Rights—neglect—failure to make reasonable progress—competency of evidence—hearsay exception

In a proceeding that resulted in the termination of respondent-mother's parental rights to her child on the statutory grounds of neglect and failure to make reasonable progress in correcting the conditions that led to the child's removal, the district court did not err in relying on testimony from a social worker about her personal memories of respondent-mother's sworn testimony at a prior hearing—evidence that respondent-mother conceded was a statement by a party and thus admissible under a hearsay exception.

Moreover, respondent-mother's argument about the weight that the testimony should be afforded was misplaced as such considerations are reserved solely for the district court.

3. Termination of Parental Rights—neglect—failure to make reasonable progress—prior invocations of Fifth Amendment rights—adverse inferences

In a proceeding that resulted in the termination of respondent-mother's parental rights to her child on the statutory ground of neglect and that she had failed to make reasonable progress in correcting the conditions that led to the child's removal, the district court was permitted to draw an adverse inference from respondent-mother's invocations at prior hearings of her Fifth Amendment right not to answer questions about torture and abuse inflicted on the child's older sibling. Further, a review of the unchallenged findings of fact revealed that respondent-mother's refusal to answer those questions was not the sole basis for the termination of her parental rights.

4. Termination of Parental Rights—neglect—sufficiency of findings—likelihood of future neglect

In a proceeding that resulted in the termination of respondent-mother's parental rights to her child, the district court's conclusion of law that the statutory ground of neglect existed—based on a likelihood of future neglect by respondent-mother if the child was returned to her care—was supported by the court's findings of fact that respondent-mother failed to: (1) complete all components of her case plan; (2) acknowledge or accept responsibility for the reasons the child was removed from her home (including previous neglect of the child, abuse and neglect inflicted on the child's older siblings, torture inflicted on one of the older siblings, and respondent-mother's ongoing involvement with the child's father despite multiple domestic violence incidents); and (3) understand the role she played in the child's previous neglect.

5. Termination of Parental Rights—best interests of the child—statutory factors—relative placements ruled out—no abuse of discretion

In the disposition portion of a proceeding that resulted in the termination of respondent-parents' parental rights to their son on the statutory ground of neglect, the district court did not abuse its discretion in determining that termination was in the child's best interest where the court's findings on each of the factors listed in N.C.G.S. § 7B-1110(a) were supported by competent evidence.

Specifically, although a social worker testified that a bond existed between respondent-mother and the child but did not include any detail about the nature of that bond—for example, whether it was strong or nurturing—the court appropriately rejected potential placements for the child with paternal relatives after determining that those placements had previously been ruled out and should not be reconsidered and that testimony of those relatives at the termination hearing was not credible.

Appeal by respondent-mother and respondent-father from order entered 26 October 2023 by Judge Faith A. Fickling-Alvarez in Mecklenburg County District Court. Heard in the Court of Appeals 28 August 2024.

Mecklenburg County Attorney's Office, by Senior Associate Attorney Kristina A. Graham, for Petitioner-Appellee Mecklenburg County Department of Social Services.

Administrative Office of the Courts, by Brittany T. McKinney, for Guardian ad Litem.

Emily Sutton Dezio for Respondent-Appellant Mother.

Peter Wood for Respondent-Appellant Father.

COLLINS, Judge.

Mother and Father appeal the termination of their parental rights to their child, Billy.[1] Mother argues that some of the adjudicatory findings of fact were unsupported by evidence, the court's remaining findings were insufficient to support the court's conclusions that grounds existed to terminate her parental rights, and the court abused its discretion when it determined that termination of her parental rights was in Billy's best interest. Father argues only that the trial court abused its discretion when it determined that termination of his parental rights was in Billy's best interest. For the reasons below, we affirm.

I. Background

Mother and Father are the biological parents of Billy. Billy was born in 2021 and has two older sisters, Stephanie and Sarah, who

1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

are Mother's biological daughters but who have different biological fathers than Billy.[2] The three children came into Mecklenburg County Department of Social Services ("DSS") custody on 16 September 2021 when DSS received a report alleging physical abuse of Sarah. The report alleged that Mother and Father hit Sarah with belts, cords, and shoes; "tie[d] up [Sarah's] hands and feet with sheets and t-shirts and . . . and h[u]ng her from a door"; taped her mouth shut; yelled at her; and made her do squats and push-ups; and that Mother told Stephanie and Sarah not to tell anyone about these things. The Charlotte-Mecklenburg Police Department ("CMPD") executed a search warrant on the house and located items that corroborated the report. Additionally, CMPD found a pit bull locked in a cupboard under the kitchen sink without access to food or water, a broken bed frame in the children's bedroom with dried and fresh feces smeared on the bed frame, and a smashed tv on top of the broken bed frame in the children's room. Sarah was taken to the emergency room, where doctors found she had "multiple injuries in various stages of healing" and these injuries were "non-accidental." Mother admitted to causing Sarah's injuries with a belt; she was arrested and charged with Felony Child Abuse.

DSS filed a petition on 20 September 2021 alleging that Sarah was abused and neglected and that Stephanie and Billy were neglected, and DSS took non-secure custody of the children. The initial adjudication and disposition hearings took place in February and March 2022, and the trial court adjudicated Billy a neglected juvenile. At disposition, the trial court did not order reunification efforts with the parents because it found that Mother and Father "committed or encouraged the commission of . . . chronic physical or emotional abuse of [Sarah] and torture of [Sarah]" and that Billy was "present in the home and observed to some degree the torture and physical abuse imposed upon [Sarah] by [parents]." The trial court adopted a primary plan of adoption for Billy with a secondary plan of guardianship but permitted the possibility of supervised visitation between the parents and Billy for two hours twice per week.

The trial court held a permanency planning hearing over 22 April 2022, 28 September 2022, and 6 October 2022. The trial court found that the parents were not making adequate progress under the plan and that they were not "actively participating in or cooperating with the plan, [DSS], and GAL." The trial court found that

2. Stephanie and Sarah are not subjects of this appeal.

> Mother and Father [] are acting in a manner inconsistent with the health and safety of the juveniles. . . .
>
> . . . .
>
> Both Mother and Father [] refused to answer questions during this proceeding in reliance on the 5th amendment privilege. These questions were related to the acts of torture and physical abuse that they imposed on [Sarah], and the injurious consequences of neglect that they imposed on [Stephanie] and [Billy]. Pursuant to case law, the [c]ourt draws an adverse inference against Mother and Father [], but the [c]ourt does not solely use these adverse inferences to support the continued cessation of reasonable efforts, but in conjunction with all the other findings the [c]ourt has made in this order.
>
> If Mother and Father [] cannot admit and/or recognize the abuse and neglect they imposed on the juveniles, they are not able to demonstrate to the Court that they understand the impact on the juveniles and they are not able to demonstrate they have rehabilitated themselves and the circumstances that caused the abuse and neglect.
>
> Mother and Father [] have had another child and they are residing together. Both of them have expressed an intent to reunify with all the children as one family unit. This intent demonstrates that Mother is not considering the best interest of the juveniles [Stephanie] and [Sarah], as she intends them to reunify with her significant other who this [c]ourt has found committed acts of physical and emotional abuse upon them, including torture upon [Sarah].

The trial court then found that DSS "appropriately ruled out" Father's mother as a possible relative placement based on concerns that she "would fail to protect the juveniles and/or would fail to follow court orders" as she had "previously allowed unauthorized contact between [Billy] and Mother and Father" against the trial court's order. Father then identified his brother as a potential relative placement for Billy and the trial court ordered DSS to assess Father's brother for possible placement.

The trial court held another permanency planning hearing on 30 August 2023 and 7 September 2023, and it again found that the parents were not making adequate progress and that the issues that brought Billy into custody had not been resolved. The trial court found

that Mother had attended classes and mental health treatment, but she was "involved in another domestic violence incident with [Father] and has continued to engage with him thereafter." During the domestic violence incident, Father struck Mother in the face, grabbed her neck and squeezed, and hit her on the side of her head with a gun. Later that same night, Mother's home was "shot into at least eight times." The trial court found that Mother was "unsure whether she will, or even wants to" file for a domestic violence protective order ("DVPO") against Father and that Father has been calling Mother from the jail and "[Mother] has accepted and engaged in these phone calls with [Father]." Additionally, the court found that Mother testified that she had been "fully honest" with her therapist but still would not discuss in therapy the "heinous, cruel, and inappropriate actions of abuse and torture" that resulted in Billy entering DSS custody. The trial court again found that Father's mother was appropriately ruled out by DSS as a possible relative placement for Billy, and it found that Father's brother had three drug-related felony charges and that DSS ruled him out as a possible relative placement.

On 11 January 2023, DSS filed a motion to terminate the parents' parental rights on the grounds of neglect, willful failure to make reasonable progress in correcting the conditions which led to removal of the juvenile, and willful failure to pay a reasonable portion of the cost of care of the juvenile. The termination of parental rights hearing ("TPR hearing") took place on 20 and 26 September 2023. DSS did not proceed on the willful failure to pay a reasonable portion of the cost of care ground. During the hearing, the trial court took judicial notice of the underlying orders without objection from any party, received live testimony from a social worker employed with DSS, and admitted twenty exhibits into evidence. Mother did not testify or call any witnesses, and she offered exhibits that were not properly admitted as conceded by her attorney during the hearing. Father did not testify but called his mother and brother as witnesses.

After considering all the evidence, the trial court terminated the parents' parental rights to Billy on the grounds of neglect and willful failure to make reasonable progress in correcting the conditions that led to Billy's removal. The trial court proceeded to the dispositional phase and concluded that it was in Billy's best interest for the parents' rights to be terminated.

II. Discussion

Mother argues that some of the adjudicatory findings of fact were unsupported by evidence, the court's remaining findings were insufficient to support the court's conclusions that grounds existed to terminate her

parental rights, and the court abused its discretion when it determined that termination of her parental rights was in Billy's best interest. Father argues only that the trial court abused its discretion when it determined that termination of his parental rights was in Billy's best interest.

A. Standard of Review

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796-97 (2020) (citation omitted). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (citing N.C. Gen. Stat. § 7B-1109(f)). We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent[,] and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). Unchallenged findings of fact are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citation omitted).

If the trial court concludes that there are grounds to terminate parental rights, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citations omitted). We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence. *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (citations omitted). Unchallenged dispositional findings are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019) (citation omitted). A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700 (citation omitted).

B. Mother's Appeal

1. Judicial Notice of Prior Orders

[1] Mother first argues that adjudicatory findings 11, 15, 16, and 18 are unsupported by the evidence because the trial court "impermissibly relied on its prior findings in the dispositional and permanency planning hearings" that were "found under a lower standard of proof than the

clear, cogent, and convincing evidence standard" of those findings made at the TPR hearing. Mother claims that the trial court "simply adopted the findings" and "that there was not sufficient evidence to support these findings[.]"

"A trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." *In re T.N.H.*, 372 N.C. at 410, 831 S.E.2d at 60 (citation omitted). "[T]he trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.*

Here, in addition to the trial court taking judicial notice of prior orders, the social worker assigned to the case testified at the TPR hearing regarding Mother's past and present lack of progress on her case plan and the progression of the case since Billy entered into DSS custody and through the TPR hearing. The trial court also admitted into evidence without objection the GAL report and twenty exhibits that were relevant to Billy's entrance into DSS custody and the progression of the case through the TPR hearing. Additionally, adjudicatory findings of fact 21, 23, and 24 all pertain to Mother's circumstances at the time of the TPR hearing. The challenged findings of fact are based, at least in part, on live testimony and other exhibit evidence provided at the TPR hearing, and the challenged findings are thus "sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented." *Id.* at 410, 831 S.E.2d at 61. We conclude that Mother's argument is without merit.

2. Competency of the Evidence

[2] Mother next argues that portions of adjudicatory findings 20, 23, and 24 pertaining to Mother's honesty in therapy are not supported because "the trial court relied on incompetent evidence in [its] findings regarding whether or not [Mother] was honest with her therapist." Mother argues that the social worker's testimony, based upon the social worker's recollection of Mother's testimony from a prior permanency planning hearing in August 2023 ("the August 2023 hearing"), is incompetent evidence because "[t]he social worker is merely reciting a recollection of [Mother's] testimony from a prior hearing."

Mother cites to *Hensey v. Hennessy*, 201 N.C. App. 56, 685 S.E.2d 541 (2009), for the proposition that, because a trial court "does not have the

authority to issue an order based solely upon the court's own personal memory of another entirely separate proceeding," the social worker here was not permitted to testify as to her recollection of Mother's testimony at a prior hearing. Mother's reliance is misplaced.

In *Hensey*, the trial court issued an order after it did not hear "any evidence" at a civil hearing and instead based its order upon the trial court's personal memory of a prior criminal proceeding. *Id.* at 67-68, 685 S.E.2d at 549. Our Court examined the appellate record and concluded that the

> plaintiff presented absolutely *no* evidence before the trial court. The most troubling aspect of this case is that the transcript of the hearing reveals that the trial judge granted the order without hearing any evidence because he "heard it on the criminal end." In other words, because he was the judge presiding over the criminal case in which charges stemming from this incident were brought against defendant, the trial judge concluded that he need not hear any evidence regarding this civil matter.
>
> . . . .
>
> Although we appreciate the trial court's concern for judicial economy, a judge's own personal memory is not evidence. The trial court does not have authority to issue an order based solely upon the court's own personal memory of another entirely separate proceeding, and it should be obvious that the evidence which must be taken orally in open court must be taken *in the case which is at bar*, not in a separate case which was tried before the same judge.

Id. (quotation marks and citations omitted).

Here, the social worker testified about her personal recollections of Mother's statements at the August 2023 hearing; this was not an instance where the trial court "issued an order based upon the court's own personal memory." *Id.* at 67, 201 N.C. App. at 549. The social worker testified that she was present in court at the August 2023 hearing and heard Mother's testimony during that hearing. She then testified without objection as to her personal memories of Mother's testimony about her engagement in therapy. *Hensey* is thus inapplicable here.

Additionally, Mother concedes that her testimony at the August 2023 hearing is "a statement by a party and would pass the hearsay exception and be admissible as evidence." Mother argues, however, that "the social

worker's recollection or prior testimony should not be afforded sufficient weight to terminate [Mother's] parental rights." Mother's testimony at the August 2023 hearing is admissible and we cannot re-examine the weight the trial court afforded to the social worker's testimony. *See In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) (explaining that the trial court is "uniquely situated" to "assess[] the demeanor and credibility of witnesses" and, as such, "appellate courts may not reweigh the underlying evidence presented at trial"); *see also In re J.I.G.*, 380 N.C. 747, 754, 869 S.E.2d 710, 715 (2022) (refusing to review the trial court's assignment of weight and credibility to testimony, stating that the determination "resides solely in the purview of the trial court").

When the social worker was questioned about Mother's engagement in therapy, the social worker testified:

> Q: [Mother] has participated in mental health services and is in individual therapy; is that correct?
>
> [Social Worker]: Yes.
>
> Q: And at the [hearing] which happened on August 30, 2023, Mother did testify that she felt she has been fully honest with her therapist as to why the children are in [DSS] custody, correct?
>
> [Social Worker]: Yes.
>
> Q: But then, further within that same hearing, Mother further testified that she did not admit to her therapist committing physical abuse against [Sarah], correct?
>
> [Social Worker]: Yes.
>
> Q: To your knowledge, has Mother discussed with her therapist anything surrounding physical abuse, emotional abuse, torture, or inappropriate physical discipline of her children?
>
> [Social Worker]: No, she has not.
>
> Q: At that August 30, 2023, hearing, [Mother] also testified that she did discuss the domestic violence incident from July 5th with her therapist, correct?
>
> [Social Worker]: Yes.
>
> Q: But then she further testified at that same hearing that [Mother] does not discuss [Father] . . . with her therapist, correct?

> [Social Worker]: Yes.
>
> Q: So you would agree that [Mother] is not being fully honest and transparent with her therapist about the facts and circumstances of why her children are in [DSS] custody, correct?
>
> [Social Worker]: Yes.

This testimony is clear, cogent, and convincing evidence that Mother was not honest with her therapist. The social worker further testified that Mother "being forthcoming with her therapist in regard to her behavior and what led to her children entering [DSS] custody" would demonstrate to DSS Mother's acceptance of responsibility, which further supports that Mother was not honest or transparent with her therapist. The challenged portions of adjudicatory findings 20, 23, and 24 pertaining to Mother's honesty in therapy are supported by clear, cogent, and convincing evidence.

3. Refusal to Testify – Fifth Amendment

[3] Mother argues that her "refusal to testify cannot be the sole basis to terminate her parental rights" and cites to adjudicatory findings 15, 16, 18, 23, and 24 as support that the trial court's basis to terminate her parental rights was made "upon her refusal to testify."[3] Upon our review of the challenged findings, we note that they reference Mother's invocations of the Fifth Amendment at prior hearings, specifically relating to questions about "the acts of torture and physical abuse that the parents imposed on [Billy's] next oldest sibling . . . ." In *In re K.W.*, this Court explained that a parent may not invoke their Fifth Amendment right not to answer questions and then use that right as both a shield and sword in a civil proceeding:

> [S]ince [m]other invoked her 5th Amendment right not to answer questions . . . , the trial court could infer that her answers would have been damaging to her claims . . . . Although mother had a right to assert her constitutional right not to answer, this proceeding is a civil case and she is not entitled to use the privilege against self-incrimination as both a "shield and a sword."

282 N.C. App. 283, 288, 871 S.E.2d 146, 151 (2022) (citation omitted). The trial court was permitted to draw an adverse inference against Mother

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3. We note that adjudicatory finding 23 does not mention Mother's choice to invoke her Fifth Amendment right.

for invoking the Fifth Amendment and the unchallenged findings of fact indicate that the trial court did not terminate Mother's parental rights solely because of her refusal to answer questions at prior hearings.

4. Grounds to Terminate Mother's Rights

[4] Mother argues that the trial court committed reversible error by concluding that she (1) neglected Billy, specifically arguing that there is a lack of evidence to support that there was a probability of repetition of neglect; and (2) willfully left Billy in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions which led to Billy's removal.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), the trial court may terminate a parent's parental rights upon finding that "[t]he parent has . . . neglected the juvenile[,]" as defined in N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1) (2023). In relevant part, a neglected juvenile is defined as one whose parent "[d]oes 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), (15)(e) (2023).

Such "neglect must exist at the time of the termination hearing." *In re B.S.O.*, 234 N.C. App. 706, 714, 760 S.E.2d 59, 65 (2014) (quotation marks, brackets, and citation omitted). "[I]f the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re V.S.*, 380 N.C. 819, 822, 869 S.E.2d 698, 701 (2022) (quotation marks and citation omitted). This Court has expressly stated that "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re C.M.P.*, 254 N.C. App. 647, 655, 803 S.E.2d 853, 859 (2017) (citation omitted). Additionally, a parent's failure to "demonstrate that sustained behavioral change of the type necessary to ensure the [minor child's] safety and welfare" can support a conclusion that there is a likelihood of repetition of neglect. *See In re R.L.R.*, 381 N.C. 863, 875, 874 S.E.2d 579, 590 (2022).

Here, it is undisputed that Billy was previously adjudicated neglected. As to the likelihood of future neglect, the trial court made numerous supported findings of fact that Mother could continue to neglect Billy if he was returned to her care, including:

> 15. . . . .
>
> > b.(i)(3) If the respondent parents could not admit and/or recognize the abuse and neglect they imposed on

> [Billy] and his older siblings, they were not able to demonstrate to the [c]ourt that they understood the impact they have had on the juveniles and they were not able to demonstrate they have rehabilitated themselves and the circumstances that caused the abuse and neglect.
>
> b.(i)(4) The respondent parents had another child named [Penny] and they are residing together. Both of them have expressed an intent to reunify with all the children as one family unit. This intent demonstrates that Mother was not considering the best interest of all of the children, as she intended them to reunify with her significant other who this [c]ourt had found committed acts of physical and emotional abuse upon them, including torture upon [Sarah].
>
> . . . .

16. [M]other participated in DV services, mental health treatment and parenting. However,

> . . . .
>
> b. Additionally, Mother failed to be transparent with her therapist and had not discussed with her therapist about the actions of abuse, torture, improper supervision and improper discipline that the respondent parents committed against [Billy] and his siblings, despite Mother indicating at the [permanency planning hearing] that she has been completely honest with her therapist.

. . . .

18. At [the second permanency planning hearing], the [c]ourt ruled:

> . . . .
>
> b. That . . . the respondent parents were not . . . actively participating or cooperating with the plan, [DSS] and GAL. They . . . were both acting in a manner inconsistent with the health and safety of the juvenile.

. . . .

20. As of the completion of this TPR hearing, Mother has demonstrated that she had employment and housing. She

had engaged in mental health services, parenting classes, and DV services, but she failed to provide documentation/evidence that she has accepted the role she played in [Sarah's] abuse or the neglect she imposed on [Stephanie and Billy]. She failed to demonstrate to the [c]ourt that she understands the impact on [Billy] and failed to demonstrate that she has been able to rehabilitate herself from the circumstances that caused the neglect against [Billy]. Mother has not been forthcoming with her therapist. She also continues to engage with, and not protect herself from, Father [] despite a recent severe incident of domestic violence he perpetrated against her at her residence.

. . . .

23. The respondent parents have been separated from [Billy] for approximately two years—a long period of time. As noted above, [Billy] was adjudicated neglected on February 2, 2022. The neglect that led to the removal and adjudication created a substantial risk of harm to [Billy]. There is a likelihood of repetition of neglect in that there exists a substantial risk of harm to [Billy] if he were returned home, as demonstrated by the respondent parents' collective failure to accept responsibility for the conditions that led to the removal and adjudication which makes it impossible for this [c]ourt to know whether the respondent parents know their behavior was wrong and/or that they know (or have learned) how to change said behavior. Respondent parents' behavior was so egregious and severe that [Billy's] safety in their care cannot be ensured. [Billy] is currently 2 years old, is not potty trained, and likely to engage in bed wetting for a significant period of time which could result in the same heinous, cruel, and tortuous disciplinary measures taken by the respondent parents against [Sarah] for bed wetting. Additional factors the [c]ourt considered as it relates to willfulness and the creation of a substantial risk of harm for [Billy] are mother's voluntary decision not to be honest with her therapist about what led [Billy] to be taken into [DSS] custody, mother's voluntary decision to continue contact with father after a recent severe domestic violence incident, and her failure to file for a DVPO after said incident all of which demonstrated a likelihood of mother not protecting [Billy] as she had not protected herself. . . .

> 24. [Mother] could have been, but made a voluntary decision to not be[,] honest and forthcoming with her therapist. . . . [S]he made a voluntary choice to continue contact with father by accepting his phone calls while he was in jail following the recent DV incident and not seek a DVPO after said incident despite having the ability to file a DVPO against him and serve him in jail. . . .

These supported findings of fact show that Mother failed to complete all of the components of her case plan, failed to acknowledge or accept responsibility for the reasons that Billy came into DSS custody, and failed to understand the role she played in Billy's neglect. These findings support the trial court's conclusion that there was a likelihood of future neglect by Mother. *See R.L.R.*, 381 N.C. at 875, 874 S.E.2d at 589 (determining that parents are "required to demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors"); *see also In re M.S.E.*, 378 N.C. 40, 58-59, 859 S.E.2d 196, 210-11 (2021) (upholding ground of neglect in part based on the parent's inadequate engagement in remedial services and inability to understand the needs of their children).

Because the trial court's findings support its conclusions of law that there was a previous adjudication of neglect and a likelihood of future neglect if Billy was returned to Mother's care, the trial court did not err in determining that grounds existed to terminate Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). *See In re V.S.*, 380 N.C. at 822, 869 S.E.2d at 701.

"In termination of parental rights proceedings, the trial court's finding of any one of the enumerated grounds [in N.C. Gen. Stat. § 7B-1111(a)] is sufficient to support a termination." *In re N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49, 57 (2014) (quotation marks, ellipsis, and citation omitted). Accordingly, we need not address the other ground for termination found by the trial court.

5. Best Interest Determination

[5] Mother lastly argues that the trial court abused its discretion by terminating her parental rights because it was not in Billy's best interest to do so.

After an adjudication that one or more grounds exist to terminate parental rights under N.C. Gen. Stat. § 7B-1111, the trial court "proceeds to the dispositional stage." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700. The court shall determine whether it is in the juvenile's best interest to terminate parental rights by considering the following criteria:

1. The age of the juvenile.

2. The likelihood of adoption of the juvenile.

3. Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

4. The bond between the juvenile and the parent.

5. The quality of the relationship between the juvenile and the proposed adoptive parent.

6. Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2023). The trial court must make written findings of the factors it considers to be relevant. *In re Z.A.M.*, 374 N.C. at 99, 839 S.E.2d at 799.

Here, the trial court made the following dispositional findings of fact:

1. The Adjudicatory Findings of Fact are incorporated herein by reference as if fully set forth.

2. [DSS] proffered live testimony from [the social worker]. The GAL proffered live testimony . . . and GAL Exhibit 1. GAL Exhibit 1 was the GAL's Termination of Parental Rights Report which was admitted into evidence without objection.

3. The permanent plan in [Billy's] best interest is adoption. The parents having their parental rights is a barrier to adoption.

4. [Billy] recently turned 2 years old. He has been in [DSS] custody since he was approximately one month old so he has been in custody almost his entire life.

5. Terminating the respondent parents' parental rights will aid in the accomplishment of the permanent plan of adoption. Neither the family nor any other prospective adoptive home can adopt the juvenile unless the respondent parents consent to an adoption or their parental rights are terminated. The respondent parents have insufficient progress on addressing the removal conditions. Given that lack of progress, significant barriers to reunification remain. Therefore, the best option available for [Billy] is for him to be adopted which requires that the parental rights of the respondent parents be terminated.

6. The Court has evidence that a bond exists between [Billy] and the respondent parents. However, the Court has no evidence of the type of bond that exist[s]. Specifically, whether it is strong or nurturing bond; or whether [Billy] even recognizes Mother and Father [] to be his parents. Additionally, Father [] has missed all his visits with [Billy] beginning July 6, 2023 through the date of the TPR hearing due to his incarceration for committing domestic violence against Mother.

7. It is not in [Billy's] best interest to keep him in [DSS] custody indefinitely for the respondent parents to have more time to show progress, to admit and/or recognize the neglect they imposed, to demonstrate to the Court that they understand the impact on [Billy], to demonstrate they have rehabilitated themselves and the circumstances that caused the neglect against [Billy], and/or to find an alternative placement for possible guardianship which is not the primary permanency plan.

8. It is in his best interest for [Billy] to obtain a safe, stable, and permanent home.

9. [Billy] has lived with his current foster family since January 12, 2022 so for approximately one year and nine months of his 2-year-old life. [Billy] has a strong, loving bond with his foster parents, as well as the biological children of the foster parents. [Billy] calls foster parents "mommy" and "daddy[,]" and he refers to the foster parents' biological children as "sister" and "brother." The quality of the relationship and care provided by the foster parents is excellent, as they ensure that all of [Billy's] physical, mental, emotional, and developmental needs are met. The foster parents provide positive and nurturing care to [Billy]. [Billy] is happy, nurtured[,] and loved by the foster parents.

10. The foster parents have expressed a desire to adopt [Billy] and have remained committed throughout the case to adopting [Billy] if he became legally cleared to do so.

11. The likelihood of [Billy] being adopted is very high.

12. Terminating the respondent parents' parental rights is in the juvenile's best interest.

Mother argues that dispositional finding 6 is not supported by the evidence because the trial court finds "no evidence of the type of bond existed between Billy and [Mother] despite the social worker testifying that a bond existed." The record evidence supports dispositional finding 6, as testimonial evidence shows that *a* bond existed between Billy and Mother, but there is no evidence of the *type* of bond that existed, such as a strong or nurturing bond. The GAL report entered into evidence and the social worker's testimony merely show that Mother had "appropriate and positive interactions with [Billy] during supervised visits[,]" but they are otherwise completely silent as to the type and extent of the bond between Mother and Billy. There is additionally no evidence that Billy recognized Mother to be his parent. Finding 6 is thus supported by competent evidence.

Mother argues that dispositional finding 7 is not supported by the evidence because "Father . . . provided approved by Gaston County DSS placements of close family relatives," our General Statutes prefer relative placements over non-family members, and Father's mother and brother "were inappropriately excluded."

