NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 297

17 DECEMBER 2024

19 FEBRUARY 2025

RALEIGH
2026

CITE THIS VOLUME

297 N.C. APP.

TABLE OF CONTENTS

Judges of the Court of Appeals v

Table of Cases Reported vii

Table of Cases Reported Without Published Opinions viii

Opinions of the Court of Appeals 1-898

Headnote Index 899

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

CHRIS DILLON

Judges

DONNA S. STROUD
JOHN M. TYSON
VALERIE J. ZACHARY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
JULEE T. FLOOD
MICHAEL J. STADING
THOMAS O. MURRY[1]
CHRISTOPHER A. FREEMAN[2]

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES JR.
LINDA M. McGEE

Former Judges

J. PHIL CARLTON
BURLEY B. MITCHELL JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS JR.
CLARENCE E. HORTON JR.
JOSEPH R. JOHN SR.[3]
ROBERT H. EDMUNDS JR.
JAMES C. FULLER
RALPH A. WALKER
ALBERT S. THOMAS JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN IV
SANFORD L. STEELMAN JR.
MARTHA GEER
LINDA STEPHENS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER JR.
WANDA G. BRYANT
PHIL BERGER JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK
RICHARD D. DIETZ
LUCY INMAN
DARREN JACKSON
ALLISON J. RIGGS
HUNTER MURPHY[4]
CAROLYN J. THOMPSON[5]

[1] Sworn in 1 January 2025. [2] Sworn in 1 January 2025. [3] Died 20 January 2025.
[4] Term ended 31 December 2024. [5] Term ended 31 December 2024.

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Assistant Director
Michael W. Rodgers

Staff Attorneys
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Niccolle C. Hernandez
Jennifer C. Sikes

CASES REPORTED

	Page
Bossian v. Chica	1
Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.	23
CL Howard Invs. I, LLC v. Wilmington Sav. Fund Soc'y, FSB	234
Creech v. Town of Cornelius	31
Fifth Ave. United Methodist Church of Wilmington v. N.C. Conf.	246
Fish v. Stetina	733
Gallagher-Masonis v. Masonis	272
Gardner v. Richmond Cnty.	751
Hansley v. Hansley	764
Higgins v. Mendoza	581
Honacher v. Uhlhorn	304
In re C.S.	317
In re D.E.-E.Y.	724
In re Est. of Bozeman	330
In re G.B.G.	772
In re H.G.	41
In re H.R.P.	339
In re K.J.D.	49
In re K.J.P.W.	786
In re M.R.B.	63
In re N.R.R.N.	673
In re X.I.F.	799
In re Z.A.N.L.W.C.	698
Keith v. Keith	356
Ludack v. Ludack	72
Mecklenburg Cnty. v. Pressley	82
No Limit Games, LLC v. Sheriff of Robeson Cnty.	375
Orsbon v. Milazzo	96
Ortez v. Penn Nat'l Sec. Ins. Co.	114
Roy v. Martin	704
Saad v. Town of Surf City	127
Se. Pub. Safety Grp., Inc. v. N.C. Dep't of Just.	655
Sessoms v. Toyota Motor Sales, U.S.A., Inc.	395
State v. Belfield	817
State v. Boyd	624
State v. Bracey	136
State v. Carwile	145
State v. Crisp	400
State v. Curtis	826
State v. Davenport	605
State v. Farook	412
State v. Greenfield	832
State v. Hicks	457
State v. Johnson	160
State v. Lacure	486
State v. Lingerfelt	168
State v. McCullough	183
State v. Middleton	592
State v. Moody	192
State v. Nanes	863
State v. Nobles	719
State v. Pressley	495
State v. Reaves	877
State v. Reel	205
State v. Spry	641
State v. Stephen	499
State v. Stollings	220
State v. Velasco	885
State v. Williams	512
State v. Wilson	535
State v. Womble	547
Vlassis v. Nissan N. Am., Inc.	560
Warren v. Bonner	615