We first note that the trial court's unchallenged adjudicatory finding 22, incorporated by reference into its dispositional findings, supports dispositional finding 7. The trial court found:

> 22. As of the completion of this TPR hearing . . . [DSS] had already appropriately ruled out [Father's] proposed family members. Furthermore, this [c]ourt did not hear any evidence at this hearing that warranted reconsideration of [Father's] proposed family members. [Father's mother's] testimony confirmed that she allowed unauthorized contact between the parents and [Billy] against the [c]ourt's order. Additionally, [father's brother's] testimony at this hearing is not credible in that it is inconsistent with the [DSS social worker's] credible testimony during this hearing and with the [c]ourt's [prior] order.

Mother did not challenge adjudicatory finding 22, and it is thus binding on appeal. *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 65 (citations omitted). This finding demonstrates that the trial court considered the testimony from Father's mother and Father's brother offered during the TPR hearing and weighed the credibility of their testimony before deciding that it would not reconsider Father's mother or brother as possible relative placements. The dispositional finding 7 is supported by the competent evidence.

Moreover, our Supreme Court has consistently held that a trial court is not required to consider potential relative placements during the dispositional phase of a TPR proceeding. *See In re H.R.S.*, 380 N.C. 728, 736, 869 S.E.2d 655, 660 (2022) (explaining that the trial court is required to consider relative placements in the "initial abuse, neglect, and dependency stage of a juvenile proceeding" and "the trial court is not expressly directed to consider the availability of a relative placement" during the dispositional phase); *see also In re S.D.C.*, 373 N.C. 285, 289, 837 S.E.2d 854, 857 (2020).

The trial court properly considered all the relevant factors of N.C. Gen. Stat. § 7B-1110, and it was within the discretion of the trial court to decide how each factor should be weighed. *In re I.N.C.*, 374 N.C. 542, 550, 843 S.E.2d 214, 220 (2020). This Court may not "substitute our preferred weighing of the relevant statutory criteria for that of the trial court[.]" *Id.* at 550-51, 843 S.E.2d at 220. The trial court's conclusion that termination of Mother's parental rights was in Billy's best interest "was not manifestly unsupported by reason." *In re Z.L.W.*, 372 N.C. at 438, 831 S.E.2d at 66.

C. Father's Appeal

Father's sole issue on appeal is that the trial court abused its discretion by terminating his parental rights without first making adequate findings of fact about two relatives offered as relative placements for Billy.

Father does not challenge any of the adjudicatory findings of fact and challenges only the portion of dispositional finding 7 pertaining to alternative placement for possible guardianship for Billy. The dispositional finding 7 states:

> 7. It is not in [Billy's] best interest to keep him in [DSS] custody indefinitely for the respondent parents to have more time to show progress, to admit and/or recognize the neglect they imposed, to demonstrate to the [c]ourt that understand the impact on [Billy], to demonstrate they have rehabilitated themselves and the circumstances that caused the neglect against [Billy], and/or to find an alternative placement for possible guardianship which is not the primary permanency plan.

We first note that the trial court's unchallenged adjudicatory finding 22, incorporated into its dispositional findings, supports dispositional finding 7. The trial court found:

> 22. As of the completion of this TPR hearing . . . [DSS] had already appropriately ruled out [Father's] proposed family members. Furthermore, this [c]ourt did not hear any evidence at this hearing that warranted reconsideration of [Father's] proposed family members. [Father's mother's] testimony confirmed that she allowed unauthorized contact between the parents and [Billy] against the [c]ourt's order. Additionally, [father's brother's] testimony at this hearing is not credible in that it is inconsistent with the [DSS social worker's] credible testimony during this hearing and with the [c]ourt's [prior] order.

Father did not challenge adjudicatory finding 22, and it is thus binding on appeal. *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 65 (citations omitted). This finding demonstrates that the trial court considered the testimony from Father's mother and Father's brother offered during the TPR hearing and weighed the credibility of their testimony before deciding that it would not reconsider Father's mother or brother as possible relative placements. The dispositional finding 7 is supported by the evidence.

Moreover, our Supreme Court has consistently held that a trial court is not required to consider potential relative placements during the dispositional phase of a TPR proceeding. *See In re H.R.S.*, 380 N.C. at 736, 869 S.E.2d at 660 (explaining that the trial court is required to consider relative placements in the "initial abuse, neglect, and dependency stage of a juvenile proceeding" and "the trial court is not expressly directed to consider the availability of a relative placement" during the dispositional phase); *see also In re S.D.C.*, 373 N.C. at 289, 837 S.E.2d at 857.

The trial court properly considered all the relevant factors of N.C. Gen. Stat. § 7B-1110, and it was entirely within the discretion of the trial court to decide how each factor should be weighed. *In re I.N.C.*, 374 N.C. at 550, 843 S.E.2d at 220. This Court may not "substitute our preferred weighing of the relevant statutory criteria for that of the trial court[.]" *Id.* at 550-51, 843 S.E.2d at 220. The trial court's determination that termination of Father's parental rights was in Billy's best interest "was not manifestly unsupported by reason." *In re Z.L.W.*, 372 N.C. at 438, 831 S.E.2d at 66.

III. Conclusion

The trial court's adjudicatory findings of fact are supported by clear, cogent, and convincing evidence, which in turn support the trial court's conclusion of law that Billy was a neglected juvenile. The trial court did not abuse its discretion in concluding that

termination of Mother and Father's parental rights was in Billy's best interest. Accordingly, we affirm the trial court's order terminating Mother and Father's parental rights.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

IN THE MATTER OF DAVID ROBERT GOLDBERG

No. COA23-1015

Filed 17 September 2024

Venue—petition for termination of sex offender registration—out-of-state conviction—registrant no longer residing in-state

The trial court erred by dismissing a petition for termination of sex offender registration based on improper venue where petitioner, who registered as a sex offender in Mecklenburg County based on his out-of-state reportable conviction because that is where he resided when he moved to North Carolina, properly filed his termination petition in Mecklenburg County even though he no longer lives in North Carolina. Although the controlling statute, N.C.G.S. § 14-208.12A, does not address where a termination petition should be filed for former North Carolina residents with out-of-state reportable convictions who no longer reside in-state, the appellate court interpreted the statute in the context of the rest of Article 27A in Chapter 14 of the General Statutes to require a person seeking removal from the registry to file in the county in which they previously maintained registration. Here, Mecklenburg County was the correct venue and the superior court in that county had jurisdiction to hear the petition.

Appeal by Petitioner from Order entered 6 July 2023 by Judge Michael A. Stone in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 May 2024.

Paul M. Dubbeling for Petitioner-Appellant.

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

HAMPSON, Judge.

Factual and Procedural Background

David Robert Goldberg (Petitioner) appeals from an Order dismissing his Petition for Termination of Sex Offender Registration based on improper venue pursuant to N.C. Gen. Stat. § 14-208.12A (2023). The Record before us tends to reflect the following:

In 2003, Petitioner was convicted of Possession of Child Pornography in the United States District Court for the District of South Carolina. Upon his conviction, Petitioner registered as a sex offender in South Carolina.

In 2005, Petitioner moved to Mecklenburg County and, as required by law, registered as a sex offender with the Sheriff of Mecklenburg County. He later moved to Florida. In November 2022, he successfully petitioned for removal from the South Carolina sex offender registry.

On 23 June 2022, Petitioner filed a Petition for Termination of Sex Offender Registration in Mecklenburg County, where he last resided in North Carolina. At the hearing, the State argued that the trial court did not have jurisdiction under N.C. Gen. Stat. § 14-208.12A to hear the Petition. The State posited there was no jurisdiction because Section 14-208.12A requires a petitioner convicted of an out-of-state or federal offense to file the petition "in the district where the person resides" and Petitioner resided in Florida, not in Mecklenburg County.

Petitioner argued that dismissal was improper because the provisions of Section 14-208.12A directing where petitions should be filed establish venue rather than determining jurisdiction. Petitioner further argued venue was proper in Mecklenburg County under the general venue provisions of N.C. Gen. Stat. § 1-82. Petitioner also contended if there was no venue or jurisdiction in Mecklenburg County where he was registered—and, thus, nowhere in North Carolina—this raised constitutional issues under the Privileges and Immunities Clause and Equal Protection Clause of the United States Constitution.

The trial court interpreted the statute as establishing venue but ruled that Mecklenburg County was an improper venue and dismissed the Petition. On 6 July 2023, the trial court entered its written Order dismissing the Petition. On 26 July 2023, Petitioner timely filed written notice of appeal.

Issue

The dispositive issue is whether N.C. Gen. Stat. § 14-208.12A allows persons whose underlying conviction occurred outside of North Carolina and who no longer reside in the state to petition for removal from the North Carolina Sex Offender Registry in the district where they previously resided and registered as a sex offender in North Carolina.

Analysis

The North Carolina Sex Offender and Public Protection Registration Program is governed by Part 2 of Article 27A in Chapter 14 of the North Carolina General Statutes. By its terms it requires:

> (a) A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first. If the person is a current resident of North Carolina, the person shall register:
>
> (1) Within three business days of release from a penal institution or arrival in a county to live outside a penal institution; or
>
> (2) Immediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.
>
> Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A.

N.C. Gen. Stat. § 14-208.7.

Under N.C. Gen. Stat. § 14-208.12A, persons required to register as a sex offender may, ten years after their initial registration, petition in Superior Court to terminate their registration requirements. The statute directs where this petition should be filed:

> If the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed in the district where the person was convicted of the offense.

> If the reportable conviction is for an offense that occurred in another state, the petition shall be filed in the district where the person resides. . . . Regardless of where the offense occurred, if the defendant was convicted of a reportable offense in any federal court, the conviction will be treated as an out-of-state offense for the purposes of this section.

N.C. Gen. Stat. § 14-208.12A(a). The statute thus expressly assigns the proper district for filing a petition for (1) those with in-state convictions (the district of conviction) and (2) those with out-of-state convictions who reside in North Carolina (their district of residence).

As an initial matter, in this case, the State contends the trial court properly dismissed the Petition. However, the State posits the trial court should have grounded its decision in a lack of jurisdiction rather than venue. The State rests its argument on our decision in *In re Dunn*, 225 N.C. App. 43, 738 S.E.2d 198 (2013).

In that case, the petitioner appealed the trial court's denial of his petition to terminate his sex offender registration. 225 N.C. App. 43, 44, 738 S.E.2d 198, 198 (2013). The petitioner's registration requirement stemmed from a North Carolina offense. *Id.* Accordingly, Section 14-208.12A(a) required that he file his petition in the district where he was convicted of the offense. The petitioner was convicted of the underlying sex offense in Montgomery County but filed his petition in Cumberland County. *Id.* We declined to reach the merits of the petitioner's argument, instead holding that under Section 14-208.12A the trial court did not have jurisdiction to hear the petition because it had not been filed in the county in which the petitioner had been convicted. *Id.* at 45, 738 S.E.2d at 199. Accordingly, we dismissed the appeal and vacated the trial court's order as null and void for lack of jurisdiction. *Id.*

The State contends that *Dunn*, because it describes Section 14-208.12A(a) as jurisdictional in nature, requires we hold the trial court in this case likewise did not have jurisdiction to hear Petitioner's Petition. *Dunn* is, however, inapposite. *Dunn* does not address registrants with out-of-state convictions and, unlike in this case, addresses a petition filed in the incorrect forum when the correct forum was expressly provided by the statute.

Petitioner's conviction, unlike that in *Dunn*, occurred outside of North Carolina. The statute mandates that his petition be filed "in the district where [he] resides." N.C. Gen. Stat. § 14-208.12A(a). The State encourages us to read this provision narrowly, such that it only

establishes jurisdiction in a district so long as the person remains a physical resident of that district. Unlike in *Dunn*, where the statute mandated the petition be filed in Montgomery County but it was mistakenly filed in Cumberland, the State argues that filing the Petition in Mecklenburg was improper because there is *no* district in which it can be properly filed. This reading would leave any registrant with an out-of-state conviction who moves to another state unable to petition for removal from the registry after the ten-year period.

The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment. *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005). In determining this intent, we look first to the plain language of the statute, then to the legislative history, the spirit of the act, and what the act seeks to accomplish. *State v. Langley*, 371 N.C. 389, 395, 817 S.E.2d 191, 196 (2018). If a literal interpretation of a word or phrase's plain meaning would lead to "absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277.

The better reading of this statute is to interpret it as a whole with the rest of Article 27A, which establishes the North Carolina Sex Offender Registry and sets registration requirements. "Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978). Any North Carolina resident with a reportable conviction is required to register with the Sheriff "of the county where the person resides." N.C. Gen. Stat. § 14-208.7. When a person required to maintain registration moves to a new county, they are required to report to both the Sheriff of the current county of residence and also the Sheriff of the new county of residence. *See* N.C. Gen. Stat. § 14-208.9(a). The Sheriff then reports the change of address or county to the North Carolina Department of Public Safety who, in turn, informs the new Sheriff of the change of address. *Id*. In that case, logically, a person with a reportable out-of-state conviction would appropriately file a petition for removal from the registry under section 14-208.12 in the judicial district containing the new county of residence.

Likewise, if the person intends to move out of state, the person is required to notify the Sheriff of the county of current residence. *See* N.C. Gen. Stat. § 14-208.9(b) (2023). The Sheriff notifies the Department of Public Safety, who notifies the appropriate state official in the new state of residence. *See* N.C. Gen. Stat. § 14-208.9(b)(2) (2023). However, there

does not appear to be any mechanism—other than that provided by Section 14-208.12—for removal from the North Carolina Sex Offender Registry for former North Carolina residents with out-of-state reportable convictions who relocate out of the state.

Simply stated, any person who takes residency in North Carolina with a reportable conviction is required to maintain registration with the Sheriff "in the county where the person resides." N.C. Gen. Stat. § 14-208.7(a). In turn, Section 14-208.12a requires a person seeking removal from the registry to file in one of two venues: if the person has a reportable North Carolina conviction, that person must file in the judicial district where the conviction occurred. *See Dunn*, 225 N.C. App. At 45, 738 S.E.2d at 199. If the person has a reportable out-of-state or federal conviction, that person must file in the judicial district in which they reside and thus were required to register in North Carolina. N.C. Gen. Stat. § 14-208.12A(a).

Here, to comply with the statutory North Carolina Sex Offender Registry reporting requirements, Petitioner was required to maintain registration in Mecklenburg County—where he resided in North Carolina. There is no indication on this Record that Petitioner relocated his residence elsewhere in North Carolina or became a resident of any other North Carolina county such that he was required to register in a different North Carolina county. As such, for purposes of the North Carolina Sex Offender Registry, Petitioner's residency in North Carolina remains in Mecklenburg County.

Thus, Petitioner—with an out-of-state reportable conviction[1]—filed the Petition in Mecklenburg County Superior Court: the district of his residence in North Carolina and the county in which he was registered with the Sheriff consistent with N.C. Gen. Stat. §§ 14-208.7 and 14-208.12A. Therefore, venue was proper in that judicial district and the Mecklenburg County Superior Court had jurisdiction to hear the Petition.[2] Consequently, the trial court erred in dismissing the Petition for improper venue.[3]

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1. For persons with a North Carolina reportable conviction, presumably venue and jurisdiction will always lie in the judicial district where the conviction occurred irrespective of residency. *Dunn*, 225 N.C. App. at 45, 738 S.E.2d at 199; N.C. Gen. Stat. § 14-208.12A(a).

2. Based on our resolution of this matter on statutory grounds we need not address the constitutional implications of Petitioner's argument.

3. We also do not address the State's alternative argument that the petition should have been dismissed based on Petitioner's failure to include with his petition an affidavit

Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's Order dismissing the Petition and remand this matter to the trial court for further proceedings on the Petition. We express no opinion on the merits of the Petition.

REVERSED AND REMANDED.

Judges WOOD and STADING concur.

IN THE MATTER OF K.B.C., A.G.S.C., J.N.C.

No. COA24-296

Filed 17 September 2024

1. Appeal and Error—appellate jurisdiction—notice of appeal—timeliness—tolling of filing period—nonjurisdictional defects

The Court of Appeals had jurisdiction to review a father's appeal from an order terminating his parental rights in his children, where a fourteen-day delay in serving the order on the father tolled the 30-day period for filing notice of appeal (in accordance with Civil Procedure Rule 58), and where the father timely filed his notice within 30 days after the order was served. Although the father's notice of appeal had incorrectly designated the Supreme Court as the appellate court to which he was appealing and failed to cite the correct statute providing for his right to appeal, these defects were nonjurisdictional.

2. Appeal and Error—preservation of issues—admission of evidence—termination of parental rights proceeding—invited error—failure to object

In an appeal from an order terminating a father's parental rights in his three children, the father could not challenge the court's admission of evidence at the termination hearing showing that the children's guardian ad litem (GAL) had obtained a signed statement

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verifying that he has provided notice of the petition to the sheriff of the county where he was originally convicted, as required by N.C. Gen. Stat. § 14-208.12A(a). This issue was not raised before the trial court and thus has not been preserved for our review. N.C. R. App. P. 10.

from him—without his attorney present—indicating that he would not oppose the entry of an order allowing his children to be adopted by their foster family. Firstly, any error in admitting the evidence was invited error, since it was the father's counsel who called the GAL to testify and elicited the testimony regarding the signed statement. Secondly, the father never objected to the GAL's testimony or to the admission of the signed statement during the hearing, and therefore he failed to preserve for appellate review his arguments challenging the evidence.

3. Termination of Parental Rights—grounds for termination—dependency—parent's incarceration—one of multiple factors

The trial court did not err in terminating a father's parental rights in his three children on the ground of dependency (N.C.G.S. § 7B-1111(a)(6)), where the court found that the father had been imprisoned for various crimes and would remain in custody for nine years. Although a parent's incarceration cannot serve as the sole basis for a dependency adjudication, the court here considered multiple factors beyond the fact of the father's incarceration, including the substantial length of his sentence, its impact on the children and their relationship with their father, the importance of the children's physical and emotional well-being, and the lack of appropriate alternative placements for the children.

Appeal by Respondent-Father from Orders entered 15 December 2023 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 27 August 2024.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for Respondent-Appellant Father.

Sherryl West for Petitioner-Appellee Wilkes County Department of Social Services.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP., by Samuel J. Ervin, IV, for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Father appeals from Orders terminating his parental rights in Karen, Amy, and Julie.[1] The Record before us tends to reflect the following:

On 6 December 2020, Wilkes County Department of Social Services (DSS) received a report that Amy and Karen, who were two-and-a-half and one-and-a-half years old respectively, were wandering alone in the parking lot of a motel while Mother[2] was sleeping in a motel room. Following substantiation of this allegation, both Mother and Respondent-Father entered into a safety plan with DSS. Pursuant to this safety plan, Respondent-Father was required to supervise the children's interactions with Mother at all times.

On 9 March 2021, Debbie Barker (SW Barker), the DSS social worker assigned to the family, was unable to locate them at their last known address. SW Barker then went to Respondent-Father's place of employment, a sawmill, and found Amy and Karen walking around the parking lot alone in only diapers and t-shirts. Mother was asleep in the family van. Respondent-Father was not present at the scene, in violation of the safety plan. Following this incident, Amy and Karen were placed with a temporary safety placement Respondent-Father had suggested. On 19 March 2021, Respondent-Father signed a case management plan in which he agreed to participate in random drug screenings, locate appropriate housing, and make weekly contact with the social worker.

On 29 April 2021, Respondent-Father was arrested for receiving stolen goods and was incarcerated in the Wilkes County Jail. While Respondent-Father was incarcerated, the minor children's temporary safety placement informed DSS they were no longer willing to care for the minor children. Respondent-Father provided SW Barker with his aunt and uncle as a temporary safety placement, and the children were subsequently placed with them.

On or about 4 July 2021, Respondent-Father was arrested for possession of methamphetamine, felony larceny, breaking and entering, larceny of a firearm, and failure to pay child support. Respondent-Father was sentenced to a term of incarceration, and his projected release

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1. Pseudonyms stipulated to by the parties pursuant to Rule 42(b) of the North Carolina Rules of Appellate Procedure.

2. Mother is not a party to this appeal.

date at the time of the termination hearing was 13 May 2032. On 8 July 2021, the children's placement informed DSS that they could not be a long-term placement for the minor children, but they would continue to care for them until DSS could find another placement. On 13 July 2021, DSS filed petitions alleging Karen and Amy were neglected juveniles.

On 15 August 2021, Mother gave birth to Julie several weeks prematurely. Julie weighed just over three pounds and tested positive for amphetamines, methamphetamine, and marijuana. On 16 August 2021, Mother left the hospital against medical advice and had no contact with DSS. On 23 August 2021, DSS filed a petition alleging Julie was a neglected and dependent juvenile and took her into nonsecure custody.

On 18 August 2021, SW Barker visited Respondent-Father at the Wilkes County Jail to inform him of Julie's birth and request that he provide another temporary safety placement for the minor children. Respondent-Father named one of his older daughters, as well as a friend and his wife, as potential placements. DSS could not approve Respondent-Father's daughter as a placement. Respondent-Father did not have a phone number for his friend, but he believed the friend and his wife lived somewhere on Highway 115 near a Dollar General. SW Barker was unable to locate them in a phone book or online. She also went out to the area described by Respondent-Father but was unable to locate them.

On 30 June 2022, all three minor children were adjudicated neglected, placed in DSS custody, and entered foster care. On 16 March 2023, DSS filed petitions to terminate both parents' parental rights in all three minor children. These Petitions came on for hearing on 17 November 2023. During these proceedings, Respondent-Father's counsel called David Borrows, the Guardian ad litem (GAL), to testify. Counsel for Respondent-Father elicited testimony that on 7 October 2022, GAL had visited Respondent-Father in prison "to find out what his intentions were and whether or not, if in the event TPR was ordered, whether he would intent [sic] to fight that." Counsel asked GAL: "And did [Respondent-Father] sign relinquishment papers at that point?" GAL responded: "I don't think it was a relinquishment paper at all. It was just a statement saying that he had no intention to fight the order [terminating his parental rights], if he were ordered by the court." GAL further testified he had written the statement Respondent-Father signed and he subsequently submitted it to the trial court. The statement read:

> I, [Respondent-Father] am the father of [Julie, Karen and Amy].

> I understand that my children are currently in foster care and are being well cared for. I believe it is in my childrens' [sic] best interest for them to remain in their present situation.
>
> I am informed by the Guardian ad Litem that the present care-givers wish to adopt my children. I state that I have no intention to oppose a court order to this effect.

GAL did not contact Respondent-Father's attorney, and his attorney was not present during this conversation with GAL. Counsel for GAL asked the trial court to admit the signed statement. No party objected to admission of the statement, and the trial court admitted it as evidence.

On 15 December 2023, the trial court entered Orders terminating both parents' parental rights in Karen, Amy, and Julie. In its Orders, the trial court concluded grounds existed to terminate Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) and (9). The Orders were served 29 December 2023. Respondent-Father timely filed Notice of Appeal on 16 January 2024. On 9 May 2024, Respondent-Father filed a Petition for Writ of Certiorari to address certain defects in his Notice of Appeal.

Appellate Jurisdiction

[1] The trial court filed its Orders terminating Respondent-Father's parental rights on 15 December 2023; however, the Orders were not served until 29 December 2023. Our Rules of Appellate Procedure provide that in appeals filed under N.C. Gen. Stat. § 7B-1001, notice of appeal is governed by Section 7B-1001(b) and (c). N.C. R. App. P. 3.1(b) (2023). Section 7B-1001(b), in turn, states notice of appeal "shall be given in writing by a proper party as defined in G.S. 7B-1002 and shall be made within 30 days after entry *and service of the order* in accordance with G.S. 1A-1, Rule 58." N.C. Gen. Stat. § 7B-1001(b) (2023) (emphasis added).

Here, the Orders were not served until 29 December 2023. Under Rule 58 of our Rules of Civil Procedure, when a party fails to serve a copy of the judgment upon the other parties within three days after the judgment is entered, "[a]ll time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement[.]" N.C. Gen. Stat. § 1A-1, Rule 58 (2023). Thus, because the Orders were not served on Respondent-Father for fourteen days after their filing, the thirty-day window for Respondent-Father to file notice of appeal was tolled until the Orders were served. Therefore, Respondent-Father

had thirty days from service of the Orders on 29 December 2023 to file notice of appeal. He did so on 16 January 2024, well within that thirty-day window. Accordingly, Notice of Appeal was timely filed.

Additionally, although Respondent-Father's Notice of Appeal contained two defects, these defects are non-jurisdictional, and we conclude his Notice of Appeal was sufficient. First, Respondent-Father incorrectly designated his appeal to the North Carolina Supreme Court rather than the Court of Appeals. However, this Court has previously held "a defendant's failure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the [opposing party] has not suggested that it was misled by the defendant's flawed notice of appeal." *State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014) (citing *State v. Ragland*, 226 N.C. App. 547, 552-53, 739 S.E.2d 616, 620 (2013)). *See also Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (notice of appeal was sufficient to confer jurisdiction where "[d]efendants could fairly infer Plaintiff's intent to appeal to this Court, as this Court is the only court with jurisdiction over Plaintiff's appeal.").

Second, Respondent-Father's Notice of Appeal failed to include the correct statute providing for his right to appeal. As above, this Court has previously heard appeals despite a party's failure to include the correct statute in its notice of appeal. *E.g.*, *Maldjian v. Bloomquist*, 245 N.C. App. 222, 225, 782 S.E.2d 80, 83 (2016) (noting defendants' failure to include a statutory citation in their notice of appeal, but determining "[n]onetheless, we review defendants' appeal . . ."). Thus, neither defect in Respondent-Father's Notice of Appeal is jurisdictional. Therefore, this Court has jurisdiction to hear his appeal.[3]

Issues

The issues on appeal are whether the trial court erred by: (I) admitting the signed statement procured by GAL; and (II) concluding grounds existed to terminate Respondent-Father's parental rights.

Analysis

I. Admission of Signed Statement

[2] Respondent-Father contends the trial court admitted and considered as evidence GAL's "makeshift surrender" and, in doing so, denied

3. Consequently, because we have appellate jurisdiction, we dismiss Respondent-Father's Petition for Writ of Certiorari.

Respondent-Father his right to counsel and right to fundamentally fair procedures. More specifically, Respondent-Father argues his interaction with GAL in which he signed the surrender violated his right to counsel, which is "an extension of a father's right to fundamental[ly] fair procedures" because GAL "encouraged [Respondent-Father] to surrender his parental rights" in the absence of counsel.

As an initial matter, DSS and GAL correctly note the trial court would not have heard the contested evidence had Respondent-Father not called GAL to testify and elicited the testimony about which Respondent-Father now complains. It is well-established under our caselaw that a party is not entitled to seek relief on appeal from a trial court action the party invited. *See, e.g.*, *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) ("Ordinarily one who causes . . . the court to commit error is not in a position to repudiate his action or assign it as ground for a new trial."); *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced."). *See also* N.C. Gen. Stat. § 15A-1443(c) (2023) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.").

Here, counsel for Respondent-Father called GAL to testify and affirmatively elicited testimony tending to show Respondent-Father signed a statement that he would not oppose the entry of an order allowing the children to be adopted by their current foster family. Counsel for Respondent-Father specifically asked GAL:

> [Counsel]: And then you did go see [Respondent-Father] while he was in Roanoke, right?
>
> [GAL]: I did.
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> [Counsel]: And what was the nature of that visit?
>
> [GAL]: I wanted to find out what his intentions were and whether or not, if in the event if TPR was ordered, whether he would intent [sic] to fight that.
>
> [Counsel]: And did he sign relinquishment papers at that point?
>
> [GAL]: I don't think it was a relinquishment paper at all. It was just a statement saying that he had no intention to fight the order, if he were ordered by the court.
>
> . . . .

> [Counsel]: Were you trying to act in the best interest of the minor children?
>
> [GAL]: Absolutely.

Thus, even if the trial court's admission and consideration of GAL's testimony was error, such error was invited by Respondent-Father and, consequently, he is not entitled to relief on appeal.

Even setting aside any invited error, Respondent-Father failed to preserve his right to challenge the admission and consideration of GAL's evidence on review. 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. 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) (2023).

The transcript of the proceeding reflects no such objection, motion, or request by Respondent-Father as to either the GAL's testimony or the admission of Respondent-Father's signed statement into evidence. Thus, this issue was not preserved for appellate review. In his briefing to this Court, Respondent-Father makes no argument to the contrary. Therefore, this issue is not preserved for appellate review.

II. Termination of Parental Rights

[3] Respondent-Father contends the trial court erred in terminating his parental rights in the minor children because it impermissibly based its determination grounds existed to terminate his parental rights solely on his incarceration. We disagree.

"A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists." *In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). "The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law." *Id.* Unchallenged findings of fact are binding on review.

Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

"If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child." *In re C.C.*, *J.C.*, 173 N.C. App. 375, 380-81, 618 S.E.2d 813, 817 (2005) (citation omitted). "The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights." *Id.* at 380-81, 618 S.E.2d at 817. "An 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." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (citation and quotation marks omitted).

Here, the trial court concluded Respondent-Father's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), which provides a court may terminate a party's parental rights upon a finding

> [t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6) (2023). Under N.C. Gen. Stat. § 7B-101, a "dependent juvenile" is one "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) (2023). "Thus, the trial court's findings regarding this ground 'must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re L.R.S.*, 237 N.C. App. 16, 19, 764 S.E.2d 908, 910 (2014) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

In support of this Conclusion, the trial court made specific Findings that are unchallenged on appeal, including the following:

> 25. On April 29, 2021, the Respondent Father was arrested for receiving stolen goods. The social worker is unaware of the length of this incarceration.
>
> . . . .
>
> 27. On or about July 4, 2021, the Respondent Father was arrested for larceny of a firearm, drug related charges, as well as other matters. He has not been out of custody since that day.
>
> . . . .
>
> 29. On or about July 8, 2021, [Paternal Aunt] contacted [DSS] and informed that she and her husband could not be long term placement for [Karen] and [Amy] and asked [DSS] to find a good home for the children.
>
> . . . .
>
> 34. In addition, Social Worker Barker spoke to the Respondent Father at the jail to ascertain any other possible placements for all three of his daughters. He named his older daughter, . . . who could not be approved by [DSS]. He also named Tom and Lisa Parsons. The Respondent Father had been incarcerated with Mr. Parsons. He did not have a phone number for the Parsons', but thought that they lived somewhere on Highway 115 near a Dollar General. The social worker searched the phone book and on line [sic] in an attempt to locate the Parsons'. She also went out to the area of the Dollar General to try to locate them with no luck. The Respondent Mother could not be located to ask for potential temporary placements.
>
> . . . .
>
> 55. Although the Respondent Father did provide two temporary safety placements for [Karen] and [Amy], neither were willing to care for [Karen] and [Amy] long term. Social Worker Debbie Barker investigated two additional possible placements recommended by the Respondent Father. His older daughter . . . could not be approved by [DSS]. He also named Tom and Lisa Parsons. Social Worker Barker could not locate them. Therefore, he

> lacked an appropriate alternative child care arrangement as to [Karen].
>
> . . . .
>
> 59. The Respondent Father was sentenced as a habitual felon and is scheduled to be released from incarceration on May 13, 2032.
>
> 60. The Respondent Father is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of N.C.G.S. 7B-101, and there is a reasonable probability that the incapability will continue for the foreseeable future.
>
> . . . .
>
> 63. Incarceration alone is neither a sword or a shield in a termination of parental rights decision. Though it is clear to the Court that the Respondent Father loves the minor child, there is a reasonable probability that the Respondent Father's incapability will continue for the foreseeable future. For the next nine years, he will not be able to provide and care for the minor child or have a personal relationship with her. These things are integral to the happiness, well-being and safety of the minor child, and the Respondent Father will not be in a position to provide these for the minor child.

The trial court made identical Findings in its Orders regarding Amy and Julie. Further, Kirsten Shepherd (SW Shepherd), a social worker for DSS, testified about Respondent-Father's capacity to care for the children while incarcerated:

> [Counsel for DSS]: [Respondent-Father] was doing what he could while incarcerated in jail or prison?
>
> [SW Shepard]: Right.
>
> [Counsel for DSS]: But, obviously, he could not establish housing for the children?
>
> [SW Shepard]: Correct.
>
> [Counsel for DSS]: He wasn't able to visit the children in person–
>
> [SW Shepard]: Correct.

> [Counsel for DSS]: –because of his circumstances? Obviously he couldn't be employed or supervise children while in jail or prison?
>
> [SW Shepard]: Correct.

Respondent-Father contends the trial court erred in concluding this ground for termination existed because its "entire basis for the dependency termination ground was [Respondent-Father]'s incarceration." This Court has consistently affirmed that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003)). However, as the above demonstrates, the trial court considered, beyond the fact of Respondent-Father's incarceration, the substantial length of Respondent-Father's sentence, its effect upon the minor children, the minor children's physical and emotional well-being, and Respondent-Father's lack of appropriate alternative placements for the children. The trial court expressly noted that because of his incarceration, "[f]or the next nine years, [Respondent-Father] will not be able to provide and care for the minor child[ren] or have a personal relationship with [them]. These things are integral to the happiness, well-being and safety of the minor child[ren][.]" Consideration of a parent's incarceration in this way is consistent with our precedent.

Our Supreme Court in *In re A.L.S.* considered an appeal by a respondent-parent whose parental rights had been terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). 375 N.C. 708, 851 S.E.2d 22 (2020). There, the respondent-parent was incarcerated during the proceedings and appeal, and she faced twenty-two to forty-two additional months of imprisonment. *Id.* at 714, 851 S.E.2d at 27. The Court explained "[t]he fact that respondent-mother faces an *extended period of incarceration* regardless of the exact date upon which she is scheduled to be released provides ample support for the trial court's determination that she was incapable of providing for the proper care and supervision of the children and that there was a reasonable probability that her incapability would continue for the foreseeable future." *Id.* (citations omitted) (emphasis added). Likewise, this Court has also found extended periods of incarceration can render a parent incapable of providing sufficient care and supervision of a minor child. *See, e.g.*, *In re L.R.S.*, 237 N.C. App. at 21, 764 S.E.2d at 911; *In re N.T.U.*, 234 N.C. App. 722, 735, 760 S.E.2d 49, 58 (2014).

Additionally, the Record establishes Respondent-Father was unable to provide an appropriate alternative childcare arrangement for the

minor children. The minor children, upon Respondent-Father's recommendation, had on two separate occasions been placed with caretakers; however, neither placement was willing to provide long-term care for the children. Most recently, Respondent-Father proposed his adult daughter, as well as a friend of his. As the trial court noted in its Findings, DSS was unable to approve Respondent-Father's daughter as a placement and DSS was unable to locate Respondent-Father's friend. Thus, the Record supports the trial court's Finding that Respondent-Father lacked an appropriate alternative childcare arrangement, and that Respondent-Father is unable to provide proper care and supervision for the minor children. Therefore, the trial court did not err in concluding Respondent-Father's parental rights were subject to termination based on dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).[4] Further, Respondent-Father makes no arguments as to disposition. Consequently, the trial court did not err in concluding it was in the best interests of the children to terminate Respondent-Father's parental rights and entering its Orders terminating Respondent-Father's parental rights.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Orders terminating Respondent-Father's parental rights in Karen, Amy, and Julie.

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

4. Because we conclude this ground has ample support in the trial court's Findings, we need not address Respondent-Father's arguments as to the remaining termination ground found by the trial court under N.C. Gen. Stat. § 7B-1111(a)(9). *See In re P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246 ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds." (citation and quotation marks omitted)).

CORNELIUS ANTONIO KINLAW, PLAINTIFF/PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, DEFENDANT/RESPONDENT

No. COA23-1101

Filed 17 September 2024

1. Administrative Law—health care personnel registry—alleged neglect or abuse—procedural due process—appeal barred by statute of limitations

In a contested case arising from the listing of petitioner—a health care worker—on the North Carolina Health Care Personnel Registry for charges of patient abuse and neglect (as required by N.C.G.S. § 131E-256(a)), the superior court did not violate petitioner's procedural due process rights in dismissing his appeal for lack of subject jurisdiction because, although petitioner had a liberty interest with which the State had interfered (being accused of wrongful actions that would likely hinder his future employment in the health care industry), the statute of limitations pertinent to his appeal (as found in N.C.G.S. § 150B-23(f)) was thirty days following the date on which the agency placed notice of its decision in the mail to petitioner, irrespective of when the notice was received.

2. Administrative Law—health care personnel registry—statute of limitations—incorrect appeal deadline in agency notice—equitable estoppel inapplicable

In a contested case arising from the listing of petitioner—a health care worker—on the North Carolina Health Care Personnel Registry for charges of patient abuse and neglect (as required by N.C.G.S. § 131E-256(a)), the Court of Appeals rejected petitioner's alternative argument that respondent agency should be estopped from relying on the thirty-day statute of limitations for appeal from placement on the registry on the ground that the agency gave petitioner an incorrect deadline for filing such an appeal; subject matter jurisdiction rests upon the law alone, rendering the doctrine of equitable estoppel irrelevant in this circumstance.

3. Administrative Law—health care personnel registry—erroneous statement by agency employee—tolling of statute of limitations not required

In a contested case arising from the listing of petitioner—a health care worker—on the North Carolina Health Care Personnel

Registry for charges of patient abuse and neglect (as required by N.C.G.S. § 131E-256(a)), the superior court did not err in declining to toll the statute of limitations applicable to petitioner's appeal due to an erroneous statement made by an agency employee to petitioner regarding the appeal because that situation did not rise to the level of an exceptional circumstance that would justify such relief.

Appeal by petitioner from order entered 19 September 2023 by Judge Joseph N. Crosswhite in Cabarrus County Superior Court. Heard in the Court of Appeals 14 August 2024.

Duke University School of Law, by Charles R. Holton and Jesse H. McCoy, II, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Farrah R. Raja, for respondent-appellee.

FLOOD, Judge.

Cornelius Antonio Kinlaw ("Petitioner") appeals from an order denying his request for judicial review for lack of subject matter jurisdiction. Petitioner first argues the trial court's conclusion that, pursuant to N.C. Gen. Stat. § 131E-256, it lacked subject-matter jurisdiction over Petitioner's appeal, was erroneous and in violation of Petitioner's procedural due process rights under the North Carolina Constitution and the United States Constitution. Petitioner further contends, in the alternative, the North Carolina Department of Health and Human Services ("DHHS") should be estopped from relying on the thirty-day statute of limitations to dismiss Petitioner's claim for lack of subject matter jurisdiction, or the statute of limitations should have been tolled. After careful review, we conclude: Petitioner had adequate notice, and his due process rights were not violated; Petitioner failed to comply with the required statutory provisions, which failed to confer subject matter jurisdiction on the trial court; and this case does not rise to the circumstances for which a statute of limitations may be tolled.

I. Factual and Procedural Background

Petitioner was working as a member of the health care field at the Atrium Health Behavioral Health clinic in Charlotte, North Carolina, when DHHS began investigating allegations against Petitioner of patient abuse and neglect when Petitioner "aggressively handled the [patient] and pushed the [patient] to the floor[.]" DHHS mailed a notice letter to

Petitioner via certified mail on 4 October 2022, which contained notice of the investigation, and stated that Petitioner's name was being placed on the North Carolina Health Care Personnel Registry for charges of patient abuse and neglect. The letter also contained further instructions on Petitioner's right to appeal.

On 6 October 2022, Petitioner received a notification from the United States Postal Service informing him that he was to receive a letter from DHHS that day, but Petitioner stated the letter did not arrive. Two days later, on 8 October 2022, Petitioner went to the post office to inquire about the letter and was informed that the letter was still in transit. On 10 October 2022, after another two days of not receiving the letter, Petitioner returned to the post office, where he was again told the letter was in transit. On that same day, Petitioner spoke with Paula Evans, DHHS's investigator for Petitioner's case, and Ms. Evans instructed him to wait for the letter. Ms. Evans further informed Petitioner that once Petitioner received the letter, he would have thirty days to appeal.

Over a week later, on 19 October 2022, Petitioner still had not received the letter and requested Ms. Evans to email him the letter. Ms. Evans emailed the letter to Petitioner the following day.

Once Petitioner received the letter, the instructions to appeal informed him to call the Office of Administrative Hearings ("OAH") for more information and provided him the number to do so. Petitioner called OAH eight times between 25 October and 28 October 2022 before receiving the necessary information to appeal to the OAH. On 6 November 2022, Petitioner emailed his appeal to the OAH as directed, and it was filed on 7 November 2022.

Upon appeal to the OAH, on 22 March 2023, Administrative Law Judge Selina Malherbe dismissed Petitioner's appeal for lack of subject matter jurisdiction. In doing so, Judge Malherbe found that Petitioner had failed to timely file his appeal, reasoning that, per N.C. Gen. Stat. § 131E-256, an appellant must file his appeal within thirty days following the mailing of DHHS's written notice; Petitioner filed his on 7 November 2022, more than thirty days following DHHS's 4 October 2022 mailing of the letter. Petitioner appealed to the trial court on 13 April 2023, and was again dismissed for lack of subject matter jurisdiction. Petitioner timely appealed to this Court on 26 September 2023.

II. Jurisdiction

This Court has jurisdiction to review Petitioner's appeal as an appeal from the final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, Petitioner argues (A) the trial court's conclusion that, pursuant to N.C. Gen. Stat. § 131E-256, it lacked subject matter jurisdiction over Petitioner's appeal, was erroneous, and in violation of Petitioner's procedural due process rights under the North Carolina Constitution and the United States Constitution. Petitioner also contends that, in the alternative, either (B) DHHS should be estopped from relying on the thirty-day statute of limitations to dismiss Petitioner's claim for lack of subject matter jurisdiction, or (C) the statute of limitations should have been tolled. We address each argument, in turn.

A. Procedural Due Process

[1] This Court reviews de novo an agency's final decision for issues of contested constitutional violations. N.C. Gen. Stat. §§ 150B-51(b)(1)–(4), (c) (2023). Under a de novo review, "the reviewing court considers the matter anew and freely substitutes its own judgment for the agency's." *Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 69, 692 S.E.2d 96, 102 (2010) (citation and internal quotation marks omitted) (cleaned up).

Pursuant to the United States Constitution, "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const., amend. XIV, § 1. The North Carolina Constitution similarly provides that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Our Supreme Court has held that "[t]he 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." *Rhyne v. K–Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (citation and internal quotation marks omitted).

"The Due Process Clause provides two types of protection—substantive and procedural due process." *State v. Williams*, 235 N.C. App. 201, 205, 761 S.E.2d 662, 665 (2014) (citation omitted). "Procedural due process restricts governmental actions and decisions which 'deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.' " *Peace v. Emp. Sec. Comm'n of N.C.*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18, 31 (1976)). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Id.* at 322, 507 S.E.2d at 278 (citation omitted).

To examine a procedural due process claim, this Court must first "determine whether there exists a liberty or property interest which has been interfered with by the State[,]. . .[and] second, we must determine whether the procedures attendant upon that deprivation were constitutionally sufficient." *Delhaize Am., Inc. v. Lay*, 222 N.C. App. 336, 343, 731 S.E.2d 486, 491 (2012) (citation and internal quotation marks omitted).

1. Liberty Interest

First, Petitioner contends he has a liberty interest with which the State has interfered. We agree.

"One of the liberty interests encompassed in the Due Process Clause of the Fourteenth Amendment is the right 'to engage in any of the common occupations of life[.]' " *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923)). Our North Carolina Supreme Court has previously held that "[t]he right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities." *Id.* at 724, 260 S.E.2d at 617. Thus, "where a state agency publicly and falsely accuses a discharged employee of dishonesty, immorality, or job[-]related misconduct, considerations of due process demand that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma upon his reputation." *Id.* at 724, 260 S.E.2d at 617 (citations omitted).

Under N.C. Gen. Stat. § 131E-256, DHHS maintains a registry of all health care personnel who DHHS has found to have, *inter alia*, committed abuse or neglect within a health care facility. *See* N.C. Gen. Stat. § 131E-256(a) (2023). A member of the health care personnel who wishes to contest such findings before being placed on the registry must file a petition "within [thirty] days of the mailing of the written notice of [DHHS]'s intent to place its findings about the person in the [registry]." N.C. Gen. Stat. § 131E-256(d) (2023).

In *Presnell*, the plaintiff was dismissed from her job as the manager of an elementary school cafeteria after being accused of bringing liquor into work. 298 N.C. at 717–18, 260 S.E.2d at 613. The plaintiff sued for defamation and wrongful discharge. *Id.* at 718, 260 S.E.2d at 613. The trial court dismissed the plaintiff's defamation claim, finding the claim failed to state a claim for defamation, but the Court of Appeals reversed, holding a claim for defamation had been sufficiently made. *Id.* at 718–19, 260 S.E.2d at 613. This matter eventually came before our Supreme Court, whereupon the Court concluded that "[b]y alleging acts of defamation

concurrent with and related to the termination of her employment, [the] plaintiff's complaint does no more than state a claim of right to an [o]pportunity to be heard in a meaningful time, place, and manner[,]" thus, invoking a due process claim. *Id.* at 724, 260 S.E.2d at 617. The Supreme Court proceeded to analyze the procedural due process claim and held that the plaintiff had a "colorable claim" of a constitutionally protected liberty interest. *Id.* at 724, 260 S.E.2d at 617. The Supreme Court reasoned that because the plaintiff's dismissal from her job was based on "alleged unsupported charges," this "might wrongfully injure her future placement possibilities" if left unrefuted. *Id.* at 724, 260 S.E.2d at 617. The Court concluded the plaintiff's due process rights would be satisfied "by providing [the] plaintiff an opportunity to clear her name in a hearing of record [e]ither before her discharge [o]r within a reasonable time thereafter." *Id.* at 724, 260 S.E.2d at 617.

Here, like in *Presnell*, Petitioner has been accused of wrongful actions that will likely hinder his future employment in the health care industry, since the registry is available for all health care facilities to review. *See* N.C. Gen. Stat. § 131E-256(d2) (2023) ("Before hiring health care personnel into a health care facility or service, every employer at a health care facility shall access the Health Care Personnel Registry and shall note each incident of access in the appropriate business files."). Thus, Petitioner has a liberty interest at stake that, if left unrefuted, "might wrongfully injure [Petitioner's] future placement possibilities." *See Presnell*, 298 N.C. at 724, 260 S.E.2d at 617.

Because Petitioner has a liberty interest that has been interfered with, we now assess whether DHHS's procedures for appealing placement on the registry were constitutionally sufficient. *See Delhaize Am.*, 222 N.C. App. at 343, 731 S.E.2d at 491.

2. Procedures

Second, Petitioner contends that the trial court's enforcement of the thirty-day statute of limitations against his appeal was in violation of his procedural due process rights. We disagree.

Our courts have long held that the North Carolina Constitution's Due Process Clause "has the same meaning as due process of law under the Federal Constitution." *State v. Garrett*, 280 N.C. App. 220, 235, 867 S.E.2d 216, 226 (2021). Procedural due process "requires that an individual receive adequate notice and a meaningful opportunity to be heard before he is deprived of life, liberty, or property." *Herron v. N.C. Bd. of Exam'rs for Eng'rs & Surveyors*, 248 N.C. App. 158, 166, 790 S.E.2d 321, 327 (2016) (citation and internal quotation marks omitted).

Due process does not require "actual notice before the government may" impose on one's liberty interest, but "[r]ather, due process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *St. Regis of Onslow Cnty. v. Johnson*, 191 N.C. App. 516, 519–20, 663 S.E.2d 908, 911 (2008) (citation and internal quotation marks omitted). Deprivation of a protected interest must be "implemented in a fair manner." *Garrett*, 280 N.C. App. at 236, 867 S.E.2d at 226. "Whether a party has adequate notice is a question of law." *Trivette v. Trivette*, 162 N.C. App. 55, 58, 590 S.E.2d 298, 302 (2004) (citation omitted).

When filing an action against being placed on the registry, a member of the health care profession must file a petition "within [thirty] days of the mailing of the written notice of the Department's intent to place its findings about the person in the [registry]." N.C. Gen. Stat. § 131E-256(d). Because N.C. Gen. Stat. § 131E-256(d) does not explicitly state when notice commences, we look to the general statute of N.C. Gen. Stat. § 150B-23(f) regarding administrative cases, which provides,

> [t]he *time limitation* [for filing a petition for a contested case hearing in the OAH], whether established by another statute, federal statute, or federal regulation, or this section, *commences when notice is given* of the agency decision to all persons aggrieved that are known to the agency by personal delivery, electronic delivery, or *by the placing of the notice in an official depository of the United States Postal Service* wrapped in a wrapper addressed to the person at the latest address given by the person to the agency.

N.C. Gen. Stat. § 150B-23(f) (2023) (emphasis added).

This Court has held that, under this statute, "a petitioner is *deemed* to have notice of a final agency decision as soon as the agency places the decision in the mail, even if it takes several days for the petitioner to receive it." *Krishnan v. N.C. Dep't of Health & Hum. Servs.*, 274 N.C. App. 170, 173, 851 S.E.2d 431, 433 (2020) (citing N.C. Gen. Stat. § 150B-23(f)). Thus, here, Petitioner was deemed by law to have had notice from the date the notice was mailed on 4 October 2024. *See Krishnan*, 274 N.C. App. at 173, 851 S.E.2d at 433; *see also* N.C. Gen. Stat. § 150B-23(f). Further, this Court has never held, upon our review of N.C. Gen. Stat. § 131E-256(d), that thirty days was an inadequate amount of time to appeal, and we decline to do so now.

"The power of the Legislature of each state to enact statutes of limitation and rules of prescription is well recognized and unquestioned." *Sayer v. Henderson*, 225 N.C. 642, 643, 35 S.E.2d 875, 876 (1945). North Carolina courts have "traditionally acknowledged the rule of statutory construction that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must adhere to its plain and definite meaning." *Gummels v. N.C. Dep't of Hum. Res.*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990) (citation omitted). "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *U.S. v. Locke*, 471 U.S. 84, 101, 105 S. Ct. 1785, 1796, 85 L. Ed. 2d 64 (1985).

Petitioner cites *Flippin v. Jarrell* in support of his argument that a thirty-day limit is constitutionally inadequate as applied to himself. 301 N.C. 108, 270 S.E.2d 482 (1980). In *Flippin*, the plaintiff brought suit after a recently enacted statute shortened the statute of limitations for bringing medical malpractice claims, leaving the plaintiff with a thirty-nine-day grace period to bring suit, as opposed to the previously longer period the plaintiff had to bring such a claim. *Id.* at 114, 270 S.E.2d at 486–87. This matter eventually came before our Supreme Court, whereupon they held that a grace period of thirty-nine days was "constitutionally insufficient and unreasonable" as applied to the plaintiff. *Id.* at 115, 270 S.E.2d at 487.

Petitioner's reliance on *Flippin*, however, is misplaced. In *Flippin*, the plaintiff's time limitation was shortened by a newly enacted statute, and our Supreme Court considered on appeal whether the plaintiff had an adequate grace period to file her appeal. *Id.* at 115, 270 S.E.2d at 487. Here, on appeal, there is no issue regarding the shortening of an appellate statute of limitations, nor regarding a grace period for Petitioner to file appeal. As such, our Supreme Court's holding in *Flippin* is immaterial to the instant case.

Petitioner's current argument fails because, regardless of when he eventually received actual notice, he was deemed by law to have received notice on 4 October 2022. *See Krishnan*, 274 N.C. App. at 173, 851 S.E.2d at 433. We decline to hold that thirty days is an inadequate amount of time for notice as provided by the General Assembly, and accordingly conclude Petitioner's due process rights were not violated. *See Sayer*, 225 N.C. at 643, 35 S.E.2d at 876.

B. Subject Matter Jurisdiction and Estoppel

[2] Petitioner argues, in the alternative, DHHS should be estopped from relying on the thirty-day statute of limitations to dismiss for lack of subject matter jurisdiction because DHHS erroneously informed Petitioner of an incorrect filing deadline. We disagree.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *Hillard v. Hillard*, 223 N.C. App. 20, 22, 733 S.E.2d 176, 179 (2012) (citation and internal quotation marks omitted).

This Court has held that "because the right to appeal to an administrative agency is granted by statute, compliance with statutory provisions is necessary to sustain the appeal." *Gummels v. N.C. Dep't of Hum. Res.*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990).

As stated above, when a member of the health care profession wishes to appeal his or her placement on the health care violations' registry by DHHS, the member must file a petition "within 30 days of the mailing of the written notice of the Department's intent to place its findings about the person in the [registry]." N.C. Gen. Stat. § 131E-256(d). If the appeal is not filed within the statutorily set thirty days, the right to appeal is lost. *See Gummels*, 98 N.C. App. at 677, 392 S.E.2d at 114.

Our courts have held that "[s]ubject-matter jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *Burgess v. Smith*, 260 N.C. App. 504, 509, 818 S.E.2d 164, 168 (2018) (citation and internal quotation marks omitted) (cleaned up). "[T]he doctrine[] of equitable estoppel . . . [is] irrelevant to issues of subject-matter jurisdiction[.]" *Id.* at 512, 818 S.E.2d at 169.

It is undisputed that Petitioner filed his appeal after thirty days. Petitioner was deemed by law to have notice on 4 October 2022 and should have filed within thirty days as required by N.C. Gen. Stat. § 131E-256(d). Petitioner's argument that DHHS should be equitably estopped is irrelevant as to whether subject matter jurisdiction was conferred on the trial court. *See Burgess*, 260 N.C. App. at 512, 818 S.E.2d at 169. As such, because Petitioner failed to comply with the statutory provisions, the trial court correctly found that it lacked subject matter jurisdiction. *See Gummels*, 98 N.C. App. at 677, 392 S.E.2d at 114.

C. Subject Matter Jurisdiction and Tolling

[3] Finally, Petitioner contends that the statute of limitations should have been tolled because Petitioner relied on an erroneous statement of the law by Ms. Evans. We disagree.

"The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court." *Dorsey v. Univ. of N.C. at Wilmington*, 122 N.C. App. 58, 62–63, 468 S.E.2d 557, 560 (1996) (citation omitted). N.C. Gen. Stat. § 150B-51(b) sets forth this standard of review, and states that:

> (b) The court reviewing a final decision [of an administrative agency] may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat.] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2023). "An appellate court's standard of review of an agency's final decision . . . has been, and remains, whole record on the findings of fact and *de novo* on the conclusions of law." *Fonvielle v. N.C. Coastal Res. Comm'n*, 288 N.C. App. 284, 287, 887 S.E.2d 93, 96 (2023) (citation omitted). "Where there is no dispute over the relevant facts, a lower court's interpretation of a statute of limitations is a conclusion of law that is reviewed *de novo* on appeal." *Goetz v. N.C. Dep't of Health & Hum. Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010) (citation omitted).

"Statutes of limitations . . . are subject to equitable tolling . . . when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *CTS Corp. v. Waldburger*, 573 U.S. 1, 9, 134 S. Ct. 2175, 2183, 189 L. Ed. 2d 62 (2014) (citation omitted) (cleaned up).

In support of his argument, Petitioner cites *House of Raeford Farms, Inc. v. State ex rel. Env't Mgmt. Comm'n*, where our Supreme Court

held that a statute of limitations should have been tolled where the trial court erroneously asserted subject matter jurisdiction over an administrative agency's decision before the appealing filing deadline passed, and the petitioners failed to comply with the statutory appealing provisions based on the trial court's assertion. 338 N.C. 262, 267, 449 S.E.2d 453, 457 (1994). The Court determined that the statute of limitations should be tolled where a petitioner relies on a trial court's assertion of having subject matter jurisdiction and, because of that assertation, fails "to comply with the statutory time requirements for seeking administrative review[.]" *Id.* at 267, 449 S.E.2d at 457.

The circumstances of the present case do not rise to the exceptional circumstances under *House of Raeford Farms*. Unlike the petitioners in *House of Raeford Farms*, Petitioner in this case did not rely on a trial court's assertion of subject matter jurisdiction, which caused him to fail to comply with the statutory provisions to appeal. *See id.* at 267, 449 S.E.2d at 457. Instead, Petitioner simply failed to comply with the thirty-day deadline of which he was deemed by law to have notice of. *See Krishnan*, 274 N.C. App. at 173, 851 S.E.2d at 433.

Because Petitioner's untimely filing was not shown to be caused by an "extraordinary circumstance," we hold that the trial court correctly declined to toll the statute of limitations. *See CTS Corp.*, 573 U.S. at 9, 134 S. Ct. at 2183, 189 L. Ed. 2d at 62.

IV. Conclusion

We conclude Petitioner's due process rights were not violated, as Petitioner was deemed by law to have notice for thirty days, and we decline to hold that thirty days is an inadequate amount of time for notice. Petitioner's equitable estoppel argument has no bearing on the issue of subject matter jurisdiction. Petitioner failed to comply with the statutory provisions to appeal and, thus, the trial court lacked subject matter jurisdiction. Further, this case does not rise to the circumstances for which a statute of limitations may be tolled. Accordingly, we affirm the lower court's decision to dismiss Petitioner's request for lack of subject matter jurisdiction.

AFFIRMED.

Judges MURPHY and COLLINS concur.

MILLSAPS v. HAGER

[295 N.C. App. 643 (2024)]

MARY K. MILLSAPS, DARRELL T. MILLSAPS, AND H&M ENTERPRISES & LOGISTICS OF STATESVILLE, INC., PLAINTIFFS
v.
DAVID B. HAGER, GAIL P. HAGER, AND HAGER TRUCKING CO., INC., DEFENDANTS

No. COA23-1028

Filed 17 September 2024

1. Appeal and Error—preservation of issues—contract dispute —lack of mutual assent—raised for first time on appeal

In a dispute between corporations regarding alleged misappropriation of revenue in which the trial court granted plaintiffs' motion to enforce a settlement agreement, defendants' argument that the agreement could not be enforced due to a lack of mutual assent regarding a material term of the agreement—regarding whether defendants would be jointly and severally liable to plaintiffs for a total sum of $385,000—was not preserved for appellate review because they did not raise the issue before the trial court; therefore, this issue was dismissed.

2. Contracts—intra-corporate dispute—settlement agreement —joint and several liability—notice of claim

In a dispute between corporations regarding alleged misappropriation of revenue, the trial court's order granting plaintiffs' motion to enforce a settlement agreement was affirmed where there was no merit to assertions by defendants (a husband and wife and their company) that plaintiffs failed to properly plead a claim for joint and several liability—which is not required under Civil Procedure Rule 8—or to give adequate notice to defendant wife of her potential joint and several liability. Based on the litigation materials, including the receiver's affidavit regarding sums owed by both the husband and the wife to the other corporation and the wife's affidavit disputing the facts and allegations against her, the wife was clearly put on notice of a potential claim for joint and several liability.

Appeal by Defendants from order entered 6 July 2023 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 28 May 2024.

Jones, Childers, Donaldson & Webb, PLLC, by Kevin C. Donaldson, for defendants-appellants.

Pope McMillan, P.A., by Clark D. Tew and Christian Kiechel, for plaintiffs-appellees.

STADING, Judge.

This appeal arises from an intra-corporate dispute and presents a single issue: whether the trial court erred in concluding that liability was joint and several as to all defendants in its order enforcing a settlement agreement between the parties. We dismiss in part and affirm in part the trial court's order for the reasons explained below.

I. Factual Background and Procedural History

The underlying action in this case was initiated on 30 July 2020 when plaintiffs Mary K. Millsaps and Darrell T. Millsaps filed a verified complaint against defendant David B. Hager and then-defendant H&M Enterprises & Logistics of Statesville, Inc. The complaint alleged that H&M was formed by David Hager and Darrell Millsaps in March 2009, with David Hager owning a fifty-one percent interest in the company and Darrell Millsaps owning the remaining forty-nine percent interest. Plaintiffs further alleged that David Hager exercised his control and management over H&M to abscond with and redirect corporate revenues—that rightfully belonged to the Millsaps—to himself, his immediate family members and for the benefit of Hager Trucking. Specifically, plaintiffs alleged that David Hager had directed corporate payments of $800 per week to his wife, Gail Hager, "for no valuable service provided to H&M" or the shareholders. Based on those allegations, the Millsaps advanced four primary claims for relief: (1) a derivative action seeking recovery of the misappropriated corporate funds; (2) production of corporate records and an accounting; (3) dissolution and appointment of a receiver; and (4) breach of fiduciary duty. The Millsaps also sought punitive damages and to pierce the corporate veil.

After defendants filed an answer and counterclaims on 4 March 2019, the parties consented to the appointment of a receiver. During the ensuing course of litigation, at the request of the receiver, H&M shifted from a defendant to a plaintiff in this suit. Additionally, plaintiffs filed an amended complaint in October 2020, adding Gail Hager as a defendant and asserting a claim for fraudulent transfer.

On 28 May 2021, plaintiffs moved for summary judgment. The trial court heard the motion on 2 December 2021, and on 20 December 2021 entered an order granting relief on plaintiffs' first, fourth, and fifth claims but denying summary judgment as to damages. Thereafter, the matter

was set for trial on 6 June 2022, but after a jury was empaneled and some testimony was presented, a mistrial was declared when the Millsaps fell ill with COVID-19. The trial was then set for the 3 October 2022 term of superior court but was automatically stayed once the Hagers filed for bankruptcy protection on 28 September 2022.

The matter was next set for trial in January 2023, but when the case was called for trial, the parties informed the trial court of the settlement agreement at issue here. Specifically, defendants' counsel informed the trial court that his clients had agreed to "enter into a consent judgment for the total sum of $385,000" with allocation among the three defendants to be resolved by counsel for defendants and counsel for plaintiffs. Counsel for plaintiffs agreed.

The next filing in the record of this matter came on 16 June 2023 in the form of plaintiffs' "Motion to Enforce Settlement Agreement." Therein plaintiffs asserted that "[d]espite agreeing to the material terms of the settlement in court, [d]fendants ha[d] refused to sign the consent judgment. . . . [because defendants alleged, they] had not agreed whether [the settlement] amount was to be assessed jointly and severally or against only one individual or another." Plaintiffs emphasized that defendants had represented to the trial court "that the dispute had been settled, announced the amount of the settlement, and announced that there was no need for trial." Plaintiffs then suggested that "[i]f [d]efendants disagree as to what the contribution towards such award should be by and between them, . . . they are entitled to seek contribution from each other" or bring an action against their shared counsel if they believed he acted outside his authority—although plaintiffs noted that the latter option would be unlikely to succeed given that the individual defendants had been present in court when the agreement was announced. Finally, they asked the trial court to enter judgment in the amount of $385,000 "against [d]efendents, jointly and severally."

At the hearing on plaintiffs' motion to enforce, the parties argued the question of joint and several liability particularly as to Gail Hager. Near the end of the hearing, defendants' counsel emphasized that "*this is the only issue*. I'm asking the [c]ourt to issue *a ruling that there is no joint and several liability* as it relates to David and Gail [Hager] based on the pleadings and based on the transcript and parties['] agreements." (Emphasis added). Defendants never suggested, much less argued, that the settlement agreement did not constitute a binding contract.

In its resulting order entered on 6 July 2023, the trial court first determined "that an issue exists in the settlement agreement, which was

reached on January 24, 2023, as to whether liability should be joint and several. However, both parties agree that the issue of joint and several liability is a matter of law that should be determined by [the trial c]ourt." The trial court then concluded that defendants' liability was joint and several and that plaintiffs "Motion to Enforce the Settlement Agreement" should be granted. Defendant timely appealed from that order.

II. Jurisdiction

This appeal lies of right under N.C. Gen. Stat. § 7A-27(b)(1) (2023) ("[A]ny final judgment of a superior court. . . .").

III. Analysis

Defendants argue that the trial court erred in finding liability to be joint and several as to defendants. Specifically, defendants contend: (1) there was no meeting of the minds between the parties as to joint and several liability—a material term—such that the settlement agreement was not a valid contract; and (2) even if a contract had been entered, "plaintiffs never made any claim for, nor sought, joint and several liability of the [current] defendants in any of their pleadings." Defendants' first position is not properly before this Court, and we are unpersuaded by their remaining contention.

A. Preservation of Defendants' First Issue on Appeal

[1] Defendants' first argument on appeal is that there was no "meeting of the minds" between the parties regarding a material term of the settlement agreement. Specifically, they maintain that, as of the June 2023 motion hearing, "[t]he allocation of the amount of the consent judgment as to each defendant was a material term that the parties still needed to agree upon." In other words, defendants assert that the settlement agreement was not a contract and thus was not enforceable at all.

In response, plaintiffs contend that the question of whether the settlement agreement constituted a contract is not properly before the Court on appeal because

> [d]efendants did not once raise this issue before the trial court. Instead, [d]efendants only asked the trial court to enter a proposed consent judgment, executing the settlement agreement they now seek to disengage themselves from, that created buckets of liability with certain damages joint and several between Gail Hager and Hager Trucking and certain damages joint and several between David Hager and Hager Trucking, but with no damages

> joint and several between Gail Hager and David Hager. . . . Furthermore, nowhere in [d]efendant[s'] brief do they contest the finding by the [trial c]ourt that "both parties agree that the issue of joint and several liability is a matter of law that should be determined by this [c]ourt as part of this hearing; and neither party objects to this [c]ourt deciding the issue as part of this hearing."

As plaintiffs then correctly note, "[t]he issue of lack of mutual assent in a contract is not reviewable when raised before an appellate court for the first time." *See Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 88, 731 S.E.2d 837, 841 (2012) ("Because the arguments as to mutual assent . . . were not properly raised at the time of the motion [in the trial court], we will not consider them for the first time on appeal."). *See also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (noting that "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]").

Our review of the transcript from the hearing on the motion to enforce confirms that while zealously arguing the issue of joint and several liability, defendants' counsel represented to the trial court that "[w]e agreed on a settlement which makes it a consent judgment." Defendants' counsel never argued or asked the trial court to rule that there was not a valid contract. Instead, he maintained that joint and several liability remained an issue that defendants asked the trial court to resolve. Accordingly, we hold that defendants' contention that the settlement agreement was not, in fact, a contract—raised the first time in this appeal—was not preserved for our consideration. That issue is, therefore, dismissed.

B. Standard of Review

Although the parties here disagree about the nature of the order from which this appeal was taken, they agree a *de novo* review is appropriate. Defendants assert that the appeal arises from an order "regarding a motion to enforce a settlement agreement" and thus urge that the summary judgment standard—*de novo* review—is appropriate. *See Hardin v. KCS Int'l Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009).

Plaintiffs emphasize that, at the hearing on their motion to enforce, the parties "asked the [trial c]ourt to make a determination on liability based upon the pleadings and prior orders in the case and determining whether [d]efendants Gail Hager and David Hager were potentially subject to any form of joint and several liability." Plaintiffs contend that this "action by the parties converted the hearing to one of a [bench]

trial on stipulated facts," the appellate standard of review for which is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, *cert. and disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). "We review conclusions of law from a bench trial de novo." *S. Seeding Serv. v. W.C. English*, 224 N.C. App. 90, 97, 735 S.E.2d 829, 834 (2012) (citation omitted).

C. Joint and Several Liability of Defendants

[2] We next address defendants' argument that the trial court erred "in finding liability to be joint and several as to all defendants" because "plaintiffs never made any claim for, nor sought joint and several liability of the defendants in any of their pleadings." Accordingly, defendants assert that plaintiffs failed to sufficiently plead or put Gail Hager on notice for a claim of joint and several liability. We disagree.

As to the first portion of defendants' position, North Carolina's Civil Procedure Rule 8 "requires only that a pleading contain 'a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief.' " *Feltman v. City of Wilson*, 238 N.C. App. 246, 251-52, 767 S.E.2d 615, 620 (2014) (quoting N.C. R. Civ. P. 8(a)(1) (brackets omitted)). In enacting Rule 8 "our General Assembly adopted the concept of notice pleading" and "[u]nder notice pleading, 'a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought.' " *Id.* (quoting *Wake Cty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646, 762 S.E.2d 477, 486 (2014)). No requirement to state a claim for joint and several liability in the complaint appears in that rule.

Moreover, as to notice, we agree with plaintiffs that defendants have been fully aware of the liability Gail Hager faces under the order appealed from. For example, the affidavit of the receiver dated 28 May 2021 noted, among other things, the following: "David *& Gail Hager* had an amount due to H&M Enterprises and Logistics of Statesville, Inc. in the amount of $356,873.74"; a "verbal agreement" between plaintiffs and *the Hagers* existed in which H&M would pay down a loan held in the name of *the Hagers personally*; that $16,226.83 of H&M funds had been used to pay utility bills for "the primary residence and rental properties of David *& Gail Hager*"; and "David *& Gail Hager* took salaries

in a disproportionate ratio compared to their respective ownerships in the company." (Emphasis added). Gail Hager then executed an affidavit on 20 July 2021 disputing the facts and allegations against her relating to the transfer of inventory, the payment of personal bills, and her personal work.

Accordingly, we agree with plaintiffs' assertion that as of the receiver's affidavit and Gail Hager's affidavit in the summer of 2021—some two years before the June 2023 filing of plaintiffs' motion to enforce the settlement agreement and the hearing on that motion later in the same month—the litigation materials in this case, including "the factual pleadings and other part[s] of the [amended] complaint, clearly put Gale Hager on notice of a potential claim for joint and several liability, [such that] it was her duty to, through discovery, motions for summary judgment, or otherwise, dispose of that possibility if she believed it to be in error."

IV. Conclusion

Defendants' argument challenging the existence of the settlement agreement on contractual grounds is dismissed. The trial court's order on plaintiffs' motion to enforce the settlement agreement is affirmed.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ZACHARY and COLLINS concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF - NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR; DUKE ENERGY PROGRESS, LLC, PETITIONER; DUKE ENERGY CAROLINAS, LLC, PETITIONER

v.

ENVIRONMENTAL WORKING GROUP, INTERVENOR; 350 TRIANGLE, INTERVENOR; 350 CHARLOTTE, INTERVENOR; THE NORTH CAROLINA ALLIANCE TO PROTECT OUR PEOPLE AND THE PLACES WE LIVE, INTERVENOR; NC WARN, INTERVENOR; NORTH CAROLINA CLIMATE SOLUTIONS COALITION, INTERVENOR; SUNRISE MOVEMENT DURHAM HUB, INTERVENOR; DONALD E. OULMAN, INTERVENOR

No. COA23-760

Filed 17 September 2024

1. Utilities—revised net metering rates—investigation of costs and benefits of customer-sited generation—Commission's obligation—de facto investigation

Prior to approving proposed revised net energy metering (NEM) tariffs, the Utilities Commission is required, pursuant to the clear and unambiguous language of N.C.G.S. § 62-126.4, to conduct an investigation of the costs and benefits of customer-sited energy generation, an interpretation of the statute that is also consistent with other provisions of the Public Utilities Act. Here, although the Commission erroneously determined that it did not, itself, have to conduct such an investigation—only that an investigation must be held prior to its approval of revised rates—the record revealed that the Commission effectively conducted the required investigation by: opening a docket; soliciting comments from all interested parties; and compiling, reviewing, and weighing the evidence collected before making its decision. Therefore, the Commission's de facto investigation fulfilled its statutory obligation, and its order approving revised NEM rates was modified and affirmed.

2. Utilities—revised net metering rates—tariff designs—elimination of flat-rate class of customers—obligation to ensure payment of full fixed cost of service

The Utilities Commission did not violate the requirement in N.C.G.S. § 62-126.4 that it must "establish net metering rates under all tariff designs" when it approved revised net energy metering (NEM) rates that, by requiring all customers to participate in a "time-of-use" (TOU) rate schedule, eliminated a previously-existing class of "flat-rate" NEM customers (who had paid the same rate of electricity purchased at any time of day, in contrast to the variable TOU rates). According to the clear and unambiguous language of the

statute, the Commission was required to establish "nondiscriminatory" NEM rates to ensure that every customer pay its full fixed cost of service under any of the offered tariff designs—not to set rates for all previously offered tariff designs—and, here, the Commission fulfilled its obligations pursuant to this provision.

3. Utilities—revised net metering rates—sufficiency of evidence and findings—approval not arbitrary and capricious or erroneous

The decision of the Utilities Commission approving revised net energy metering (NEM) rates was not arbitrary and capricious or based on an error requiring reversal where the Commission's findings were supported by competent, material, and substantial evidence—collected during the Commission's de facto investigation (as required by statute) of the costs and benefits of customer-sited generation—and where those findings, in turn, supported its conclusions of law that a sufficient investigation was performed and that the rates proposed by the electric public utility companies met the statutory requirement of being nondiscriminatory and in furtherance of ensuring that NEM customers pay their full fixed cost of service.

Appeal by Intervenors-appellants from order entered 23 March 2023 by the North Carolina Utilities Commission. Heard in the Court of Appeals 7 February 2024.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Jack E. Jirak, Marion "Will" Middleton, III, Catherine Wrenn, and J. Ashley Cooper, pro hac vice, for petitioners-appellees Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC.

Chief Counsel Lucy E. Edmondson and Anne M. Keyworth, Staff Attorney, for intervenor-appellee Public Staff – North Carolina Utilities Commission.

Lewis & Roberts, PLLC, by Matthew D. Quinn, for intervenors-appellants NC WARN, North Carolina Climate Solutions Coalition, and Sunrise Movement Durham Hub.

Catherine Cralle Jones and Caroline Leary, pro hac vice, for intervenor-appellant Environmental Working Group.

Andrea C. Bonvecchio for intervenors-appellants 350 Triangle, 350 Charlotte, and the North Carolina Alliance to Protect Our People and the Places We Live.

Donald E. Oulman, pro se, as intervenor-appellant.

MURPHY, Judge.

N.C.G.S. § 62-126.4 requires the electric public utility Companies to file proposed revised NEM tariffs for the Utilities Commission's approval. The plain language of the statute provides that, before the Commission may establish net metering rates, it must conduct an investigation of the costs and benefits of customer-sited generation. The plain statutory language further directs that—only after the Commission has fulfilled this statutory duty—the Commission shall establish nondiscriminatory net metering rates that ensure the NEM customer pays its full fixed cost of service under all offered NEM tariff designs. The Commission erred in concluding that it was not required to perform an investigation of the costs and benefits of customer-sited generation; however, the record reveals that the Commission de facto performed such an investigation when it opened an investigation docket in response to the Companies' proposed revised NEM rates; permitted all interested parties to intervene; and accepted, compiled, and reviewed over 1,000 pages of evidence.

The Commission is delegated exclusive authority to establish NEM rates, and we do not disturb an order by the Commission approving NEM rates unless we determine it to be unconstitutional, in excess of the Commission's statutory authority or jurisdiction, procedurally unlawful, legally erroneous, unsupported by the evidence, or arbitrary or capricious and prejudicial to an appellant's substantial rights. The Commission made findings of fact as to the costs and benefits of customer-sited generation supported by competent, material, and substantial evidence; reached conclusions of law supported by these findings of fact; and acted pursuant to its explicit statutory authority under N.C.G.S. § 62-126.4. We uphold the Commission's order establishing the Companies' revised NEM rates as modified by this opinion to reflect that N.C.G.S. § 62-126.4 requires the Commission to perform an investigation of the costs and benefits of customer-sited generation before it may establish NEM rates.

BACKGROUND

Environmental Working Group, 350 Triangle, 350 Charlotte, the North Carolina Alliance to Protect Our People and the Places We Live, NC

WARN, North Carolina Climate Solutions Coalition, Sunrise Movement Durham Hub, and Donald E. Oulman (collectively, "Appellants") appeal from the *Order Approving Revised Net Metering Tariffs* entered by the North Carolina Utilities Commission ("Commission") on 23 March 2023, which established new rates for net energy metering ("NEM") customers served by Appellees Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC (collectively, "the Companies").

A. History of NEM

The Commission first approved NEM rates for pilot photovoltaic ("PV") rate riders in 2000. These pilot riders allowed customers with small-scale PV generating facilities "to operate their facilities in parallel with the utility, to use the generation from the PV facility to offset some or all of the electricity that would otherwise be supplied to them by the utility, and to receive a credit for any excess generation provided to the utility."

In October 2005, the Commission established an initial framework for NEM in North Carolina, defined "as a billing arrangement whereby the customer-generator is billed according to the difference over a billing period between the amount of energy consumed by the customer at its premises and the amount of energy generated by the renewable energy facility." This framework included a mandatory "time-of-use" ("TOU") rate schedule, with compensation rates for excess customer generation to be "commensurate with the TOU period" during which excess energy was generated, and eliminated all types of stand-by charges for participating customers.

In July 2006, the Commission ordered "utilities to amend their NEM tariffs and riders to allow for any residual excess on-peak energy not consumed by the participating customer during on-peak periods to be applied against any remaining off-peak consumption during a monthly billing period[]" and "maintained its position[s] that the TOU-demand rate schedule requirement for NEM was not too complicated" and "that renewable energy certificates ([']RECs[']) associated with excess energy would be transferred to the utility to help offset the costs otherwise borne by the utility and ratepayers in general that were incurred to accommodate NEM."

In August 2007, our General Assembly enacted the Clean Energy and Energy Efficiency Portfolio Standard ("CEPS"). *See* N.C.G.S. § 62-133.8 (2023). In response, the Commission amended NEM policy to require

> utilities to offer customer-generators the option of NEM under any rate schedule available to customers in the same rate class but allow[] customers on the TOU-demand

> tariff to retain all the RECs associated with the customer's generation while allowing the utility to obtain the RECs from NEM customers on all other retail rate schedules at no cost as part of the NEM arrangement. The Commission further determined that NEM customers on any TOU rate schedule must have on-peak generation first applied to offset on-peak consumption and excess off-peak generation first applied to offset off-peak consumption.

The Commission acknowledged potential concerns of cross-subsidization under this framework "but decided that such potential was outweighed by the potential for non-quantified benefits and the clearly enunciated State policy favoring development of additional renewable generation."

In 2017, the General Assembly enacted the Distributed Resources Access Act, N.C.G.S. §§ 62-126.1 through 62-126.10, which declared

> as a matter of public policy it is in the interest of the State to encourage the leasing of solar energy facilities for retail customers and subscription to shared community solar energy facilities. The General Assembly further finds and declares that in encouraging the leasing of and subscription to solar energy facilities pursuant to this act, cross-subsidization should be avoided by holding harmless electric public utilities' customers that do not participate in such arrangements.

N.C.G.S. § 62-126.2 (2023). The Act also required the Commission to establish NEM rates according to the following procedure:

> (a) Each electric public utility shall file for Commission approval revised net metering rates for electric customers that (i) own a renewable energy facility for that person's own primary use or (ii) are customer generator lessees.
>
> (b) The rates shall be nondiscriminatory and established only after an investigation of the costs and benefits of customer-sited generation. The Commission shall establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service. Such rates may include fixed monthly energy and demand charges.
>
> (c) Until the rates have been approved by the Commission as required by this section, the rate shall be the applicable net metering rate in place at the time the facility

> interconnects. Retail customers that own and install an on-site renewable energy facility and interconnect to the grid prior to the date the Commission approves new metering rates may elect to continue net metering under the net metering rate in effect at the time of interconnection until [1 January] 2027.

N.C.G.S. § 62-126.4 (2023).

In 2021, the General Assembly enacted House Bill 951, which created specific goals for reduced carbon emissions from electric generating facilities, instructed the Commission to create a "Carbon Plan" to achieve these goals, and directed the Commission to

> (i) evaluate and modify as necessary existing standby service charges, (ii) revise net metering rates, (iii) establish an on-utility-bill repayment program related to energy efficiency investments, and (iv) establish a rider for a voluntary program that will allow industrial, commercial, and residential customers who elect to purchase from the electric public utility renewable energy or renewable energy credits, including in any program in which the identified resources are owned by the utility in accordance with sub-subdivision b. of subdivision (2) of Section 1 of this act, to offset their energy consumption, which shall ensure that customers who voluntarily elect to purchase renewable energy or renewable energy credits through such programs bear the full direct and indirect cost of those purchases, and that customers that do not participate in such arrangements are held harmless, and neither advantaged nor disadvantaged, from the impacts of the renewable energy procured on behalf of the program customer, and no cross-subsidization occurs.

2021 North Carolina Laws S.L. 2021-165 § 5 (H.B. 951).

B. Procedural History

On 29 November 2021, the Companies filed a joint petition for approval of revised NEM rates with the Commission pursuant to N.C.G.S. § 62-126.4. In their petition, the Companies stated that the proposed revised rates were chosen based on their own recently-conducted "Comprehensive Rate Design Study," which the Companies alleged fulfilled the statutory requirement that revised "rates shall be . . . established only after an investigation of the costs and benefits of customer-sited

generation." N.C.G.S. § 62-126.4 (2023). Specifically, the Companies claimed that

> the results of the Rate Design Study provide a current and detailed look at the costs and benefits of serving NEM customers under Existing NEM Programs. The Companies utilitized these results to create rate structures that accurately capture the current costs to serve these customers and ensure NEM customers pay their "full fixed cost of service" in accordance with [N.C.G.S. § 62-126.4].

Based on the Comprehensive Rate Design Study, the Companies' proposed rates would (1) establish a monthly minimum bill amount to ensure that energy distribution costs are properly recovered from the customers who created those costs; (2) create a grid access fee for customers with large solar facilities, as those customers "represent the greatest potential for under-recovery of fixed costs"; (3) create non-bypassable charges to recover costs not currently included in the Companies' energy rates to ensure that solar program expenses and non-energy linked costs are not inappropriately collected from non-solar customers, but from NEM customers; (4) credit customers "for any net monthly exports to the utility grid" at the same rates that the Companies pay to utility-scale qualifying facilities to "accurately capture the benefits provided to the total utility system by the customer-sited generation and [to] align the costs of serving these customers with the benefits [the Companies] receive[]" from these customers; and (5) utilize the Companies' established TOU rate schedule to "produce rates that are more reflective of the costs and help reduce cost shifts by incentivizing load to be shifted to low-cost times and ensuring cost recovery for higher cost peak periods[,]" "with any net excess energy exported to the grid from a customer-sited facility credited to the customer each month at avoided cost rates."

The Companies also presented the Commission with a Memorandum of Understanding ("MOU") amongst themselves and four solar energy interest groups, indicating the interest groups' support of the Companies' proposed NEM tariffs and of a resolution proposed in a separate docket to create incentives for residential customer-generators who took service under the new NEM rates. The MOU further "set[] out a non-binding understanding that [the Companies] would explore a solar program tailored to low-income customers as a potential future [energy efficiency] or demand response program[]" and "work collaboratively with stakeholders to develop a policy proposal for the next generation of nonresidential NEM."

On 10 January 2022, the Commission docketed the Companies' petition *In the Matter of Investigation of Proposed Net Metering Policy Changes* and directed all interested parties to file comments or petitions to intervene on or before 15 March 2022. The Commission recognized Appellees North Carolina Utilities Commission – Public Staff and the North Carolina Attorney General's Office as intervenors pursuant to N.C.G.S. §§ 62-15(d) and 62-20. The Commission also granted the petitions of Appellants to intervene in the docket. The Commission accepted comments, reply comments, and further responsive comments into the docket. The Commission established the final deadline for further responsive comments on 27 May 2022.

On 16 June 2022, several of the Appellants filed a joint motion for an evidentiary hearing. The Commission accepted parties' responses to the motion filed on or before 24 June 2022 and, on 8 November 2022, denied the motion. The Commission further ordered that the parties file proposed orders and briefs. On 23 March 2023, the Commission entered an *Order Approving Revised Net Metering Tariffs*, which included slight alterations to the Companies' proposed tariffs. On 3 April 2023, the Companies filed the new NEM tariffs, to become effective on 1 July 2023. Appellants appealed.

ANALYSIS

Appellants contend that the Commission established the Companies' proposed NEM rates in violation of N.C.G.S. § 62-126.4 by (A)(1) failing to conduct an independent "investigation" of the costs and benefits of customer-sited generation and (A)(2) eliminating an existing class of flat-rate NEM customers. Alternatively, Appellants argue that the Commission's order is arbitrary or capricious or unsupported by competent evidence because the Commission (B)(1) failed to consider multiple benefits of customer-sited generation and (B)(2) relied on the MOU, a non-unanimous "settlement agreement."

We review a decision by the Utilities Commission pursuant to N.C.G.S. § 62-94:

> [We] may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or

> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (2023). "Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable." N.C.G.S. § 62-94(e) (2023). We may reverse the Commission's decision only upon "strict application of the six criteria enumerated in N.C.G.S. § 62-94(b)":

> Read contextually, therefore, the requirements that "substantial rights have been prejudiced," that error must be prejudicial and that actions of the Commission are presumed just clearly indicate that judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria which circumscribe judicial review.

State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 20 (1981). The appellant bears the burden to demonstrate that the Commission erred as a matter of law and that this error was prejudicial. *See id.* at 25.

We review the Commission's findings of fact to determine whether they are supported by "competent, material, and substantial evidence[.]" *State ex rel. Utils. Comm'n v. Cooper*, 368 N.C. 216, 223 (2015). Unchallenged findings of fact are deemed supported by such evidence and are consequently binding on appeal. *Id.* We review the Commission's conclusions of law to determine if they are supported by its findings of fact. *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352 (1987); *see also Coble v. Coble*, 300 N.C. 708, 714 (1980) ("Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken . . . in logical sequence . . . .").

A. Commission's Statutory Duties

Appellants argue that the Commission failed to fulfill its statutory duties under N.C.G.S. § 62-126.4 and, therefore, erred in establishing

the Companies' proposed NEM rates. N.C.G.S. § 62-126.4, entitled "Commission to establish net metering rates," mandates the following:

> (a) Each electric public utility shall file for Commission approval revised net metering rates for electric customers that (i) own a renewable energy facility for that person's own primary use or (ii) are customer generator lessees.
>
> (b) The rates shall be nondiscriminatory and established only after an investigation of the costs and benefits of customer-sited generation. The Commission shall establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service. Such rates may include fixed monthly energy and demand charges.
>
> (c) Until the rates have been approved by the Commission as required by this section, the rate shall be the applicable net metering rate in place at the time the facility interconnects. Retail customers that own and install an on-site renewable energy facility and interconnect to the grid prior to the date the Commission approves new metering rates may elect to continue net metering under the net metering rate in effect at the time of interconnection until January 1, 2027.

N.C.G.S. § 62-126.4 (2023).

Appellants' argument that the Commission erred in applying N.C.G.S. § 62-126.4 to the instant case is two-fold. First, Appellants argue that the Commission itself was required to—and did not—perform "an investigation of the costs and benefits of cutomer-sited generation[]" before approving the Companies' proposed rates; that is, no party other than the Commission may perform an investigation of the costs and benefits of customer-sited generation within the meaning of N.C.G.S. § 62-126.4, and the Commission performed no such investigation before it established the Companies' revised NEM rates. Second, Appellants argue that the Commission failed to "establish net metering rates under all tariff designs" by effectively "eliminat[ing] the class of 'flat-rate' NEM customers who paid the same rate for electricity purchased at any time of day" and "requiring all residential NEM customers to participate in [a] TOU [rate] with [Critical Peak Pricing ('CPP')][.]"

1. Investigation

[1] In its order, the Commission concluded that the plain and unambiguous language of N.C.G.S. § 62-126.4(b) does *not* require the statutorily-prescribed investigation to be Commission-led:

> The Commission also disagrees with the argument that [N.C.G.S. § 62-126.4] requires the Commission to conduct its own investigation of the costs and benefits of customer-sited generation. The statute states that "rates shall be . . . established only after an investigation of the costs and benefits of customer-sited generation." N.C.G.S. § 62-126.4(b). The statute then requires the Commission to establish the rates. *Id.* Nothing in the plain language of the statute mandates that the investigation must be conducted by the Commission, only that an investigation take place prior to rates being established. While the statute provides the Commission with the ability to direct an investigation, nothing in the plain language of the statute requires the Commission, itself, to conduct the investigation. The Commission concludes that the statute only mandates that an investigation be conducted prior to the establishment of rates, which has occurred.

The Companies argue that this conclusion was proper, as N.C.G.S. § 62-126.4 "expressly states when and if it tasks a particular party with performing an activity. For example, it identifies utilities as the parties to 'file for Commission approval' of revised net metering rates, and it identifies the Commission as the party who will 'establish' the revised net metering rates." By contrast, the Companies contend, the statute clearly and unambiguously requires only that "an investigation of the costs and benefits of customer-sited generation[,]" *id.*, be performed "but [] does not task any specific party—much less the Commission—with leading that investigation."

Appellants challenge this conclusion, contending that both the statutory language and "[t]he legislative intent behind [N.C.G.S. §] 62-126.4 make[] clear that the *Commission* must lead an independent cost-benefit analysis into customer-sited generation."

We agree with Appellants that the plain language of N.C.G.S. § 62-126.4 clearly and unambiguously requires that it is the *Commission* who must conduct an investigation of the costs and benefits of customer-sited generation before it may establish net metering rates.

Therefore, we need not look further than the plain language of the statute to ascertain its meaning:

> "In resolving issues of statutory construction, we look first to the language of the statute itself." *Walker v. Bd. of Trs. of the N.C. Local Gov'tal Emps. Ret. Sys.*, 348 N.C. 63, 65 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409 (1996)).
>
> > When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990). However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.").
>
> *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006). Thus, the initial issue that must be addressed in construing the relevant statutory language requires a determination of whether the language in question is ambiguous or unambiguous.

Fidelity Bank v. N.C. Dep't of Revenue, 370 N.C. 10, 18-19 (2017) (parallel citations omitted).

As Appellants aptly note, "[n]early every aspect of [N.C.G.S. § 62-126.4] requires that the Commission, not the [electric public utility], take lead on the establishment of new NEM tariffs. For instance, the title of the statute is, 'Commission to establish net metering rates.' " N.C.G.S. § 62-126.4(a) dictates that "[e]ach electric public utility shall file for Commission approval revised net metering rates[.]" N.C.G.S. § 62-126.4(a) (2023). Subsection (a) clearly and unambiguously provides that, after an electric public utility has fulfilled its statutory duty of filing revised net metering rates, those rates are subject to the Commission's approval. *Id.* Subsection (b) then dictates that the Commission shall establish "nondiscriminatory" net metering rates "under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service[,]" but "*only* after an investigation of the costs and benefits

of customer-sited generation." N.C.G.S. § 62-126.4(b) (2023) (emphasis added). Furthermore, subsection (c) provides that the utility's proposed revised rates are without effect unless and until the Commission has approved them. N.C.G.S. § 62-126.4(c) (2023).

N.C.G.S. § 62-126.4 both empowers and requires the Commission—and only the Commission—to establish net metering rates. Furthermore, it requires that the Commission may *only* do so after an investigation of the costs and benefits of customer-sited generation. It is clear from the plain language of the statute that the investigation of the costs and benefits of customer-sited generation contemplated in subsection (b) is to be performed in connection with, and as a prerequisite to, the Commission establishing net metering rates. Notably, the statute makes no reference to the public utility outside of its duty under subsection (a). The statute does not mandate that an investigation of the costs and benefits of customer-sited generation be performed in connection with the utility's filing of revised NEM rates. Despite the contentions of the Companies and the Public Staff, this reading does not require us "to insert language into or read limitations or requirements into [the] statute[]."

The Public Staff contends that, under our holding in *AH N.C. Owner LLC v. N.C. Dept. of Health and Human Services*, 240 N.C. App. 92 (2015), even if we determine that the plain language of the statute does not align with the Commission's interpretation, we must "defer" to the Commission's interpretation that *any* party may perform an investigation of the costs and benefits of customer-sited generation before the Commission establishes net metering rates. *See id.* at 102 ("It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute as long as the agency's interpretation is reasonable and based on a permissible construction of the statute.") (cleaned up). As the Public Staff notes, however, such deference is appropriate only when we have determined that the statutory language is ambiguous. *Id.* As determined above, the language at issue here is not. Furthermore, such deference, even when appropriate, does not contravene our de novo standard of review for issues of law; "[s]o far as necessary to the decision and where presented," it is the court who "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C.G.S. § 62-94(b) (2023). We emphasized the same in *AH N.C. Owner*, where the controlling statute required this Court to "conduct its review of the final decision using the de novo standard of review." *AH N.C. Owner*, 240 N.C. App. at 102.

Even assuming, *arguendo*, that the statute is ambiguous as to the meaning of "investigation," N.C.G.S. § 62-126.4 "must be construed consistently with other provisions of the" Public Utilities Act. *See Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 358 (2014) ("Further, [N.C.G.S.] § 132-1.3 must be construed consistently with other provisions of the Public Records Act.").

N.C.G.S. § 62-37, entitled "Investigations," empowers the Commission to, "on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility . . . either with or without a hearing as it may deem best[.]" N.C.G.S. § 62-37 (2023). "If[,] after such an investigation, . . . the Commission, in its discretion, is of the opinion that the public interest shall be served" by a further investigation, audit, or appraisal, it shall "report its findings and recommendation to the Governor and Council of State" and seek authorization "to order any such appraisal, investigations, or audit to be undertaken by a competent, qualified, and independent firm" of its choosing.

Furthermore, N.C.G.S. § 62-126, entitled, in pertinent part, "Investigation of existing rates[,]" provides that,

> [w]henever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint of anyone directly interested, finds that the existing rates in effect and collected by any public utility are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force, and shall fix the same by order.

N.C.G.S. § 62-136(a) (2023). This statute not only contemplates another type of "investigation" that the Commission may perform; it also employs phrasing similar to that of N.C.G.S. § 62-126.4. The Public Utilities Act directs the Commission to "make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction." N.C.G.S. § 62-130 (2023). Furthermore, "[t]he Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility." N.C.G.S. § 62-136(d) (2023). As part of this duty, the Commission may investigate existing rates to ensure they are not "unjust, unreasonable, insufficient or discriminatory, or in

violation of any provision of law[.]" N.C.G.S. § 62-136(a) (2023). N.C.G.S. § 62-136 provides that, "[w]henever the Commission, *after a hearing had* . . . finds that the existing rates" of a public utility "are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine . . . and shall fix . . . just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force[.]" N.C.G.S. § 62-136(a) (2023) (emphasis added).

Here, the Commission concluded that "nothing in the plain language of [N.C.G.S. § 62-126.4] requires the Commission, itself, to conduct" an investigation of the costs and benefits of customer-sited generation because "the statute only mandates that an investigation *be conducted* prior to the [Commission's] establishment of rates[.]" By the Commission's same reasoning, nothing in the plain language of N.C.G.S. § 62-136 would require the Commission, itself, to have a hearing because the statute only mandates that a hearing *be had* prior to the Commission's finding, determination, and order. Such a result, where the Public Utilities Act grants the Commission exclusive authority to set rates for public utilities and empowers the Commission to conduct hearings to this end, is both plainly absurd and in direct conflict with the General Assembly's directives throughout the chapter. *See State v. Beck*, 359 N.C. 611, 614 (2005) ("[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."). Here, too, where the Public Utilities Act grants the Commission exclusive authority to set rates for public utilities and empowers the Commission to conduct investigations to this end, the Commission's interpretation would lead to absurd and contradictory results.

We hold that N.C.G.S. § 62-126.4 clearly and unambiguously requires the Commission to first investigate the costs and benefits of customer-sited generation and to then establish net metering rates. Therefore, we must determine whether, under these facts, the Commission did perform such an investigation. Although the Commission did not purport to have done so, the record demonstrates that the Commission de facto performed an investigation of the costs and benefits of customer-sited generation before it established the Companies' proposed revised rates.

As the Commission notes, the statute does not "require that the 'investigation' be in any particular format or using any particular procedure." On 10 January 2022, the Commission entered an *Order Requesting Comments* in this matter, designated as *In the Matter of Investigation of Proposed Net Metering Policy Changes*. As noted by

the Public Staff, the Commission established this docket "specifically to evaluate [the Companies'] filings and investigate the cost[s] and benefits of customer-sited generation as presented in the docket with the goal of establishing NEM rates[,]" and the Commission allowed "all interested parties to file comments and reply comments on [the Companies'] proposed revised NEM rates." The Commission then "[found] and conclude[d], based on all the foregoing materials of record, that the requirements established in [2017 North Carolina Laws S.L. 2017-192 (HB 589)] and N.C.G.S. § 62-126.4 have been satisfied in a manner sufficient to enable the Commission to establish new NEM tariffs as mandated by those enactments."

We hold that the Commission conducted an investigation of the costs and benefits of customer-sited generation by opening a docket, requesting comments from all interested parties, compiling and reviewing more than 1,000 pages of evidence, and weighing the merits of this evidence to assist in making its final determination.

2. Tariff Designs

[2] Appellants further argue that the Commission violated its statutory mandate to "establish net metering rates *under all tariff designs*," N.C.G.S. § 62-126.4(b) (2023) (emphasis added), "[b]y requiring all residential NEM customers to participate in TOU with CPP," thereby "eliminat[ing] the [existing] class of 'flat-rate' NEM customers who paid the same rate for electricity purchased at any time of day." According to Appellants, the Commission was required to—and did not—establish rates that continued to "provide an NEM option for those customers with the flat-rate tariff."

N.C.G.S. § 62-126.4(b) reads, in pertinent part: "[t]he Commission shall establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service." *Id.* The Commission determined that "[t]he most natural reading of the language of subsection 126.4(b) is that the Commission is to ensure that under whatever tariff designs net metering *is being offered* the rates set must be sufficient to recover all fixed costs of service[,]" *not* to ensure that rates be set under *all previously offered* tariff designs. The Commission further determined that "the fundamental operative requirement expressly advanced" by the language of N.C.G.S. § 62-126.4 "is to ensure that NEM customers pay their 'full fixed cost of service.' "

We agree with the Commission that N.C.G.S. § 62-126.4 plainly directs the Commission, after its investigation, to establish NEM rates that are "nondiscriminatory[]" and that, "under all tariff designs[,] . . .

ensure that the net metering retail customer pays its full fixed cost of service." N.C.G.S. § 62-126.4(b) (2023). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614. As the Commission noted, Appellants' proposed reading of the language "is forced and effectively rewrites the sentence . . . as a conjunctive[.]" N.C.G.S. § 62-126.4 does not direct the Commission to establish NEM rates under all tariff designs *and* ensure the NEM customer pays its full fixed cost of service; rather, the statute requires the Commission to establish NEM rates under all tariff designs *that* ensure the NEM customer pays its full fixed cost of service.

To be sure, we note that—even if the statutory language were ambiguous—the General Assembly has declared its purpose in enacting the Distributed Resources Access Act, including N.C.G.S. § 62-126.4:

> The General Assembly of North Carolina finds that as a matter of public policy it is in the interest of the State to encourage the leasing of solar energy facilities for retail customers and subscription to shared community solar energy facilities. The General Assembly further finds and declares that in encouraging the leasing of and subscription to solar energy facilities pursuant to this act, cross-subsidization should be avoided by holding harmless electric public utilities' customers that do not participate in such arrangements.

N.C.G.S. § 62-126.2 (2023). "The primary endeavor of courts in construing a statute is to give effect to legislative intent." *Beck*, 359 N.C. at 614. By both its plain language and stated legislative intent, N.C.G.S. § 62-126.4 requires the Commission to establish nondiscriminatory rates that ensure that, under any of the offered tariff designs, the NEM customer will pay its full fixed cost of service.

B. Order Establishing NEM Rates

[3] As we have determined that the Commission fulfilled its statutory duties, we proceed to determine whether the Commission's *Order Approving Revised Net Metering Tariffs* is proper. The Public Utilities Act empowers the Commission to, *inter alia*, "provide just and reasonable rates and charges for public utility services without unjust discrimination[] [or] undue preferences or advantages . . . and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy[.]" N.C.G.S. § 62-2(a)(4) (2023). "The General Assembly has delegated to

the Commission, and not to the courts, the duty and power to establish rates for public utilities." *State ex rel. Utils. Comm'n v. Westco Tel. Co.*, 266 N.C. 450, 457 (1966). Therefore, we review the Commission's order only to determine whether the Commission's findings therein are supported by competent, material, and substantial evidence and whether these findings support its conclusions of law.

1. Costs and Benefits of Customer-Sited Generation

First, Appellants contend that the Commission's order approving revised net metering tariffs is "arbitrary and capricious" and subject to reversal under N.C.G.S. § 62-94(b)(6) because it "failed to consider multiple material benefits of NEM solar." *See* N.C.G.S. § 62-94(b) (2023) ("[The Court] may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are . . . arbitrary or capricious."). Appellants argue that

> [t]he Commission was presented with substantial evidence about which costs and benefits, under the applicable standard of care, must be considered in any cost-benefit analysis of NEM solar. Instead of grappling with this issue and identifying which costs and benefits should be factored into the cost-benefit analysis, the Commission blindly accepted, without analysis, that the costs and benefits analyzed in the Companies' internal Embedded and Marginal Cost Study were sufficient. The Commission's failure to analyze and make conclusions about this crucial issue—i.e., about exactly which costs and which benefits are relevant—renders the Commission's decision, in violation of [N.C.G.S.] § 62-94(b)(6), arbitrary and capricious.

We begin by emphasizing, as the Commission correctly noted, that "[t]he statute requires an investigation of the costs and benefits of *customer-sited generation*[,]" not "a value of solar study." Appellants contend that the Commission failed to make a "reasoned determination of *which* costs and benefits should be considered," such that its cost-benefit analysis is "by its very nature . . . arbitrary and capricious." While Appellants correctly note that the Commission found that "[t]he analyses in the embedded and marginal cost studies that Duke conducted . . . capture[d] the *majority, if not all*, of the known and verifiable benefits of solar generation[,]" the Commission further specified *which* costs and benefits it deemed appropriate for its consideration. First, the Commission found that

> [t]he record . . . relative to including the benefits of avoided [transmission and distribution ("T&D")] costs in the [Net Excess Energy Credit ("NEEC")[1]] is inconclusive and the Commission will not require that such benefits be added to the NEEC calculations at this time, but rather will revisit the matter in future avoided cost proceedings.

The Commission then "reiterate[d] its position that only *known and measurable benefits and costs* should be included in the determination of the NEEC." The Commission reasoned that it "cannot speculate on future deferrals of T&D costs" and "is also not persuaded that NEM will always provide a grid deferral benefit[]" and found that this uncertainty "alone justifies the exclusion of avoided T&D benefits from the NEEC."

Furthermore, the Commission found that the cost-of-service studies performed at the Commission's request in the Companies' 2019 general rate cases were appropriate for its consideration of "the need for the proposed NEM tariffs" in the present docket, as "the cost-of-service studies used for this investigation were the last ones conducted[,] and no costs have been added to base rates since that time[.]" The Commission also took notice of the "discussion and commentary" in 2022 Carbon Plan proceedings, wherein the Companies "considered, evaluated, and discussed the use of behind-the-meter generation to achieve the goals of [2021 North Carolina Laws S.L. 2021-165 (HB 951)] and the general system benefits of doing so." The Commission found the information presented during these proceedings to be appropriate for its consideration "in the present docket[,]" as "both HB 589 and HB 951 address review and revision of the present NEM programs[.]"

This Court is without power to require the Commission to adopt the "National Standard Practice Manual for Benefit-Cost Analysis of Distributed Energy Resources" advanced by Appellants in its investigation of the costs and benefits of customer-sited generation. While "an order which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal[,]" the Commission's order synthesizing the parties'

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1. The Net Excess Energy Credit, or NEEC, refers to the rate at which the Companies' NEM customer receives credit for the net excess energy generated by that customer and exported to the grid. "The initial NEEC proposed in each new NEM tariff is based upon avoided cost rates approved in" a separate docket. "Duke indicated it will update the NEEC upon the approval of new avoided costs . . . in general rate case proceedings" or "biennial avoided cost proceedings."

arguments and materials, declining to adopt the standards proposed by Appellants, and explaining which costs and benefits it found to be appropriate for its consideration, "is sufficient to show that the Commission gave more than minimal consideration to" Appellants' proposed guidelines. *State ex rel. Utils Comm'n v. Thornburg*, 314 N.C. 509, 511, 515 (1985).

The Commission found that the Companies' "proposal provides an adequate mechanism to reduce the cross-subsidy of fixed cost recovery by incorporating a number of rate design elements[,] . . . including the requirement that NEM customers take service under a time-of-use rate schedule to enable intra-period netting." The Commission then concluded that the Companies' "proposed residential NEM tariffs have met the statutory requirement to develop NEM rates that address [an] NEM customer's full fixed cost of service."

Ultimately, the Commission found and concluded, "based on all the foregoing materials of record, that the requirements established in HB 589 and N.C.G.S. § 62-126.4 have been satisfied in a manner sufficient to enable the Commission to establish new NEM tariffs as mandated by those enactments." We hold that the record contains competent, material, and substantial evidence to support the Commission's findings as to the costs and benefits of customer-sited generation, and these findings support its conclusion that a sufficient investigation was performed such that it may establish the Companies' proposed NEM rates.

2. Settlement Agreement

Finally, Appellants contend that the non-unanimous MOU and the non-binding stipulation agreement presented by the Companies "should be given little or no weight." Our Supreme Court has held

> that a stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding. The Commission must consider the nonunanimous stipulation along with all the evidence presented and any other facts the Commission finds relevant to the fair and just determination of the proceeding. The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes "its own independent conclusion" supported by substantial evidence on the record that the

> proposal is just and reasonable to all parties in light of all the evidence presented.

State ex rel. Utils. Comm'n v. Carolina Util. Customers, Ass'n, 348 N.C. 452, 466 (1998). As determined above, the Commission independently analyzed all materials in the record; made findings of fact supported by competent, material, and substantial evidence; and reached conclusions of law supported by its findings of fact. Therefore, the Commission's consideration of the MOU was appropriate.

CONCLUSION

The Commission acted pursuant to its statutory authority in establishing the Companies' revised NEM rates. The record indicates that the Commission de facto fulfilled its statutory duty to investigate the costs and benefits of customer-sited generation before establishing the Companies' NEM rates. Furthermore, the Commission properly considered the evidence before it and made appropriate findings of fact and conclusions of law. Appellants have failed to demonstrate that their substantial rights were prejudiced by the Commission's order due to any error justifying reversal under N.C.G.S. § 62-94(b), and we modify and affirm the Commission's order establishing the Companies' proposed NEM rates.

MODIFIED AND AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

STATE v. EVANS

[295 N.C. App. 671 (2024)]

STATE OF NORTH CAROLINA
v.
LORI ANN EVANS

No. COA23-1160

Filed 17 September 2024

1. Larceny—by an employee—intent to permanently deprive—sufficiency of evidence

In a prosecution for three counts of larceny by an employee, where defendant—a manager at a discount store—was responsible for depositing $11,000.83 in cash into the bank on the store's behalf but failed to do so, the trial court properly denied defendant's motion to dismiss the charges for insufficient evidence that defendant intended to permanently deprive the store of its money, where the State presented substantial evidence that: defendant took the cash, falsely logged the cash deposits into the store's deposit log, and then quit her job the next day; went missing for three months, evading both her employer's and law enforcement's efforts to contact her, as well as evading arrest; and did not reimburse the stolen funds until over six months after her arrest and over 10 months after she originally took the money.

2. Sentencing—prior record level—calculation—classification of prior misdemeanor conviction—prior plea agreement not breached

After defendant was found guilty on three counts of larceny by an employee, the trial court correctly applied N.C.G.S. § 15A-1340.14(c) in classifying defendant's prior misdemeanor conviction as a felony for the purpose of calculating her prior record level at sentencing. Even though the prior conviction resulted from a plea agreement wherein defendant pled guilty to misdemeanor possession of methamphetamine after originally being charged with felony possession, the court's choice to classify the conviction as a felony did not breach defendant's plea agreement. Under the statute's plain language, defendant's prior conviction had to be classified as it would have been classified at the time that she committed the larceny offenses she was now being sentenced for; here, the felony classification was proper, since the legislature had amended the General Statutes by striking the offense of misdemeanor possession of methamphetamine and classifying any amount of methamphetamine possession as a felony.

Appeal by Defendant from judgment entered 25 May 2023 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 14 August 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip K. Woods, for the State-Appellee.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen, for Defendant-Appellant.

COLLINS, Judge.

Defendant Lori Ann Evans appeals from judgment entered upon a jury's guilty verdict of three counts of larceny by an employee. Defendant argues that the trial court erred by denying her motion to dismiss for insufficient evidence and erred in calculating her prior record level. Because the State presented sufficient evidence that Defendant acted with the requisite intent, the trial court did not err by denying Defendant's motion to dismiss. Because the trial court properly applied the relevant sentencing statute, the trial court did not err in calculating Defendant's prior record level. We find no error.

I. Background

Defendant was indicted on 4 April 2022 for three counts of larceny by an employee. When the case came on for trial, the State's evidence tended to show the following:

Defendant was the manager of a Dollar General store in Benson off N.C. Highway 50. On 13, 14, and 15 May 2021, Defendant was to deliver cash deposits to First Citizens Bank on behalf of Dollar General. On each of these days, Defendant indicated in the store deposit log that she was taking a bag of cash to deposit, and Dollar General's security footage captured Defendant leaving the store with a deposit bag. In total, Defendant took $11,000.83 from the store. On 16 May, Defendant made an entry into the store deposit log indicating that she had made the three deposits. The next day, Defendant quit her job. A cash audit later revealed that these deposits had not been made.

After being notified that the bank had never received the deposits, a loss prevention officer for Dollar General attempted to contact Defendant several times but was unsuccessful. The officer asked another store manager—who knew Defendant well—to contact Defendant; however, that store manager was also unsuccessful in doing so. The

missing cash was then reported to the Johnston County Sheriff's Office. A Sheriff's deputy attempted to reach Defendant on several occasions but was unsuccessful.

Warrants were issued for Defendant's arrest on 28 May 2021. Sheriff's deputies attempted to serve Defendant at her last known home address in Benson, North Carolina; the home, however, was vacant when they arrived. Defendant was finally located in Chadbourn, North Carolina, on 5 September 2021 and served with arrest warrants.

More than six months later, on 29 March and 28 April 2022, Defendant made three deposits totaling $11,000.83 into Dollar General's bank account, using the same cash bags that she had used to remove money from the store in May 2021. The three cash bags contained twenty-six, thirty, and forty-four $100 bills, respectively. According to Dollar General's loss prevention officer, it was highly unusual for a deposit bag to contain more than twenty $100 bills.

At trial, Defendant admitted to leaving the store with the deposit bags and making an entry into the store deposit log indicating that she had made the three deposits. She testified, however, that she left the bags in her car for her daughter to deposit and assumed her daughter had made the deposits. When asked why she had not answered the calls from Dollar General's loss prevention officer and managers, Defendant testified that she did not answer because, at that time, she did not know any money was missing. Defendant further testified that once apprehended for the missing cash, she "scrape[d] and scrounge[d]" $11,000.83 by working and borrowing from family members and deposited this money into Dollar General's bank account.

Defendant's motions to dismiss the charges were denied. The jury convicted Defendant of all three counts of larceny by an employee.

At sentencing, the trial court classified Defendant as a prior record level two and sentenced her to a term of five-to-fifteen months' imprisonment, suspended, and twenty-four months of supervised probation. Defendant gave an oral notice of appeal in open court.

II. Discussion

A. Motion to Dismiss

[1] Defendant first contends that the trial court erred by denying her motion to dismiss because the evidence presented was insufficient to support a conclusion that Defendant intended to permanently deprive Dollar General of its money.

This Court reviews the trial court's denial of a motion to dismiss de novo. *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013). In doing so, the reviewing court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances." *Id.* at 379, 526 S.E.2d at 455. Once the court determines that a reasonable inference may be drawn, it is then for the jury to decide whether the facts satisfy the defendant's guilt beyond a reasonable doubt. *Id.* "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Id.* (quotation marks and citation omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted). When considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, "giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192–93, 451 S.E.2d 211, 223 (1994) (citation omitted).

To survive a motion to dismiss a charge of larceny by an employee, the State must present sufficient evidence of the following elements:

> (1) the defendant was an employee of the owner of the stolen goods; (2) the goods were entrusted to the defendant for the use of the employer; (3) the goods were taken without the permission of the employer; and (4) the defendant had the intent to steal the goods or to defraud his employer.

State v. Frazier, 142 N.C. App. 207, 209, 541 S.E.2d 800, 801 (2001) (citations omitted); *see also* N.C. Gen. Stat. § 14-74 (2023). The intent required by the fourth element includes "both the intent to wrongfully take *and* the intent to permanently deprive the owner of possession." *State v. Spera*, 290 N.C. App. 207, 216, 891 S.E.2d 637, 644 (2023).

Direct evidence of a defendant's intent to permanently deprive the owner of possession is not required; the requisite intent is often inferred from circumstantial evidence. *Id.* at 215, 891 S.E.2d at 644. For example, this intent can "be deemed proved if it appears [the defendant] kept the goods as his own [un]til his apprehension, or that he gave them away, or

sold or exchanged or destroyed them . . . ." *State v. Smith*, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966) (quotation marks and citation omitted); *see, e.g.*, *State v. Osborne*, 149 N.C. App. 235, 243, 562 S.E.2d 528, 534 (2002) (defendant's keeping the stolen goods among his own possessions until apprehension was sufficient evidence of the requisite intent); *State v. Allen*, 193 N.C. App. 375, 381, 667 S.E.2d 295, 299 (2008) (defendant's abandonment of the stolen item, demonstrating an indifference to whether the stolen item would ever be recovered by the victim, was sufficient evidence of the requisite intent).

Here, Defendant was entrusted with three bags of Dollar General's money totaling $11,000.83 between 13 and 15 May 2021. She made an entry into Dollar General's deposit log on 16 May 2021 indicating that she had deposited that money into the bank. In reality, she had not made those deposits and had no first-hand knowledge of anyone else making those deposits. The next day, Defendant quit her job.

Dollar General's loss prevention officer, a Dollar General store manager, and law enforcement officers attempted to contact Defendant on numerous occasions. All of those attempts failed. When law enforcement officers attempted to serve Defendant with her arrest warrants at her home, her home appeared vacant. Ultimately, it took law enforcement over three months to locate Defendant, who was found in Chadbourn.

On 29 March and 28 April 2022, more than ten months after taking the cash out of the Dollar General store and indicating to Dollar General that the cash had been deposited in the bank, and more than six months after being arrested, Defendant deposited $11,000.83 into Dollar General's bank account. The denominations of the bills deposited were different from the denominations of bills typically deposited by Dollar General. Defendant admitted at trial that the cash she deposited in March and April 2022 was not the cash she took from the store in May 2021; the cash she had been entrusted to by the store was gone.

Defendant quit her job the day after she falsely indicated that she had deposited Dollar General's money into its bank account and left town. Considered in the light most favorable to the State, the evidence was sufficient to support a conclusion that Defendant intended to wrongfully take and permanently deprive Dollar General of the money she was entrusted with. *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223.

Citing *Spera*, Defendant contends that her reimbursement of the stolen funds shows that she never intended to permanently deprive Dollar General of the money. Unlike in *Spera*, however, Defendant did not deposit any money into Dollar General's bank account until after she

was arrested for three counts of larceny by an employee, more than ten months after she had failed to deposit the money. *See, e.g.*, *Spera*, 290 N.C. App. at 219–20, 891 S.E.2d at 646–47 (holding that there was insufficient evidence of a permanent deprivation, as the evidence tended to show that the defendant merely took the stolen car for a "joy ride" and returned the keys to the victim roughly thirty minutes after the taking). Defendant's contentions do not warrant dismissal for insufficient evidence. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

Because the State presented sufficient evidence of each element of the offense of larceny by an employee, the trial court did not err by denying Defendant's motions to dismiss.

B. Defendant's Prior Record Level

[2] Defendant next contends that the trial court erred in calculating her prior record level for sentencing. Specifically, Defendant argues that by treating her 1999 misdemeanor conviction as a felony, the trial court breached her 1999 plea agreement, wherein she pled guilty to misdemeanor possession of methamphetamine after being charged with felony possession of methamphetamine.

A trial court's determination of a defendant's prior record level is a conclusion of law reviewed de novo review on appeal. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). Likewise, this Court reviews de novo whether the State breached a plea agreement and whether the trial court entered a judgment inconsistent with the terms of a plea agreement. *State v. Knight*, 276 N.C. App. 386, 390, 857 S.E.2d 728, 732 (2021).

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions . . . ." N.C. Gen. Stat. § 15A-1340.14(a) (2023). One point is assigned for misdemeanor convictions. *Id.* § 15A-1340.14(b) (2023). Felony convictions are assigned more points, depending upon the class of felony, with two points assigned to each prior felony Class H or I conviction. *Id.* For purposes of determining a defendant's prior record level, "the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." *Id.* § 15A-1340.14(c) (2023).

The State presented to the trial court a computerized criminal history printout indicating that Defendant was charged in 1999 with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia; pled "guilty to a lesser degree" to misdemeanor possession of methamphetamine; and was sentenced to forty-five days of

confinement, suspended for one year of unsupervised probation, and ordered to pay a $100 fine and court costs. That same year, however, the North Carolina General Assembly amended our general statutes by striking the offense of misdemeanor possession of methamphetamine and classifying the possession of any amount of methamphetamine as a felony. *See* 1999 N.C. Sess. Laws 370. By the plain language of N.C. Gen. Stat. § 15A-1340.14(c), because possession of methamphetamine was classified as a Class I felony on the date Defendant committed larceny by an employee in the present case, the trial court did not err by assigning her 1999 conviction two points for the purpose of determining her prior record level. *See* N.C. Gen. Stat. § 15A-1340.14(c); *see also State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.") (citation omitted).

Defendant argues that by classifying her prior conviction as a felony, the trial court breached her 1999 plea agreement. In essence, Defendant argues that she did not get the benefit of her earlier bargain. We disagree.

"A plea agreement is treated as contractual in nature, and the parties are bound by its terms." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted). Plea agreements differ from ordinary contracts, however, because a defendant waives various constitutional rights by pleading guilty to a crime. *Knight*, 276 N.C. App. at 390, 857 S.E.2d at 732. Therefore, the plea bargain process "must be attended by safeguards to [e]nsure the defendant receives what is reasonably due in the circumstances." *Id.* (quotation marks and citation omitted).

On this record, Defendant was charged with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. She "bargained" for a conviction to a lesser degree of possession of methamphetamine, dismissal of the possession of drug paraphernalia charge, and a sentence in accordance with that agreement. Defendant thus received "what [was] reasonably due in the circumstances." *Id.*

N.C. Gen. Stat. § 15A-1340.14(c) was enacted in 1993, six years before Defendant pled guilty to possession of methamphetamine. *See* 1993 N.C. Sess. Laws 538. With the passage of 1999 N.C. Sess. Laws 370, Defendant was on notice that, should she be convicted of an offense in the future, her conviction for possession of methamphetamine would be assigned two points for the purpose of determining her prior record level. The language of N.C. Gen. Stat. § 15A-1340.14(c) is clear and unambiguous: Defendant's prior offense must be classified as it would be classified at

the time she committed the offense for which she is currently being sentenced. Additionally, as the trial court noted below, Defendant is not now a convicted felon. "But for purposes of calculating her prior record level, she is a prior record level two because two points would be assigned to that offense. Since [possession of methamphetamine] is now a felony."

Accordingly, because the trial court properly applied N.C. Gen. Stat. § 15A-1340.14(c) and did not otherwise breach Defendant's 1999 plea agreement, the trial court did not err in calculating Defendant's prior record level.

III. Conclusion

Because the State presented substantial evidence of each element of the charge of larceny by an employee, the trial court did not err by denying Defendant's motion to dismiss. Because the trial court did not breach Defendant's prior plea agreement, the trial court did not err in calculating Defendant's prior record level.

NO ERROR.

Judges MURPHY and FLOOD concur.

STATE OF NORTH CAROLINA
v.
TRAVIS K. McCORD, AKA SHAWN LATTIMORE, DEFENDANT

No. COA23-915

Filed 17 September 2024

1. Constitutional Law—mandatory life without parole—Miller statute resentencing—credibility findings by resentencing judge permitted

In a resentencing proceeding conducted pursuant to N.C.G.S. § 15A-1340.19B(a)(2) (part of the statutory scheme (the *Miller* statute) enacted in response to the holding in *Miller v. Alabama*, 567 U.S. 460 (2012), which barred mandatory life without parole sentences for defendants who were under age 18 at the time of their crimes), the imposition of a sentence of life without parole for defendant—who was 16 years old at the time of the crime for which he was convicted of first-degree murder—was affirmed where the resentencing judge made findings in support of his sentencing

decision regarding the credibility of evidence offered at defendant's trial, as explicitly permitted by the *Miller* statute and the United States Supreme Court decision in *Miller*.

2. Constitutional Law—mandatory life without parole—Miller statute resentencing—consideration of mitigating factors

In a resentencing proceeding conducted pursuant to N.C.G.S. § 15A-1340.19B(a)(2) (part of the statutory scheme (the *Miller* statute) enacted in response to the holding in *Miller v. Alabama*, 567 U.S. 460 (2012), which barred mandatory life without parole sentences for defendants who were under age 18 at the time of their crimes), the resentencing court did not abuse its discretion in imposing a sentence of life without parole for defendant, who was 16 years old at the time of the crime for which he was convicted of first-degree murder, after considering and weighing the evidence—including defendant's involvement in the execution of the initial robbery plan, his leadership when the incident turned into a murder, his efforts thereafter to minimize his risk of being held responsible, his multiple disciplinary infractions over two decades of imprisonment, and his high rank in a gang—that was relevant to the contested mitigating factors of defendant's age, immaturity, reduced ability to appreciate risks and consequences, subjection to family and peer pressure, and likelihood to benefit from rehabilitation.

3. Constitutional Law—Miller statute—facial constitutionality—Eighth Amendment

The Court of Appeals overruled defendant's arguments that (1) the *Miller* statute (N.C.G.S. § 15A-1340.19A et seq.) is facially unconstitutional—because it contains a presumption in favor of life without parole and does not provide adequate guidance for sentencing courts—and (2) a sentence of life without parole for a juvenile offender remains unconstitutional under both the United States and North Carolina Constitutions; the North Carolina Supreme Court had previously considered and rejected each contention.

Appeal by defendant from orders and judgments entered 3 March 2023 by Judge W. Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 13 August 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Heidi M. Williams, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

DILLON, Chief Judge.

In 1999, Defendant Travis K. McCord was sentenced to life without parole ("LWOP") for first-degree murder. As Defendant was only 16 years old at the time of the murder, Defendant was entitled to a resentencing hearing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). After the resentencing hearing, the court again sentenced Defendant to LWOP. We affirm.

I. Background

Defendant previously appealed his conviction in the early 2000s.[1]

Under the law applicable at the time of Defendant's trial, it was mandatory for the trial judge to sentence a defendant convicted of first-degree murder who was 16 years of age at the time of the murder to LWOP. *See* N.C.G.S. § 14-17 (1997).

In 2012, the United States Supreme Court's decision in *Miller v. Alabama* held that *mandatory* LWOP sentences for defendants who were under 18 years of age at the time of the crime violate the United States Constitution's Eighth Amendment prohibition on cruel and unusual punishments. 567 U.S. at 465. Four years later, in 2016, in the case of *Montgomery v. Louisiana*, the United States Supreme Court determined that *Miller* applies retroactively. 577 U.S. at 208–09.

In response to *Miller*, our General Assembly enacted N.C.G.S. § 15A-1340.19A, *et seq*. (2023) (the "*Miller* statute"). The *Miller* statute requires that the sentencing court conduct a hearing for every defendant convicted of first-degree murder[2] who was under 18 years old at the time of the offense to determine whether LWOP or a lesser sentence is appropriate. N.C.G.S. § 15A-1340.19B(a)(2).

Defendant was granted a *Miller* resentencing hearing, which occurred in January 2020.

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1. Defendant appealed his conviction in *State v. McCord*, 140 N.C. App. 634 (2000). Our Court remanded the case for a *Batson* hearing but otherwise held no error. *See id*. On remand, the trial court found no *Batson* violation, and our Court affirmed. *See State v. McCord*, 158 N.C. App. 693 (2003).

2. Under the *Miller* statute, a first-degree murder conviction *based on the felony murder rule* carries a sentence of life imprisonment *with* parole rather than an LWOP sentence. *See* N.C.G.S. § 15A-1340.19B(1).

Defendant also filed motions challenging the constitutionality of his sentence and the constitutionality of North Carolina's statutory scheme, the *Miller* statute.

In March 2023, the superior court convened a hearing and entered orders resentencing Defendant to LWOP and denying his constitutional challenges. Defendant appeals.

II. Argument

Defendant makes essentially three arguments on appeal, which we address in turn.

A. Credibility Determination

[1] Defendant first argues that the resentencing judge, in making his sentencing determination, impermissibly assessed the credibility of witnesses who testified during the 1999 trial, where he was not the presiding judge at that trial. For instance, in his order, the resentencing judge made findings regarding Defendant's propensity to criminal behavior and the lead role Defendant played in the murder, based largely on the 1999 trial testimony of two of the three accomplices who had participated with Defendant in the killing:

> The testimony of Katina Lankford (hereinafter Lankford) and Amy Sigmon (hereinafter Sigmon) as set forth in the trial transcript was credible and generally consistent with the testimony of other witnesses in the trial as well as being consistent with physical evidence presented and analyzed for purposes of the trial. Based on consistency of the testimony with other evidence presented at the trial, the Court finds that their version of the events is factually true.

Indeed, the testimonies from the accomplices tended to show, not only that Defendant participated in the murder, but that he was the leader of the group. However, while it is clear the jury believed the evidence that Defendant participated in the murder (based on their guilty verdict), it is unknowable whether the jury believed that Defendant was the leader. But in determining an LWOP sentence to be appropriate, the resentencing judge found the testimony of two accomplices and other evidence—tending to show that Defendant was the leader and likely to reoffend—to be credible.

We conclude that the judge in a *Miller* resentencing hearing, rather than a jury, may make credibility findings regarding the evidence offered

at the trial to support his sentencing decision. In so holding, we are persuaded by the following: The United States Supreme Court's holding in *Miller* states that "*a judge* or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible punishment for juveniles." 567 U.S. at 489 (emphasis added). *See also Raines v. State*, 845 S.E.2d 613 (Ga. 2020) (jury not required to make findings in *Miller* resentencing hearing); *State v. Keefe*, 478 P.3d 830 (Mont. 2021) (same); *People v. Skinner*, 917 N.W.2d 292 (Mich. 2018) (same).

Also, our *Miller* statute provides that "[t]he order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and *such other findings as the court deems appropriate to include in the order*." N.C.G.S. § 15A-1340.19C(a) (2023) (emphasis added). Further, the *Miller* statute provides the matter may be heard by a judge other than the judge who presided at trial. *See* N.C.G.S. § 15A-1340.19C(b) (2023).

Our General Assembly has provided that in *any* criminal jury trial, the presiding judge may be substituted with a new judge during the course of the trial prior to sentencing in certain circumstances. *See* N.C.G.S. § 15A-1224 (2023). After this substitution, the new judge may be required, and is allowed, to make credibility findings about witnesses who testified even prior to the substitution in considering the appropriate sentence within the presumptive range.

Similarly in federal court, the Federal Rules of Criminal Procedure allow for the substitution of a new judge during the sentencing phase in certain circumstances. *See* Fed. R. Crim. P. 25(b)(1). The sentencing judge is allowed to make credibility findings about witnesses who testified in front of the other judge during the guilt determination phase of the trial in order to appropriately sentence the defendant. For example, in *United States v. Bourgeois*, 950 F.2d 980 (5th Cir. 1992), the trial judge became disabled after the trial, so the case was transferred to another judge for sentencing. *Id.* at 987. The defendant requested that the substituting judge recuse himself or grant the defendant a new trial because the substituting judge would not be able to assess the credibility of the witnesses who testified at trial in front of the preceding judge. *Id.* The Fifth Circuit rejected the defendant's argument, concluding that the substituting judge "was capable of assessing the credibility of the witnesses and the evidence at trial by a thorough review of the record." *Id. See also United States v. Casas*, 425 F.3d 23, 56 (1st Cir. 2005); *United States v. McGuinness*, 769 F.2d 695, 696 (11th Cir. 1985) (stating "[a] sentencing judge enjoys broad discretion to determine whether he can perform sentencing duties in a case he did not try.").

Here, the judge who presided over Defendant's *Miller* resentencing stated that he "considered everything presented to it" in determining Defendant's sentence, which includes evidence such as the 1999 trial transcript and Defendant's 1997 confession following his arrest for the murder. We are satisfied that the judge thoroughly reviewed the record and could appropriately assess the credibility of the two co-defendants who testified against Defendant at the 1999 trial.

B. Mitigating Factors

[2] Defendant argues that the trial court ignored mitigating evidence and misapplied some of *Miller*'s mitigating factors. We review orders weighing the *Miller* factors only for abuse of discretion. *State v. Golphin*, 292 N.C. App. 316, 322 (2024). "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." *Id.*

Pursuant to the *Miller* statute, the defendant may submit mitigating circumstances for the court to consider in determining whether to impose an LWOP sentence. N.C.G.S. § 15A-1340.19B(c)(1)–(9).

1. Contested Mitigating Factors

Defendant specifically contests the court's weighing of the following factors: (1) age, (2) immaturity, (3) reduced ability to appreciate risks and consequences, (4) family and peer pressure exerted upon the defendant, and (5) the defendant's likelihood to benefit from rehabilitation.

a. Defendant's age

Defendant was 16 years, 7 months, and 15 days old at the time of the murder. The resentencing court found that "Defendant [was] substantially closer to the age of a criminal adult." Nonetheless, the court noted that "[t]he chronological age and the youth of the Defendant is a mitigating factor to which the court gave substantial weight." We conclude the court did not abuse its discretion in its consideration of this mitigating factor.

b. Immaturity

The resentencing court did not give significant weight to the factor of immaturity. The court found that, being less than 18 years old, Defendant lacked "some degree of maturity" but there was "no evidence of any specific immaturity that mitigates Defendant's conduct in this case." For example, the forensic psychiatry expert testified that immaturity can manifest itself in impetuous and impulsive acts, and the court noted that Defendant did not "act impetuously or impulsively[,]" as the

plans for committing the robbery (which escalated into murder) were modified multiple times and Defendant was involved in at least two of those plan modifications. Accordingly, we conclude the court did not abuse its discretion in its consideration of this mitigating factor.

c. Ability to appreciate risks and consequences

The court found that Defendant's ability to appreciate risks and consequences as a mitigating factor was "not existent and does not apply." Specifically, the court noted that a person of Defendant's age with no intellectual or mental health disabilities would know the consequences of armed robbery, rape, kidnapping, and murder. The court further noted: Defendant deliberately minimized the chance of being held responsible for the murder by moving the victim from the motel (a public place) to a remote place; Defendant killed the victim to eliminate her as a potential witness; Defendant forced his co-defendants to participate in the execution-style murder so they would be less likely to testify against him; and Defendant had condoms (and let a co-defendant borrow a condom to rape the victim), but he chose not to use a condom while he raped the victim because he planned to kill her and knew pregnancy would not be an issue. We conclude the court did not abuse its discretion in its consideration of this mitigating factor.

d. Familial or peer pressure

The court found that familial or peer pressure was not a mitigating factor in this case. For example, the court noted that

> [a]lthough Defendant was brought into the crime by the other participants, once the plan to rob the victim was initiated, the Defendant became a leader in its execution. At the time of the murder, it was the Defendant who not only pressured the others to participate in the murder but he actually forced the other participants to shoot the victim to kill he[r] under the duress of being told if they did not shoot the victim, he would kill them.

And though the court did not assign mitigating value to Defendant's dysfunctional childhood here, the court explicitly found his dysfunctional childhood to be a mitigating factor later in its Order under the category of "any other mitigating factor or circumstance." We conclude the court did not abuse its discretion in its consideration of this mitigating factor.

e. Likelihood to benefit from rehabilitation in confinement

The resentencing court found the likelihood that Defendant would benefit from rehabilitation in confinement was not a mitigating factor.

The court noted that it had the benefit of evaluating Defendant's behavior while serving his sentence over the last two decades. Specifically, Defendant has had multiple disciplinary infractions, he was convicted of simple assault in 2003 and assault of a government official in 2013, and he is a high-ranking member of the Blood Nation gang. We conclude the court did not abuse its discretion in its consideration of this mitigating factor.

C. Constitutional Arguments

[3] Defendant argues that North Carolina's *Miller* statute is unconstitutional on its face because it contains a presumption in favor of LWOP and its framework does not provide adequate guidance for sentencing courts.[3] Our Supreme Court, however, has sustained the constitutionality of our State's *Miller* statute. *See State v. James*, 371 N.C. 77, 99 (2018). We conclude the statute is not unconstitutional on its face.

Defendant also argues that an LWOP sentence for juvenile offenders is unconstitutional under both the Eighth Amendment of the United States Constitution and Article 1, Section 27 of the North Carolina Constitution. He specifically argues an LWOP sentence should never be imposed because it is impossible to determine how a human being may change in the future (*i.e.*, impossible to determine if a human being is irreparably corrupt). Defendant's argument is without merit, as our Supreme Court has recognized that LWOP sentences are constitutional (under both the federal and state constitutions) for a juvenile deemed to be irreparably corrupt. *See State v. Conner*, 381 N.C. 643, 659–69 (2022); *State v. Kelliher*, 381 N.C. 558, 560 (2022).

AFFIRMED.

Judges WOOD and THOMPSON concur.

3. Defendant asserts this argument to preserve it for reconsideration by our Supreme Court and for possible future federal review.

STATE v. NOVA

[295 N.C. App. 686 (2024)]

STATE OF NORTH CAROLINA
v.
VICTOR MANUEL MEDINA NOVA, DEFENDANT

No. COA23-883

Filed 17 September 2024

Evidence—other crimes, wrongs, or acts—similarity and temporal proximity—not unduly prejudicial—indecent liberties with a child

In a prosecution for taking indecent liberties with a child, the trial court did not err in admitting evidence of defendant's sexual conduct with another minor, pursuant to Evidence Rule 404(b), where the evidence was: (1) uncontestedly admitted for a proper purpose; (2) sufficiently similar—each incident involving defendant fondling the genitals of boys (ages 10 and 13 years) with whom he had developed a relationship at the same church; and (3) sufficiently close in time—the incidents having occurred only two years apart. Moreover, the probative value of evidence of the other incident—in showing a common plan by defendant—was not substantially outweighed by the danger of unfair prejudice, particularly where the trial court gave the jury an appropriate limiting instruction.

Appeal by Defendant from judgment entered 12 January 2023 by Judge David A. Phillips in Gaston County Superior Court. Heard in the Court of Appeals 14 August 2024.

Stephen G. Driggers, for defendant-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Chris D. Agosto Carreiro, for the State.

STADING, Judge.

Defendant Victor Manuel Medina Nova appeals from judgment entered after a jury found him guilty of taking indecent liberties with a child. After careful review, we discern no error.

I. Background

When he was around eight years old, N.R.[1] and his family began

1. A pseudonym is used to protect the victim's identity.

attending Casa de Dios Puerta al Cielo ("the church"). By the time he was twelve years old, N.R. became involved in the church by participating in the worship team as the drummer, operating the audio system during services, and attending youth group. Through his involvement at the church, N.R. had the occasion to meet Defendant.

Defendant is a former adult member of the church who worked with the youth group and the worship team. N.R. began assisting Defendant with the music during church services when he was thirteen years old. At the time, N.R. viewed Defendant as a "mentor" because "he was . . . the only person that was consistent and . . . there for [him]." N.R. discussed many things with Defendant, including his parents and school. Over time, Defendant increasingly engaged in inappropriate behaviors with N.R. including grabbing N.R.'s bottom and touching him when nobody was watching or around.

During a worship practice in the summer of 2014, when N.R. was thirteen years old, he told Defendant of his plans to try out for the school soccer team. Defendant told N.R. that in doing so, N.R. would have to undergo a physical examination and be "check[ed]." Defendant then asked N.R. if he could "check" him and "motioned" for N.R. to "stand beside" a large printer in the room. Defendant then put his hands inside of N.R.'s underwear and nodded his head up and down while fondling N.R.'s genitalia. As N.R. was leaving, Defendant told him not to tell anybody what had happened.

N.R. first reported Defendant's abuse in 2017 to a youth leader at the church. At this time, N.R. learned that he was not the only youth member to have been abused by Defendant. Upon hearing that Defendant also abused B.T.,[2] another minor, N.R. came forward and reported Defendant's actions to law enforcement.

On 19 February 2018, Defendant was indicted and charged with one count of taking indecent liberties with a child. Before trial, the State moved to introduce B.T.'s testimony under Rule of Evidence 404(b). N.C. Gen. Stat. § 8C-1, R. 404(b) (2023). The trial court granted the State's motion, concluding that "the facts surrounding the [D]efendant's previous child sex offense [were] sufficiently similar to the case before the [c]ourt," and that B.T.'s testimony was relevant to show "motive, intent, modus operandi, preparation, knowledge, identity of the perpetrator, lack of accident and common scheme or plan." The trial court also concluded "that the temporal proximity between the two offenses [was] not

2. A pseudonym is used to protect the victim's identity.

so remote that it would render the evidence inadmissible in the present case," and that "the probative value of the 404(b) evidence outweigh[ed] the potential for unfair prejudice. . . ."

Defendant's trial began on 9 January 2023. During the trial, the State presented testimony from B.T., testimony from B.T.'s mother, and played a recording of B.T.'s interview with a children's advocacy center. Before the introduction of this evidence, the trial court instructed:

> Members of the jury, evidence will be presented tending to show that the defendant touched [B.T.'s] genitals. This evidence is received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed. That the defendant had the intent, which is a necessary element of the crime charged in this case. That there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it is received. You may not consider it for any other purpose.

Thereafter, B.T. testified that he and his parents knew Defendant through the church. B.T. recounted that he and his siblings had stayed with Defendant for several weeks while their parents traveled to Central America. At some point during this stay with Defendant, B.T. was watching TV on the couch alone and Defendant "climbed over [him] . . . started rubbing [his] shoulder . . . and . . . laid down there with [him]." B.T. said that after heading to bed, Defendant entered his bedroom, "got underneath the covers" with him, and started touching him "in his private area and bottom." Defendant then attempted "to make [B.T.] touch his private area. . . . moved [B.T.] onto [his] stomach, and . . . rubb[ed] his private area against [B.T.'s] bottom." B.T.'s mother testified that he was ten years old when this incident occurred.

Defendant moved to dismiss the charge at the close of the State's evidence, arguing that the State failed to put on evidence that Defendant acted "for the purpose of sexual arousal" when he had touched N.R. The State argued that Defendant's intent could be inferred from the character evidence presented by B.T. and Defendant's nodding while touching N.R. The trial court denied Defendant's motion to dismiss. During the presentation of Defendant's evidence, he elected to take the stand and denied having touched N.R. inappropriately. Defendant subsequently admitted to watching B.T. while his parents were out of town, and he denied ever touching B.T. inappropriately. Defendant again moved for

dismissal of the charge at the close of all evidence, which was also denied. After deliberating, the jury delivered a guilty verdict. The trial court sentenced Defendant to sixteen to twenty-nine months in prison and ordered him to register as a sex offender for a period of thirty years. Defendant gave notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction to consider Defendant's appeal under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Analysis

Defendant submits one issue for our consideration: whether the trial court erred in admitting testimony under Rule 404(b) that was dissimilar to the crime charged and unfairly prejudicial. After careful review, we hold that the trial court did not err by admitting B.T.'s testimony under Rule 404(b). We also hold that the trial court did not abuse its discretion when conducting a Rule 403 balancing test. N.C. Gen. Stat. § 8C-1, R. 403 (2023).

A. Standard of Review

This Court reviews the admission of Rule 404(b) evidence by engaging in a two-step analysis: (1) whether the evidence is admissible under Rule 404(b), and (2) whether the trial court abused its discretion in applying a Rule 403 balancing test. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012) (citation omitted). "When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions." *Id.* at 130, 726 S.E.2d at 159. "We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *Id.*

"Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted). And "[u]nder the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary it could not have been the result of a reasoned decision." *State v. Turner*, 273 N.C. App. 701, 708, 849 S.E.2d 327, 332 (2020) (citation omitted).

B. Rule 404(b) Evidence

Defendant contends that the trial court erred by concluding that B.T.'s testimony was admissible under Rule 404(b) because it was not sufficiently similar or temporally proximate. We disagree. Since Defendant does not contest whether B.T.'s testimony was admitted for a proper purpose, our review is limited to the similarity and temporal proximity requirements of Rule 404(b). *State v. Godfrey*, 263 N.C. App. 264, 270, 822 S.E.2d 894, 899 (2018) (citation and internal brackets omitted) ("when prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403.").

Rule 404(b) of the North Carolina Rules of Evidence provides:

> 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, R. 404(b). Rule 404(b) is "a rule of inclusion, and evidence of prior bad acts is admissible unless the only reason that the evidence is introduced is to show the defendant's propensity for committing a crime like the act charged." *State v. Pickens*, 385 N.C. 351, 356, 893 S.E.2d 194, 198 (2023) (citation omitted). If a party offers evidence under Rule 404(b), it "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence." *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citation omitted). That said, our courts have "liberal[ly] . . . allow[ed] evidence of similar offenses in trials on sexual crime charges." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996) (citation omitted). "This is particularly true where the fact sought to be proved is the defendant's intent to commit a similar sexual offense for which the defendant has been charged." *State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561-62 (1992) (citation omitted).

The admission of evidence under Rule 404(b) is "constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citation omitted). "Prior acts are sufficiently similar 'if there are some unusual facts present in both crimes' that would indicate that the same person committed them." *Id.* at 131, 726 S.E.2d at 159 (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d

876, 890-91 (1991)). But "[w]e do not require that the similarities 'rise to the level of the unique and bizarre.' " *Id.* (quoting *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988)). "Our case law is clear that near identical circumstances are not required . . . ; rather, the incidents need only share some unusual facts that go to a purpose other than propensity for the evidence to be admissible." *Id.* at 132, 726 S.E.2d at 160 (internal quotation marks and citations omitted).

Defendant acknowledges that Rule 404(b) is a rule of inclusion but argues the similarity and temporal requirements of *Beckelheimer* are not met here. *Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159. In *Beckelheimer*, the defendant was charged with three counts of indecent liberties with a child and one count of first-degree sexual offense after he "placed his hands in the victim's pants, then unzipped the victim's pants and performed oral sex on him while holding him down." *Id.* at 128, 726 S.E.2d at 157. At trial, the State offered prior acts evidence from the victim's half-brother pursuant to Rule 404(b). *Id.* The half-brother testified that when he was about thirteen years old, "defendant . . . touched [his] genital area outside of his clothes while pretending to be asleep, . . . reach[ed] inside his pants to touch his genitals, [and] . . . performed oral sex on him." *Id.* at 129, 726 S.E.2d at 158. The trial court concluded that the prior act contained sufficient similarities with respect to the victim's age, the location of the abuse, and "how the occurrences were brought about." *Id.* at 131, 726 S.E.2d at 159. Although the half-brother's assault took place "ten to [twelve] years ago," the trial court "concluded that given the similarities, particularly the location of the occurrence, how the occurrences were brought about, and the age range of each of the alleged victims at the time of the acts which occurred in the bedroom, that temporal proximity is reasonable." *Id.* at 129, 726 S.E.2d at 158.

Thereafter, the *Beckelheimer* defendant appealed the introduction of the half-brother's testimony on the grounds of similarity and temporal proximity. *Id.* at 129-30, 726 S.E.2d at 158. Our Supreme Court held that there was sufficient similarity and temporal proximity "to support the State's theory of modus operandi in th[e] case." *Id.* In reaching this decision, the court noted that Rule 404(b) does not "require circumstances to be all but identical for evidence to be admissible. . . ." *Id.* at 132, 726 S.E.2d at 160 (citation omitted). Rather, "the incidents need only share some unusual facts that go to a purpose other than propensity." *Id.* (internal quotation marks and citations omitted). As to the issue of temporal proximity, the court noted that "[r]emoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as

to permit a reasonable inference that the same person committed both crimes." *Id.* at 132-33, 726 S.E.2d at 160 (citation omitted). In these types of cases, "remoteness in time goes to the weight of the evidence rather than its admissibility." *Id.* at 133, 726 S.E.2d at 160 (citations omitted).

Here, the trial court's findings support its conclusion that B.T.'s testimony satisfied the admissibility requirements of Rule 404(b) because there are sufficient similarities between the two alleged incidents. Contrary to Defendant's urging, B.T. and N.R. were sufficiently close in age at the time of the alleged acts. Both victims were young boys—B.T. was ten years old, and N.R. was thirteen.[3] Defendant also seeks to differentiate between the setting as one alleged incident occurred in a back room of the church and the other occurred in a bedroom. This distinction of exact setting is one of lesser significance than the trial court's finding Defendant's behavior taking place when both boys were isolated away from adults. Defendant then attempts to juxtapose the trial court's findings regarding acts of abuse because Defendant not only touched B.T.'s "genital area"—as he did with N.R.—but he also "pressed his genitals into [B.T.'s] buttocks region." Evidence of Defendant's additional acts committed against B.T. does not negate the similarity of the initial act committed against both boys. Furthermore, the trial court found, and evidence shows, a key similarity in that Defendant met and developed relationships with both boys through the church. Thus, there are "some unusual facts present in both crimes that would indicate that the same person," Defendant, "committed them." *Id.* at 131, 726 S.E.2d at 159 (citations and internal quotation marks omitted).

Although there is no brightline rule addressing how much time is too remote to show temporal proximity, the incident with N.R. occurred only two years before the incident with B.T. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (a ten-to-twelve-year separation between two instances is reasonable if the "*modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried."); *see also State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 825 (1988) (a seven-year gap between prior acts and the charged acts rendered 404(b) evidence inadmissible since "its probative impact . . . [amounted to] little more than character evidence illustrating the predisposition of the accused.").

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3. Citing page fourteen of the record, Defendant's brief asserts that "the incident with N.R. occurred in 2014, when N.R. was 14 years old." However, pages three and twelve of the record show that N.R. was still thirteen on the day of the incident. Furthermore, the trial court's order states on the same page cited by Defendant that "[t]he victim . . . was 13 years of age. . . ."

Here, the modus operandi of the crime being tried is not only strikingly similar to B.T.'s testimony, but also occurred only two years earlier. Accordingly, the temporal proximity requirement of Rule 404(b) has been sufficiently satisfied.

We hold that the trial court did not err by concluding that B.T.'s testimony was admissible because the prior act was sufficiently similar and temporally proximate to the incident involving N.R. *Id.* at 132, 726 S.E.2d at 159 (citation omitted).

C. Rule 403 Balancing Test

Defendant next contends that the trial court abused its discretion by admitting B.T.'s testimony because its probative value was outweighed by unfair prejudice pursuant to Rule 403. Defendant argues that "the jury could not properly evaluate N.R.'s credibility, given the over-persuasive impact of B.T.'s 404(b) evidence." We disagree.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, R. 403. "Unfair prejudice, as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Wilson*, 345 N.C. 119, 127, 478 S.E.2d 507, 513 (1996) (citations and internal quotation marks omitted). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). "In general, the exclusion of [404(b)] evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion." *Wilson*, 345 N.C. at 127, 478 S.E.2d at 513 (citation omitted). "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citations and internal quotation marks omitted).

Here, the trial court concluded that "the probative value of the 404(b) evidence outweigh[ed] the potential for unfair prejudice in that the evidence is relevant to show motive, intent, modus operandi, preparation, knowledge, identity of the perpetrator, lack of accident, and common scheme or plan." The trial court's conclusion is supported by reason because both instances involved "young [h]ispanic males. . . . both knew [ ] [D]efendant through the church. Both allegations involved [ ] [D]efendant fondling each young man's [genitals]. . . . [and] in each

case, [ ] [D]efendant isolated the victim away from other adults." These similarities also are fairly supported by the record because "the trial court conduct[ed] voir dire on the evidence, ma[de] extensive findings, [and] concluded the evidence [was] relevant for a purpose such as showing common plan. . . ."

The trial court also properly curtailed the risk of unfair prejudice by issuing a limiting jury instruction as follows: "[i]f you believe this evidence, you may consider it but only for the limited purpose for which it is received. You may not consider it for any other purpose." *See State v. Barnett*, 223 N.C. App. 450, 456, 734 S.E.2d 130, 135 (2012) ("Limiting instructions mitigate the danger of unfair prejudice to the defendant"). By limiting the scope in which the jury could view B.T.'s testimony, the judge mitigated the risk of the evidence having an "undue tendency to suggest decision on an improper basis." *Wilson*, 345 N.C. at 127, 478 S.E.2d at 513 (citations and internal quotation marks omitted). For these reasons, we conclude that the trial court's ruling was not "arbitrary," but was "the result of a reasoned decision." *Turner*, 273 N.C. App. at 708, 849 S.E.2d at 332 (citation omitted).

The trial court's conclusion following a Rule 403 balancing test was well-reasoned and rests within its sound discretion. Any risk of unfair prejudice was adequately tempered by the trial court's limiting instruction.

IV. Conclusion

We hold that the trial court did not err by admitting B.T.'s testimony because it satisfies the similarity and temporal proximity requirements of Rule 404(b). We also hold that the trial court did not abuse its discretion in determining that B.T.'s testimony was more probative than prejudicial after conducting a Rule 403 balancing test. There was thus no error at trial, and we affirm the judgment.

NO ERROR.

Judges TYSON and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
BRINDELL WILKINS, DEFENDANT

No. COA23-839

Filed 17 September 2024

1. False Pretense—obtaining something of value—renewal of law enforcement certification—falsification of records—no causal connection

The trial court erred by denying defendant's motion to dismiss charges of obtaining property by false pretenses arising from defendant—who was then the elected sheriff of his county—having falsified training attendance records in order to continue his law enforcement certification. The State's evidence was insufficient to prove the essential element of "obtaining" something of value because renewal of a license or certification does not constitute obtaining property within the meaning of N.C.G.S. § 14-100 and, here, defendant only sought to retain the certification previously issued to him. Therefore, there was no causal connection between defendant's misrepresentation and obtaining the initial certification.

2. Indictment and Information—obstruction of justice—falsified training records—no allegation of act to subvert legal proceeding—fatally defective

Where indictments charging defendant with common law obstruction of justice were fatally defective, the trial court lacked subject matter jurisdiction to enter judgment on those charges and therefore erred by denying defendant's motion to dismiss. Although the indictments alleged that defendant—then the elected sheriff of his county—falsified training attendance records in order to continue his law enforcement certification, they did not allege facts to support the essential element that the wrongful acts were done to subvert a potential investigation or legal proceeding.

Appeal by Defendant from Judgments entered 8 December 2022 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 12 June 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Heidi M. Williams, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele Goldman, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Brindell Wilkins (Defendant) appeals from Judgments entered pursuant to jury verdicts finding him guilty of six counts of Obtaining Property by False Pretenses and six counts of felony Obstruction of Justice. The Record before us tends to reflect the following:

In 2009 Defendant was appointed Sheriff of Granville County, and in 2010 he was elected to that office. Prior to this appointment, Defendant served in Granville County as a deputy sheriff from 1989 through 1996, as an auxiliary officer from 1996 through 2001, and as chief deputy sheriff from 2001 until his appointment as Sheriff.

During his time as a deputy, Defendant received the certification required to hold that position. The North Carolina Sheriffs' Education and Training Standards Commission (the Commission) sets requirements for deputy sheriffs to become certified justice officers, while the North Carolina Sheriffs' Education and Training Standards Division (Division) operates as staff for the Commission, overseeing training and certification for justice officers. Requirements for deputy sheriffs include an initial 600-to-700-hour Basic Law Enforcement Training course.

After obtaining certification, justice officers must complete annual in-service training, which includes firearm requirements for officers authorized to carry firearms. Sheriffs' offices are required to submit a yearly report to the Division setting forth which of its justice officers completed annual training and, if applicable, whether they qualified to carry a firearm for that year. The Division then reviews the reports and audits the records for compliance with the Commission's standards.

As Sheriff, Defendant was not required to maintain certification or complete in-service training requirements. N.C. Gen. Stat. § 17E-11. However, he was still able to voluntarily complete training to maintain his certification if he so chose.

Between the years of 2013 and 2019, Defendant reported to the Division that he had satisfactorily completed voluntary in-service training and firearm qualification classes. However, a 2019 investigation of the Granville County Sheriff's Office revealed that Defendant's signatures on training class rosters appeared to be falsified. His firearms

requalification scores were not posted with those of the deputy sheriffs, and deputy sheriffs later testified at trial that Defendant had not participated in in-service training or firearms training and requalification with them. Defendant was charged with six counts each of Obtaining Property by False Pretenses and Obstruction of Justice.

At trial, Defendant admitted that he had not completed in-service training or firearms training and requalification since becoming Sheriff. He testified he submitted the false records for "a personal reason" and that he "wanted to get credit for it."

Defendant moved to dismiss all charges and the trial court denied his Motion. The jury found Defendant guilty on all twelve counts. The trial court sentenced Defendant to six to seventeen months' imprisonment, with an additional suspended sentence of the same length. Defendant gave oral Notice of Appeal.

Issue

The issues on appeal are whether the trial court (I) erred in denying Defendant's Motion to Dismiss the charges of Obtaining Property by False Pretenses; and (II) erred in denying Defendant's Motion to Dismiss the charges of Obstruction of Justice.

Analysis

We review the trial court's denial of a motion to dismiss *de novo*, substituting our judgment freely for that of the trial court. *State v. Walker*, 286 N.C. App. 438, 441, 880 S.E.2d 731, 735 (2022). "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). If so, the motion is properly denied. *Id.* at 66, 296 N.C. at 651-52.

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "Only defendant's evidence which does not contradict and is not inconsistent with the state's evidence may be considered favorable to defendant if it explains or clarifies the state's evidence or rebuts inferences favorable to the state." *State v. Sumpter*, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986).

I. Obtaining Property by False Pretenses

[1] To convict Defendant of Obtaining Property by False Pretenses (OPFP), the State must provide evidence of "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); N.C. Gen. Stat. § 14-100 (2023). Defendant argues that the State has failed to prove the final element because the certification was already in his possession when he filed the false reports and renewing a certification does not constitute "obtaining" it as required by the statute. We agree.

To convict for OPFP, "[t]here must be a causal relationship between the representation alleged to have been made and the *obtaining* of the money or property." *State v. Davis*, 48 N.C. App. 526, 531, 269 S.E.2d 291, 294-95 (1980) (emphasis added). Thus, Defendant's argument—that he did not obtain anything because of his misrepresentation but only maintained possession of a certification obtained prior—depends on whether renewal of a license or certification constitutes obtaining property within the meaning of the statute.

We addressed a similar question in *State v. Mathis*, 261 N.C. App. 263, 819 S.E.2d 627 (2018). There, the defendant was a bail bondsman charged with OPFP for renewing his bondsman's license after submitting reports that misrepresented the bonds he had issued. *Id.* at 267, 819 S.E.2d at 631. Renewal allowed him to keep the license for another year. *Id.* As in this case, the defendant argued that he had not obtained anything of value because he already had a license prior to the misrepresentation. *Id.* at 281, 819 S.E.2d at 639-40. We agreed and rejected the State's argument that retaining the bondsman's license fell within the definition of "obtaining" as used in the OPFP statute, holding that "retain is not within the definition of obtain" and that a renewal could not constitute obtaining for the purposes of the statute. *Id.* We noted that the Department of Insurance had different processes and requirements for obtaining a bondsman's license and renewing or retaining one. *Id.* We also noted that the rule of lenity, which requires us to strictly construe criminal statutes and resolve ambiguities in favor of defendants, supported our holding. *Id.*; *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007).

Defendant argues that, similarly to *Mathis*, his false pretense led only to retaining the certification he first obtained while working as a deputy and there is therefore no causal connection between his

misrepresentation and *obtaining* the certification. We agree. Here, the indictment alleged Defendant obtained "continued law enforcement certification." Applying *Mathis*, we conclude that renewing a previously acquired law enforcement certification does not constitute obtaining property. As with the bondsman's license at issue in that case, the process for obtaining and renewing law enforcement certification differs considerably, with initial obtainment requiring completion of the Basic Law Enforcement Training course. The evidence showed Defendant did not obtain a new certification but retained a previously issued one, and to "retain is not within the definition of obtain." *Id.* at 282, 819 S.E.2d at 640. Because Defendant must have obtained property to be charged with OPFP, we conclude the trial court erred in denying his motion to dismiss.

The State attempts to distinguish *Mathis*, arguing that our decision in that case rested on an error in the indictment. The indictment in *Mathis* alleged the defendant "obtain[ed] . . . a Professional Bail Bondsman's License" that the parties agreed had, in fact, been in his possession prior to his alleged acts. *Id.* at 282, 819 S.E.2d at 640. It was only on appeal at oral argument that the State introduced the argument that "retaining wrongfully is obtaining" and that "obtaining a renewal" may constitute "obtaining." *Id.* at 282, 819 S.E.2d at 640. We declined to engage with this argument because it was inconsistent with the indictment, which did not allege the defendant had "obtained a renewal." *Id.* ("Additionally, the State's assertion at oral argument—Defendant obtained a renewal—is not what the State alleged in the indictment.").

In this case, the indictment alleges that Defendant obtained "continued law enforcement certification." While this phrasing is slightly different from the indictment in *Mathis*, it does not change the facts of this case: that Defendant obtained his certification prior to making any misrepresentation, and his false pretenses led only to a retention of certification. Under *Mathis*, this is not obtaining property within the meaning of the statute and Defendant could not be convicted of OPFP. *Id.* at 283, 819 S.E.2d at 640 ("The State also contended obtaining a renewal may be obtaining. We disagree."). The trial court erred by denying his Motion to Dismiss the charges of Obtaining Property by False Pretenses.

II. Obstruction of Justice

[2] To prove the offense of common law obstruction of justice, the State must show Defendant: "(1) unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud." *State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342-43 (2014). "[A]ny action intentionally undertaken by the defendant for the purpose of obstructing,

impeding, or hindering the plaintiff's ability to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice." *Blackburn v. Carbone*, 208 N.C. App. 519, 703 S.E.2d 788 (2010). An obstructive act is "one that is done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation, which might lead to a judicial or official proceeding." *State v. Coffey*, 292 N.C. App. 463, 471, 898 S.E.2d 359, 364, *disc. review denied*, 386 N.C. 341, 901 S.E.2d 796 (2024).

We do not reach Defendant's arguments as to the sufficiency of evidence supporting his conviction for obstruction of justice because the indictments are facially invalid as to this charge. Because a facially invalid indictment fails to confer subject matter jurisdiction on the trial court, its validity may be challenged at any time and a conviction based on an invalid indictment must be vacated. *State v. Perkins*, 286 N.C. App. 495, 502, 881 S.E.2d 842, 849 (2022). "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).[1]

An indictment must include "[a] plain and concise factual statement in each count, which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2023). Defendant argues the State failed to allege obstruction because the indictment asserts no facts showing Defendant's actions were done to subvert a potential investigation or legal proceeding. The indictment alleged Defendant:

> unlawfully, willfully and feloniously with deceit and intent to defraud, did commit the infamous offense of obstruction of justice by knowingly providing false and misleading information in training records indicating he had completed mandatory in-service training and annual firearm qualification where he had not completed it, and knowing that these records and/or the information contained in these records would be and were submitted to the North Carolina Sheriffs' Education and Training

1. Defendant has filed with this Court a Motion for Appropriate Relief requesting that we address the error in the indictment in light of *Coffey*. Because errors in the indictment are jurisdictional in nature and may be raised at any time, including *sua sponte*, we elect to address this issue in this opinion and dismiss Defendant's Motion as moot.

> Standards Division thereby allowing defendant to maintain his law enforcement certification when he had failed to meet the mandated requirements.

This indictment is materially identical to that at issue in the related case of *State v. Coffey*, 292 N.C. App. 463, 898 S.E.2d 359, 364, *disc. review denied*, 386 N.C. 341, 901 S.E.2d 796 (2024). There, the defendant certified our present Defendant's falsified attendance and firearms records. *Id.* at 360-61. The indictment alleged he acted "for the purpose of allowing Sheriff Wilkins and Chief Deputy Boyd to maintain their law enforcement certification when he had failed to meet the mandated requirements." *Id.* at 365. However, it did not allege that he acted with intent to obstruct an investigation or judicial proceeding. This raised the question of what constitutes an "act which prevents, obstructs, impedes or hinders public or legal justice." *Id.* at 363; *In re Kivett*, 309 N.C. 635, 670, 309 S.E. 2d 442, 462 (1983) (defining common law obstruction of justice).

We observed that, under our precedent, an act that obstructs justice must be one that is "done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation, which might lead to a judicial or official proceeding." *Id.* at 364. When the indictment fails to allege that the acts were intended to interfere with an investigation or proceeding, it fails to allege facts supporting an element of the offense. *Id.* at 365. The indictments in *Coffey*, as in this case, alleged the defendant "willfully and knowingly provided false and misleading information in training records knowing those records would be submitted to [the Division.]" *Id.* However, there was no indication in the indictment that the defendant had acted to hinder any investigation by the Division or to impair their ability to seek relief against the involved parties: "While these alleged actions are wrongful, there are no facts asserted in the indictment to support the assertion Defendant's actions were done to subvert a potential subsequent investigation or legal proceeding." *Id.* Instead, the indictments alleged his actions were "done for the sole purpose of allowing his supervisors to maintain their certifications." *Id.*

Defendant's nearly identical indictment likewise asserts only that his submission of falsified records was done for the purpose of maintaining his certification despite failing to meet the requirements. It does not allege that his wrongful acts were done to subvert a potential investigation or legal proceeding, and therefore fails to allege he performed an act which "prevents, obstructs, impedes or hinders public or legal justice." *Kivett*, 309 N.C. at 670, 309 S.E.2d at 463; N.C. Gen. Stat.

§ 15A-924(a)(5) (2023). The indictment therefore fails entirely to charge Defendant with a criminal offense.[2]

Thus, here, the indictments were insufficient by failing to allege the crime of common law obstruction of justice. Therefore, the indictments were fatally defective. Consequently, the trial court erred in denying Defendant's Motion to Dismiss because the indictments as to Obstruction of Justice were defective and the trial court lacked subject matter jurisdiction to enter judgment thereon.[3]

Conclusion

Accordingly, for the foregoing reasons, we reverse the ruling of the trial court as to Defendant's Motion to Dismiss the charges of Obtaining Property by False Pretenses and vacate the trial court's Judgments as to Defendant's convictions of common law Obstruction of Justice.

REVERSED IN PART; VACATED IN PART.

Judges MURPHY and WOOD concur.

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2. We note that our Supreme Court has recently held that "an indictment raises jurisdictional concerns only when it wholly fails to charge a crime against the laws or people of this State." *State v. Singleton*, 386 N.C. 183, 184-85, 900 S.E.2d 802, 805 (2024). A "mere pleading deficiency" does not deprive our courts of jurisdiction. *Id.* at 215, 900 S.E.2d at 824. The indictment in this case does not allege conduct that could be understood to constitute common law obstruction of justice and therefore fails entirely to allege a criminal act, creating a jurisdictional defect. We additionally observe that the Supreme Court denied discretionary review in *Coffey* subsequent to its opinion in *Singleton*. 901 S.E.2d 796. *Coffey* remains binding precedent upon this Court.

3. It must be noted that the trial court did not have the benefit of our decision in *Coffey*.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 SEPTEMBER 2024)

BIGGS v. ERIE INS. EXCH. No. 23-1167	Durham (23CVS1463)	Dismissed
CAMPBELL v. WARREN No. 23-1011	Burke (13CVD552) (15CVD988)	Reversed and Remanded
HANDS v. HANDS No. 24-19	Mecklenburg (20CVD15708)	Affirmed
IN RE B.-L.K. No. 24-188	Moore (22JT65)	Affirmed
IN RE P.Z.R. No. 24-402	New Hanover (21JT41) (21JT42)	Affirmed
IN RE R.A.S. No. 24-150	Johnston (19JT234-500) (19JT235-500) (19JT236-500)	Affirmed
KOTSIAS v. FLA. HEALTH CARE PROPS. No. 23-1029	N.C. Industrial Commission (X59853)	AFFIRMED IN PART, REMANDED IN PART, ALL COSTS TAXED TO APPELLANT
SMITH v. SMITH No. 24-245	Forsyth (22CVS5302)	Dismissed
STATE v. ABERNETHY No. 24-232	Catawba (22CRS609)	No Error
STATE v. BAILEY No. 24-485	Moore (23CRS203372) (23CRS215138)	No Error
STATE v. BRADSHAW No. 23-797	Guilford (18CRS85724)	Dismissed
STATE v. DAVIS No. 23-1088	Brunswick (23CRS366)	Affirmed
STATE v. DUMAS No. 24-76	Montgomery (23CRS1012)	No Error

STATE v. ELLISON No. 24-53	Buncombe (20CRS91286) (20CRS92077) (21CRS472)	Vacated and Remanded
STATE v. HENDERSON No. 23-553	Buncombe (20CRS89242-43)	No Plain Error
STATE v. JONES No. 24-49	Buncombe (02CRS50329) (02CRS50399-400)	Affirmed
STATE v. JONES No. 23-991	Nash (21CRS53377) (21CRS53378)	No Error
STATE v. MOODY No. 24-61	Mecklenburg (20CRS16583)	AFFIRMED In Part, and DISMISSED In Part
STATE v. PARKER No. 24-432	Forsyth (22CRS353186) (22CRS357432)	No Error
STATE v. PATTERSON No. 23-730	Forsyth (19CRS55162) (22CRS1020)	No Error
STATE v. PENA No. 23-537	Mecklenburg (12CRS223248-51)	No Error
STATE v. RAWSON No. 23-610	Buncombe (22CRS1610)	No Error
STATE v. ROLLINSON No. 23-992	New Hanover (20CRS51101-02)	No Error
STATE v. SLADE No. 23-1157	Guilford (15CRS93186-88) (19CRS25103-07)	Affirmed in Part, Vacated in Part, Remanded for Resentencing
STATE v. SUGGS No. 23-4	Mecklenburg (19CRS27393) (19CRS28377)	No Error
STATE v. TAFT No. 24-430	Pitt (21CRS53490) (21CRS53773)	Affirmed in Part, Vacated in Part, and Remanded

STATE v. WARREN No. 24-164	Beaufort (22CRS279630) (22CRS687)	No Error
STEPHENS v. LUNNERMON No. 24-243	Cumberland (22CVD6293)	Affirmed
TADLOCK v. MORETZ No. 23-561	Catawba (19CVD1047)	Affirmed
TEASLEY v. HARRIS TEETER, LLC No. 24-537	Durham (23CVS004839)	Dismissed
WELLS FARGO BANK, N.A. v. GEORGE No. 23-1002	New Hanover (23CVD2728)	Affirmed

HEADNOTE INDEX

AIDING AND ABETTING—Continued

defendant in his alleged slander of title because plaintiff failed to allege the essential element of slander of title that she suffered special damages as a result of false statements contained in a deed that was recorded by defendant attorney and that purported to transfer title to plaintiff's property. Generalized assertions that plaintiff suffered damages, including that she incurred expenses in hiring an attorney to defend title, were insufficient to demonstrate special damages. **Hill v. Ewing, 345.**

APPEAL AND ERROR

Abandonment of issues—order modifying temporary restraining order—no issue presented—In a city's action to abate a public nuisance filed against multiple parties, including the owners and manager of a motel (motel defendants), where the motel defendants appealed from two orders of the trial court but presented issues in their brief as to just one of the orders (a default judgment entered against them), their appeal from the second order (granting another defendant's motion to modify a temporary restraining order and allowing the initiation of foreclosure proceedings) was deemed abandoned and was therefore dismissed. **State ex rel. City of Sanford v. Om Shree Hemakash Corp., 372.**

Appellate jurisdiction—juvenile neglect case—orders appointing guardian ad litem—denial of request to representation by retained counsel—In a neglect matter, where the trial court denied respondent-mother's request to be represented by her privately retained counsel, respondent-mother could not challenge on appeal the court's appointment of a guardian ad litem (GAL) to represent her, since she did not appeal from either of the two interlocutory orders appointing the GAL, and, at any rate, neither of those orders qualified as appealable orders under the Juvenile Code (N.C.G.S. § 7B-1001). Although the appellate court was inclined to review the GAL appointment issue by invoking Appellate Rule 2, it could not do so because the record lacked a transcript of the hearing where the GAL was appointed and, therefore, there was no way to determine if respondent-mother objected to the appointment at that hearing. However, with respect to respondent-mother's argument regarding the denial of her right to representation by her retained counsel, appellate review was proper because the adjudication order clearly addressed the issue, respondent-mother adequately gave notice of appeal of that order, and a transcript of the adjudication hearing was available. **In re A.K., 115.**

Appellate jurisdiction—notice of appeal—timeliness—tolling of filing period—nonjurisdictional defects—The Court of Appeals had jurisdiction to review a father's appeal from an order terminating his parental rights in his children, where a fourteen-day delay in serving the order on the father tolled the 30-day period for filing notice of appeal (in accordance with Civil Procedure Rule 58), and where the father timely filed his notice within 30 days after the order was served. Although the father's notice of appeal had incorrectly designated the Supreme Court as the appellate court to which he was appealing and failed to cite the correct statute providing for his right to appeal, these defects were nonjurisdictional. **In re K.B.C., 619.**

Appellate rules violations—nonjurisdictional—substantial violation—sanction imposed—Where the appellant brief submitted by respondent-mother in a child custody case contained numerous nonjurisdictional violations of Appellate Procedure Rules 26 and 28—including misuse of appendices to evade word-count limits, use of nonconforming font and formatting, and failure to include a non-argumentative statement of facts—burdening both the appellee's response (and compelling a rule violation by appellee in its brief) and the appellate court's review, the

APPEAL AND ERROR—Continued

Court of Appeals, as a sanction, declined to consider any arguments presented by respondent-mother in her appendices and addressed her challenges to the district court's findings of fact only to the limited extent they were referenced in the body of her brief. In so doing, the court overruled respondent-mother's contentions because she only argued the existence of evidence tending to conflict with the district court's findings and quibbled with their wording, and the weight and credibility of the evidence was for the district court to decide. **Harney v. Harney, 456.**

Interlocutory order—claims dismissed—counterclaims remained pending—Rule 54(b) certification—In an action for damages arising from the delayed disbursement of a small business loan, the trial court's order of summary judgment dismissing plaintiffs' claims against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention was immediately appealable where, although the order was interlocutory because it left the city's counterclaims pending, the trial court certified that there was "no just reason for delay" of immediate review pursuant to Civil Procedure Rule 54(b). **Flomeh-Mawutor v. City of Winston-Salem, 104.**

Interlocutory order—partial summary judgment—substantial right—danger of inconsistent verdicts—In a dispute over whether a former owner of a piece of property (defendant, a construction company) could legally dump debris on the property (now owned by plaintiffs) pursuant to an easement purporting to give defendant that right, the trial court's interlocutory order granting partial summary judgment to defendant on two of plaintiffs' causes of action—plaintiffs having been granted partial summary judgment on their other three causes of action—was immediately reviewable because it affected a substantial right. Given that future proceedings could lead to separate trials on the different causes of action—which all involved the single fundamental question of whether defendant illegally dumped debris on plaintiffs' property—there was a danger of separate juries reaching inconsistent verdicts, particularly on the question of when plaintiffs' various causes of action accrued (in accordance with each relevant statute of limitation) based on competing accrual evidence. **Shannon v. Rouse Builders, Inc., 144.**

Oral notice of appeal—Appellate Rule 4 "at trial" interpreted—next day during same session of court sufficient—Defendant's oral notice of appeal from a criminal judgment was timely made pursuant to Appellate Rule 4(a) (requiring that a party seeking appeal may give oral notice "at trial") even though it was given the day after his trial, because it was made, through counsel, during the same session of court and before the same judge who entered the judgment. Therefore, the appellate court had jurisdiction over the matter, and defendant's petition for writ of certiorari was dismissed as moot. **State v. McLean, 254.**

Petition for writ of certiorari—guilty plea—error in probation sentence—extraordinary circumstances—In an appeal from judgments entered after defendant pleaded guilty to four counts of second-degree exploitation of a minor, although defendant's notice of appeal was deficient (because he failed to specify which court he was appealing to and did not reference the judgments from which he appealed), defendant's petition for writ of certiorari was granted based on a showing of extraordinary circumstances, since the trial court likely erred concerning defendant's probation sentence, and an unwarranted extension of probation constitutes substantial harm. **State v. Barton, 182.**

Petition for writ of certiorari—satellite-based monitoring order—meritorious argument—extraordinary circumstances—In an appeal from orders requiring

APPEAL AND ERROR—Continued

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

state a claim of abuse. Therefore, the trial court erred by granting the father's Rule 12(b)(6) motion to dismiss the juvenile petition. However, since some of the father's other pending motions potentially could result in the striking of some or all of the petition, the court's dismissal order was vacated rather than reversed. The matter was remanded for consideration of whether, after resolution of all of the motions, any allegations remained for purposes of Rule 12(b)(6). **In re A.D.H., 480.**

Adjudication—neglect—substantial risk of future neglect—mental health and substance abuse—failure to provide necessary medical care—The trial court did not err in adjudicating respondent-mother's child as neglected where both respondent-mother and the child tested positive for illegal drugs immediately after the child's birth, and where respondent-mother's subsequent failure to complete a substance abuse assessment, timely complete a mental health assessment, and arrange for necessary medical care for the child indicated a substantial risk of future neglect. Notably, even though the child suffered from multiple health issues, including a hernia that required surgical removal, respondent-mother failed to attend twenty-four out of forty-one doctor's appointments for the child due to cancellations and no-shows, all within the first year of the child's life. **In re K.C., 363.**

Felony child abuse—jury instruction on lawful corporal punishment—exemption not applicable—plain error not shown—In a felony child abuse prosecution, the trial court did not plainly err in failing to instruct the jury regarding lawful corporal punishment by a parent where the evidence was insufficient that defendant, the fiancée of the victim's mother, was acting in loco parentis; moreover, even assuming that she had been acting in that capacity, overwhelming evidence was presented from which a jury could conclude that defendant's punishments—including making the five-year-old victim run in place for long periods of time three to four times in a week, resulting in bruised and swollen feet so painful the child could not walk normally—were rooted in malice, thus making any potential exemption under the lawful corporal punishment principle inapplicable. **State v. Freeman, 209.**

Right to representation by retained counsel—statutory mandate—qualifications for retained counsel—The adjudication and disposition orders in a neglect matter were vacated—and the matter was remanded—because the trial court violated the statutory mandate in N.C.G.S. § 7B-602(a) by denying respondent-mother's request to release her court-appointed counsel and to be represented by her privately retained counsel, who had made an appearance in the case, after determining that the retained counsel's representation would be detrimental to respondent-mother because he lacked experience representing parents in abuse, neglect, and dependency proceedings. The court did not address the requirements of section 7B-602(a) when making its determination, and although a lack of specific experience with juvenile cases would have disqualified a court-appointed counsel from representing respondent-mother, the rules for qualifying court-appointed attorneys to represent parents in Chapter 7B cases do not apply to privately retained attorneys, who only require a valid license to practice law to appear in such cases. **In re A.K., 115.**

CHILD CUSTODY AND SUPPORT

Custody—awarded to non-parent—constitutionally protected status of parent—sufficiency of findings—In a custody dispute between a minor child's mother and maternal grandfather, the district court's numerous well-supported findings of fact—including that the mother: had limited contact with the child after his birth; had little involvement with the child's medical and therapy providers, despite the

CONSTITUTIONAL LAW—Continued

from a police officer that the victim had identified a photograph of defendant as the only other person who had been in her home (other than the victim's spouse, who suffered from dementia) when the checks were taken and to whom the forged checks had been made payable. Defendant could not show that the identification was so suggestive as to create a substantial likelihood of irreparable misidentification; thus, she failed to demonstrate the need for discretionary review to prevent a manifest injustice. **State v. Simpson, 425.**

Effective assistance of counsel—failure to move to suppress out-of-court identification—no error shown—In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker from the residence of a client, defendant did not receive ineffective assistance as a result of her counsel's failure to move to suppress—as either a violation of the Eyewitness Identification Reform Act (EIRA) or her constitutional due process rights—testimony from a police officer that the victim had identified a photograph of defendant as the only other person who had been in her home (other than the victim's spouse, who suffered from dementia) when the checks were taken and to whom the forged checks had been made payable. The identification did not fall under the EIRA and was not so suggestive as to create a substantial likelihood of irreparable misidentification; accordingly, a motion to suppress on either basis would have been denied as meritless. **State v. Simpson, 425.**

Effective assistance of counsel—failure to renew motion to dismiss—prejudice not shown—In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), juvenile could not demonstrate the prejudice necessary to show he received ineffective assistance when his counsel failed to renew a motion to dismiss petitions for second-degree forcible rape and sexual battery for insufficiency of evidence that juvenile used physical force beyond that inherent in the sexual contact. The evidence—including testimony from the victim that juvenile grabbed her and would not let her leave the room after she said no to his advances and told him to stop—taken in the light most favorable to the State, showed juvenile's use of force, however slight, to compel the victim's submission. Accordingly, even had juvenile's counsel renewed the motion to dismiss, it would have been properly dismissed. **In re D.R.J., 352.**

Effective assistance of counsel—failure to request limiting instructions and object to jury charge—prejudice not shown—The appellate court rejected defendant's arguments that he received ineffective assistance when his trial counsel failed to (1) request limiting instructions directing the jury to consider only the conduct alleged in the charging instrument (communicating slurs spelled out on milk jugs displayed toward his neighbor's home) and regarding Evidence Rule 404(b) testimony of other harassing behavior directed at the neighbor; and (2) object to the jury instruction on stalking listing fear of death and bodily injury—in addition to fear of continued harassment—as a type of emotional distress defendant knowingly caused his neighbor. Defendant could not demonstrate prejudice in light of his admitted placement in his driveway of milk jugs he had had marked with letters spelling out slurs and the absence of evidence that the victim experienced any emotional distress other than a fear of continued harassment; accordingly, there was no reasonable probability that, but for defense counsel's alleged errors, the jury's verdict would have been different. **State v. Plotz, 404.**

Freedom of speech—time, place, manner restrictions—intermediate scrutiny—protests outside government office and employee's home—In a case

CONSTITUTIONAL LAW—Continued

where the trial court entered a civil no-contact order pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent), who founded an anti-DSS organization and led protests on the streets and sidewalks near DSS's main office and the DSS director's personal residence, the court did not violate respondent's state or federal free-speech rights by ordering respondent to peacefully protest no less than twenty-five feet from the DSS office employee entrance without using "voice amplification devices" or yelling when children were leaving the building. These content-neutral restrictions properly regulated the time, place, and manner of respondent's speech where they passed the highest applicable judicial standard—here, intermediate scrutiny—because they were narrowly tailored to serve a significant government interest (protecting DSS employee safety and preventing psychological harm to children leaving the DSS office) and left ample alternative channels of communication open for respondent to peacefully protest. **Durham Cnty. Dep't of Soc. Servs. v. Wallace, 440.**

Mandatory life without parole—Miller statute resentencing—consideration of mitigating factors—In a resentencing proceeding conducted pursuant to N.C.G.S. § 15A-1340.19B(a)(2) (part of the statutory scheme (the *Miller* statute) enacted in response to the holding in *Miller v. Alabama*, 567 U.S. 460 (2012), which barred mandatory life without parole sentences for defendants who were under age 18 at the time of their crimes), the resentencing court did not abuse its discretion in imposing a sentence of life without parole for defendant, who was 16 years old at the time of the crime for which he was convicted of first-degree murder, after considering and weighing the evidence—including defendant's involvement in the execution of the initial robbery plan, his leadership when the incident turned into a murder, his efforts thereafter to minimize his risk of being held responsible, his multiple disciplinary infractions over two decades of imprisonment, and his high rank in a gang—that was relevant to the contested mitigating factors of defendant's age, immaturity, reduced ability to appreciate risks and consequences, subjection to family and peer pressure, and likelihood to benefit from rehabilitation. **State v. McCord, 678.**

Mandatory life without parole—Miller statute resentencing—credibility findings by resentencing judge permitted—In a resentencing proceeding conducted pursuant to N.C.G.S. § 15A-1340.19B(a)(2) (part of the statutory scheme (the *Miller* statute) enacted in response to the holding in *Miller v. Alabama*, 567 U.S. 460 (2012), which barred mandatory life without parole sentences for defendants who were under age 18 at the time of their crimes), the imposition of a sentence of life without parole for defendant—who was 16 years old at the time of the crime for which he was convicted of first-degree murder—was affirmed where the resentencing judge made findings in support of his sentencing decision regarding the credibility of evidence offered at defendant's trial, as explicitly permitted by the *Miller* statute and the United States Supreme Court decision in *Miller*. **State v. McCord, 678**.

Miller statute—facial constitutionality—Eighth Amendment—The Court of Appeals overruled defendant's arguments that (1) the *Miller* statute (N.C.G.S. § 15A-1340.19A et seq.) is facially unconstitutional—because it contains a presumption in favor of life without parole and does not provide adequate guidance for sentencing courts—and (2) a sentence of life without parole for a juvenile offender remains unconstitutional under both the United States and North Carolina Constitutions; the North Carolina Supreme Court had previously considered and rejected each contention. **State v. McCord, 678.**

EMINENT DOMAIN—Continued

as dangerous and marking them for demolition, on remand from the North Carolina Supreme Court for de novo review of the trial court's dismissal of plaintiffs' claims on summary judgment, the Court of Appeals affirmed the trial court after holding that an adequate state law remedy existed for each of plaintiffs' *Corum* claims pursuant to Chapter 160A (since repealed) of the North Carolina General Statutes. Chapter 160A provided remedies—such as rights of appeal and to petition for certiorari review—that meaningfully addressed plaintiffs' claims of violation of their constitutional rights due to defendant's allegedly arbitrary actions. **Askew v. City of Kinston, 295.**

EVIDENCE

Exclusion of testimony—no offer of proof—argument dismissed—In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), juvenile's argument that the district court erred in excluding testimony from the grandparents of the juvenile (and the victim) about prior instances when the victim allegedly conflated fictional television portrayals with her real life—which juvenile contended was relevant to the victim's untruthfulness and admissible pursuant to Evidence Rule 404(b)—was dismissed because juvenile failed to make an offer of proof regarding the excluded testimony, preventing the Court of Appeals from determining whether the exclusion was prejudicial. The court further noted that Evidence Rule 608(b)—not Rule 404(b)—addresses the admission of specific instances of conduct concerning a witness's character for truthfulness or untruthfulness. **In re D.R.J., 352.**

Felony child abuse—serious physical injury—reckless disregard for human life—substantial evidence—motion to dismiss properly denied—The trial court did not err in denying defendant's motion to dismiss a charge of felony child abuse for insufficient evidence of "serious physical injury" and "reckless disregard for human life" where the evidence, viewed in the light most favorable to the State, was substantial on each challenged element, in that: (1) the repeated punishments defendant inflicted on the five-year-old victim resulted in bruised and swollen feet so painful the child had difficulty walking, causing him great pain and suffering; and (2) defendant's provision of water, foot soaks, and lotion to the victim did not assuage her indifference to the child's health and safety. **State v. Freeman, 209.**

Hearsay—business records exception—authentication—affidavit—not notarized—signed under penalty of perjury—After defendant made several unauthorized purchases using corporate credit cards she received through her employment, the trial court in the resulting embezzlement prosecution properly admitted records of defendant's purchases—from the credit card company and from a vendor—under the business records exception to the rule against hearsay (Evidence Rule 803(6)), where the records were accompanied by letters from employees of the credit card company and the vendor stating that the records met the requirements listed in Rule 803(6). Although the letters were not notarized, they still qualified as "affidavits" because they were signed under penalty of perjury; therefore, the letters were sufficient to authenticate the evidence under Rule 803(6). **State v. Hollis, 224.**

Hearsay—exceptions—statements made for medical diagnosis or treatment—eyewitness account of abuse—reasonably pertinent to diagnosis—At defendant's trial for sexual offenses committed against his two minor daughters, where a pediatrician specializing in child maltreatment testified about her medical examination of one of the daughters, the trial court properly admitted the daughter's

EVIDENCE—Continued

hearsay statement to the pediatrician that defendant had inappropriately touched her sister. The daughter's statement qualified as one "made for purposes of medical diagnosis or treatment" under the hearsay exception in Evidence Rule 803(4), since the daughter made the statement during her own medical exam, which was not limited to a physical examination but also involved assessing her mental health. Therefore, although the statement seemingly had more to do with what happened to her sister, the statement was reasonably pertinent to the daughter's diagnosis by the pediatrician because her eyewitness account of her sister's sexual abuse would undoubtedly have affected her mental health. **State v. Anderson, 168.**

Lay opinion testimony—identification of defendant in videos and photographs—plain error—prejudice not shown—In a prosecution on charges arising from the theft of a purse containing a credit card from a car and the use of the card at a Walmart, the trial court did not commit plain error in allowing lay opinion testimony from a law enforcement officer who identified defendant as the person depicted in surveillance video footage from the store and in photographs derived from the footage. Even assuming, without deciding, that admission of the testimony was error—in that it was not "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony or the determination of a fact in issue" (Evidence Rule 701)—defendant failed to demonstrate that the testimony had a probable impact on the jury's verdicts given the overwhelming evidence, both direct and circumstantial, of his guilt. **State v. Thomas, 269.**

Murder trial—victim's prior felony convictions—admissibility—to show defendant's state of mind—prejudice—In a prosecution for first-degree murder arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm, where defendant fatally shot the victim after the victim pushed defendant to the ground, the trial court erred in excluding evidence that defendant knew of the victim's status as a convicted felon. Under Evidence Rule 404(b), while evidence of the victim's prior felony convictions was inadmissible to show the victim's propensity for violence, it was admissible to show defendant's state of mind during the shooting; specifically, the evidence tended to explain why defendant—a disabled seventy-two-year-old war veteran—might have been afraid of the victim after being assaulted by him. Because the evidence spoke to the reasonableness of defendant's fear, it was essential to his claim of self-defense, and therefore its exclusion was prejudicial to defendant. The court's error further prejudiced defendant where it lead to the exclusion of other evidence regarding defendant's state of mind, and the exclusion of that evidence likely misled and confused the jury. **State v. Hague, 380.**

Other crimes, wrongs, or acts—limiting instruction not requested—no error—In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor by means of epithets written on milk jugs, the trial court did not err in failing to give a limiting instruction regarding evidence of additional, uncharged harassing acts by defendant—including making a profane gesture and racist remarks, revving his truck and flashing its headlights at the neighbor's residence in the middle of the night, and banging on a shared wall of the duplex—admitted pursuant to Evidence Rule 404(b) where defendant did not request such an instruction, either when the evidence was admitted or during the charge conference. **State v. Plotz, 404.**

Other crimes, wrongs, or acts—similarity and temporal proximity—not unduly prejudicial—indecent liberties with a child—In a prosecution for taking

EVIDENCE—Continued

indecent liberties with a child, the trial court did not err in admitting evidence of defendant's sexual conduct with another minor, pursuant to Evidence Rule 404(b), where the evidence was: (1) uncontestedly admitted for a proper purpose; (2) sufficiently similar—each incident involving defendant fondling the genitals of boys (ages 10 and 13 years) with whom he had developed a relationship at the same church; and (3) sufficiently close in time—the incidents having occurred only two years apart. Moreover, the probative value of evidence of the other incident—in showing a common plan by defendant—was not substantially outweighed by the danger of unfair prejudice, particularly where the trial court gave the jury an appropriate limiting instruction. **State v. Nova, 686.**

Prior bad acts—sexual offense trial—child victims—uncharged acts against one sibling—common plan or scheme—In a trial for multiple sex offenses committed against each of two child victims (siblings whose mother defendant dated off and on for ten years), there was no error in the trial court's decision to allow the State to introduce evidence of sexual acts allegedly committed by defendant against the older victim for which defendant was not charged and which were alleged to have taken place a few years prior to the charged offenses. The evidence was admissible under Evidence Rule 404(b) to show a common plan, intent, or scheme to abuse both of the siblings because the acts were sufficiently similar and not so remote in time to the charged acts. Further, the trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence for purposes of Rule 403, where the court carefully considered the evidence first outside the presence of the jury and admitted a limited amount of testimony regarding the uncharged acts. **State v. Lopez, 239.**

Prior consistent statement—improper corroboration—objection waived—evidence of similar character—At defendant's trial for sexual offenses committed against his two minor daughters, the trial court erred by allowing defendant's half-brother to testify that his stepsister mentioned seeing defendant sexually abusing the half-brother's then-five-year-old daughter, where the trial court did so "to corroborate." The stepsister did not testify at defendant's trial, so her out-of-court statement was inadmissible as a prior consistent statement because there was no in-court testimony to corroborate. Nevertheless, the court's error did not prejudice defendant because he had waived any objection to that testimony by failing to object to other evidence of a similar character, including in-court testimony from the half-brother's daughter and defendant's written statement to law enforcement, both of which described the stepsister witnessing the abuse referred to in her out-of-court statement. **State v. Anderson, 168.**

Prior conviction elicited on cross despite stipulation—relevancy—impeachment of witness—In defendant's trial for multiple offenses including possession of a firearm by a felon, in which he asserted that the guns found in his home were not his, the trial court did not abuse its discretion by allowing the State to ask defendant's mother on cross-examination about her knowledge of defendant's prior conviction (also for possession of a firearm by a felon) even though defendant had already conceded that he was a convicted felon in order to avoid the prior conviction being heard by the jury. The prior conviction was relevant to impeach the mother's credibility as a witness after she stated that she had "never known" defendant to have any guns, since she admitted being present in the courtroom when defendant pleaded guilty to the older charge. Although there was a chance that the jury would use the information to defendant's detriment in deciding whether defendant was the owner of the guns in the present case, the possibility of undue prejudice did not outweigh the legitimate probative value of the evidence. **State v. Jones, 234.**

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

Certificate of need—competing proposals—reasonableness of cost, design, and means of construction—remanded for further findings—In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the reasoning of the administrative law judge (ALJ) was unsound as to respondent's conclusions of law that intervenor complied with a statutory requirement (N.C.G.S. § 131E-183(a)(12)) that it demonstrate the reasonableness of the cost, design, and means of construction of the facility on the proposed site. Specifically, the ALJ treated restrictive covenants and zoning requirements applicable to the site as unproblematic and, moreover, considered an alternative site not included in intervenor's application—which, in any event, was itself impaired by a proposed highway extension as well as power lines, a greenway, and water hazards. Given the possibility that the ALJ might not have awarded the CON to intervenor but for its contemplation of the alternative site, the matter was remanded for consideration of intervenor's application taking into account only the site proposed therein. **Duke Univ. Health Sys. Inc. v. N.C. Dep't of Health & Hum. Servs., 25.**

Certificate of need—competing proposals—relative impact on competition—decision affirmed—In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding the relative impact on competition of each CON application because the alleged error argued by petitioner on appeal—a categorical preference for a new market competitor—was (1) not evident in the ALJ's decision, and (2) even if it were present, would be unavailing given the undisputed fact that petitioner controlled 98% of acute care beds in the county at the time of its CON application. **Duke Univ. Health Sys. Inc. v. N.C. Dep't of Health & Hum. Servs., 25.**

Certification of need application—failure to hold hearing—substantial prejudice not shown—An administrative law judge (ALJ) correctly determined that, in providing a written comment period in lieu of holding a public hearing on a certificate of need (CON) application (due to public health concerns during a pandemic), the N.C. Department of Health and Human Services failed to follow proper procedure because the public hearing requirement in N.C.G.S. § 131E-185(a1)(2) was mandatory. The ALJ erred, however, when it reversed the agency's decision (conditionally approving the CON application) on the sole basis that the failure constituted substantial prejudice as a matter of law rather than evaluating specific evidence of concrete harm—other than generalized market competition—to the two other healthcare providers who filed petitions for a contested case hearing. This portion of the ALJ's decision was reversed and the matter was remanded for additional consideration. **Fletcher Hosp., Inc. v. N.C. Dep't of Health & Hum. Servs., 82.**

Contested case—certificate of need application—approval without public hearing—no per se substantial prejudice—waiver of statutory right inapplicable—In a contested case regarding two university healthcare systems' competing applications to the Department of Health and Human Services (DHHS) for a certificate of need to develop 68 acute care beds, where the losing applicant (petitioner)

SEARCH AND SEIZURE—Continued

later found) within the curtilage of defendant's house, defendant did not receive ineffective assistance of counsel where his trial attorney did not move to suppress evidence seized pursuant to the search warrants. Even if the officer's warrantless search of the curtilage at defendant's home had been unlawful, the warrants were still supported by probable cause based on information acquired independently of the officer's unlawful entry, including phone records placing defendant and the victim at defendant's house at the time of the murder, thereby purging the warrants of any taint. **State v. Corrothers, 192.**

Unlabeled pill bottle—probable cause—officer's observations and prior knowledge—In a drug prosecution, the trial court properly denied defendant's motion to suppress opioids found in an unlabeled orange pill bottle in defendant's car despite improperly basing its decision on a reasonable suspicion standard because the officer who encountered defendant at a gas station had probable cause to believe that the bottle containing white pills (which defendant hid from view inside his car upon seeing the officer) contained illegal drugs, justifying a search of defendant's vehicle. Although the officer did not know that defendant was then on supervised probation (and subject to searches based on a lower standard—reasonable suspicion), the officer recognized defendant from previous encounters, knew that defendant had been involved with illegal drugs in the past, and remembered defendant trying to hide drugs from an officer who served him with an indictment on a prior occasion. Further, when the officer asked defendant about the unlabeled orange pill bottle, defendant repeatedly lied about its existence. **State v. Siler, 262.**

Warrantless search of vehicle—probable cause—odor and appearance of marijuana—The trial court did not err by denying defendant's motion to suppress evidence of a firearm, bullets, alleged marijuana, and sandwich bags found during a warrantless search of defendant's vehicle after a lawful traffic stop. Officers had probable cause to search defendant's vehicle after detecting a strong odor of marijuana, viewing a significant amount of marijuana residue on the passenger side floorboard, and, after specifically asking defendant about marijuana, obtaining a response that the residue was from defendant's cousin. Contrary to defendant's argument, the recent liberalization of laws regarding hemp did not substantially alter the plain view doctrine with regard to marijuana, even if industrial hemp and marijuana look and smell the same. Here, based on the trial court's unchallenged findings of fact, the officers had a reasonable belief based on their observations and experience that the substance detected by odor and sight was marijuana. **State v. Little, 541.**

SENTENCING

New trial following appellate review—more severe sentence imposed—no lesser sentence statutorily authorized—The statutory prohibition in N.C.G.S. § 15A-1335 on imposing a sentence, following appellate review, "for the same offense . . . which is more severe than the prior sentence" was not implicated where, in defendant's new trial, the trial court added an additional prior record level point pursuant to N.C.G.S. § 15A-1340.14(b)(6) (one point assigned "if all the elements of the present offense are included in any prior offense for which the offender was convicted"), with the result that defendant's prior record level was raised from III to IV. The trial court sentenced defendant at the bottom of the presumptive range applicable to a prior record level IV offender with habitual felon status in the absence of any mitigating factors for the convictions consolidated in the judgment and was not statutorily authorized to impose any lesser sentence—the sole exception to the provisions of N.C.G.S. § 15A-1335. **State v. Thomas, 269.**

TERMINATION OF PARENTAL RIGHTS—Continued

as the father punching the mother in the stomach while she was pregnant with the child), would experience a repetition of neglect if returned to the mother's care. That determination was supported by the findings and evidence, including that the mother was not credible in her denials that—in violation of her case plan and court orders—she remained in an ongoing relationship with the father and had taken the child to see him during each of three extended unsupervised overnight visits she was allowed in the weeks leading up to the termination hearing. **In re R.H., 494.**

Neglect—failure to make reasonable progress—competency of evidence—hearsay exception—In a proceeding that resulted in the termination of respondent-mother's parental rights to her child on the statutory grounds of neglect and failure to make reasonable progress in correcting the conditions that led to the child's removal, the district court did not err in relying on testimony from a social worker about her personal memories of respondent-mother's sworn testimony at a prior hearing—evidence that respondent-mother conceded was a statement by a party and thus admissible under a hearsay exception. Moreover, respondent-mother's argument about the weight that the testimony should be afforded was misplaced as such considerations are reserved solely for the district court. **In re B.A.J., 593.**

Neglect—failure to make reasonable progress—judicial notice—testimony from prior hearings—In a proceeding that resulted in the termination of respondent-mother's parental rights to her son on the statutory grounds of neglect and failure to make reasonable progress in correcting the conditions that led to the child's removal, the district court did not err in taking judicial notice of findings of fact made in prior orders—even though those findings were based on a lower evidentiary standard—where the court also considered evidence at the termination hearing, including testimony from the social worker assigned to the case, the guardian ad litem's report, and twenty exhibits related to respondent-mother's progress on her case plan. **In re B.A.J., 593.**

Neglect—failure to make reasonable progress—prior invocations of Fifth Amendment rights—adverse inferences—In a proceeding that resulted in the termination of respondent-mother's parental rights to her child on the statutory ground of neglect and that she had failed to make reasonable progress in correcting the conditions that led to the child's removal, the district court was permitted to draw an adverse inference from respondent-mother's invocations at prior hearings of her Fifth Amendment right not to answer questions about torture and abuse inflicted on the child's older sibling. Further, a review of the unchallenged findings of fact revealed that respondent-mother's refusal to answer those questions was not the sole basis for the termination of her parental rights. **In re B.A.J., 593.**

Neglect—sufficiency of findings—likelihood of future neglect—In a proceeding that resulted in the termination of respondent-mother's parental rights to her child, the district court's conclusion of law that the statutory ground of neglect existed—based on a likelihood of future neglect by respondent-mother if the child was returned to her care—was supported by the court's findings of fact that respondent-mother failed to: (1) complete all components of her case plan; (2) acknowledge or accept responsibility for the reasons the child was removed from her home (including previous neglect of the child, abuse and neglect inflicted on the child's older siblings, torture inflicted on one of the older siblings, and respondent-mother's ongoing involvement with the child's father despite multiple domestic violence incidents); and (3) understand the role she played in the child's previous neglect. **In re B.A.J., 593.**

ZONING—Continued