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	Page
Amato v. Miller	579
Anderson v. WMCI Charlotte II, LLC	731
Arstark v. Cabarrus Cnty.	579
Barefoot v. Lafayette Cemetery Park Corp.	231
Cambre v. Med. Imaging Ctr., LLC	579
Cameron v. Newman	731
Clark v. Baldwin	231
Clark v. Clark	623
Garner v. Jessup	579
Geico Indem. Co. v. Powell	231
Gronlund v. Hawk	231
Hill v. Hill	231
In re A.R.B.	731
In re A.W.	897
In re B.F.	623
In re C.C.B.	897
In re C.K.R.	231
In re I.G.J.	731
In re J.D.S.	897
In re J.L.W.	731
In re L.-A.S.N.-C.	731
In re L.L.A.	731
In re L.M.H.	897
In re M.C.	231
In re P.G.	623
In re R.S.M-M.	897
In re Will of Hobbs	579
In re Z.C.H.	731
Kersey v. Perdue Farms, Inc.	579
Kotsias v. Fla. Health Care Props.	231
Meyer v. Allnutt	579
Midland Credit Mgmt., Inc. v. Mitchell	231
Miller v. United Prop. & Cas. Ins. Co.	231
Myers v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.	623
N.C. Farm Bureau Mut. Ins. Co. v. Barnhardt	231
Oxford Hous. Auth. v. Church	897
Peter Millar, LLC v. Shaw's Menswear, Inc.	731
Price v. New Hanover Cnty. Child Support	579
Smoky Mountain Country Club Prop. Owners Ass'n, Inc. v. Dungan	623
Sosna v. Causey	231
State v. Aguilar	731
State v. Barrett	897
State v. Bell	897
State v. Boles	897
State v. Bracy	579
State v. Brewington	897
State v. Bryant	579
State v. Carr	897
State v. Clark	731
State v. Crowder	579
State v. Curl	897
State v. Davis	232
State v. Davis	731
State v. Davis	897
State v. Finger	898
State v. Ford	232
State v. Gause	731
State v. Greene	232
State v. Grier	898
State v. Hayes	232
State v. Hines	232
State v. Jenkins	232
State v. Jones	232
State v. King	623
State v. Locklear	898
State v. Long	898
State v. Martinez	232
State v. McLean	579
State v. McPherson	580
State v. Merrell	232
State v. Metcalf	732
State v. Minyard	580
State v. Moore	898

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	Page
State v. Noblitt	898
State v. Phillips	232
State v. Pica	898
State v. Pittman	580
State v. Quick	232
State v. Ramey	232
State v. Robertson	898
State v. Rutherford	232
State v. Shipman	898
State v. Smith	232
State v. Taylor	232
State v. Ward	732
State v. Washington	898
State v. Webb	732
State v. Williams	233
State v. Wilson	233
Sullivan v. Pender Cnty.	898
Testerman v. Cothran	580
Thomas v. E&J Auto., Inc.	233
United Sewing Mach. Sales, LLC v. Digit. Cutting Servs., Inc.	623
Valdovinos v. Duke Univ.	233
Williamson v. Smith	580
Wynnefield Props., Inc. v. Emergency Restoration Experts, LLC	233
Yow v. Dispatch & Servs., Inc	233

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DENNIS DAVID BOSSIAN, PLAINTIFF
v.
ANDREW PAUL CHICA, KIMBERLY ANN BOSSIAN, DEFENDANTS

No. COA24-474

Filed 17 December 2024

1. Torts, Other—interference with parental rights—interference with contract—failure to state a claim

In an action brought by a father (plaintiff) against his former wife (the mother of two children with plaintiff) and the man with whom she lived (together, defendants) after one of plaintiff's children—primary physical custody of whom had been awarded to the mother—moved to Rhode Island to live with plaintiff, but after two years, returned to North Carolina to live with defendants, the trial court did not err in allowing defendants' motion to dismiss pursuant to Civil Procedure Rule 12(b)(6), where plaintiff failed to allege facts supporting his claims for tortious interference with parental rights and tortious interference with contract, in that, although plaintiff and the mother had signed agreements to modify custody before a notary to permit the child to move to Rhode Island and live with plaintiff, no court order modifying custody had been entered, and, thus, even taking as true plaintiff's allegation that defendants had "induced" the child who had been residing with him to live with defendants, such actions were entirely consistent with the controlling custody order, the terms of which could not be altered by contract.

2. Attorneys—Rule 11 sanctions—pro se signature sufficient to certify—other bases not supported by findings of fact —remanded

The trial court's imposition of sanctions against plaintiff under Civil Procedure Rule 11(a) was reversed where one basis for the award was the failure of plaintiff, an attorney licensed in Rhode Island and Massachusetts who represented himself in this tort action, to verify his pleading because he signed the complaint and thus certified the pleading as a party for Rule 11(a) purposes. To the extent defendants' motion for sanctions was allowed because plaintiff's complaint was not well grounded in fact, not warranted by existing law, or filed to harass defendants, the trial court failed to make findings of fact that would support such an award, despite evidence in the record that would permit them; accordingly, the matter was remanded to the trial court to make additional findings.

3. Attorneys—Rule 34 sanctions—gross violation of Appellate Rules—inclusion of collateral matters in reply brief—remand for determination of sanctions

As a result of plaintiff's gross violations of the Appellate Procedure Rules—by including legal arguments and factual assertions entirely outside the issues on appeal and outside of the record (some of which plaintiff acknowledged were "collateral" to the appeal at hand)—the Court of Appeals, on its own initiative, imposed sanctions pursuant to Appellate Rule 34 by remanding the matter to the trial court for a hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of that rule; specifically, the appellate court directed the award of up to half of the additional attorney fees related to the appeal, with the option to award less left to the sole discretion of the trial court.

Judge MURPHY concurring in part and concurring in result only in part.

Appeal by plaintiff from order entered 17 February 2021 by Judge Ned Mangum in District Court, Wake County. Heard in the Court of Appeals 22 October 2024.

Dennis D. Bossian, pro se, plaintiff-appellant.

Tharrington Smith, LLP, by Jeffrey R. Russell, Alice C. Stubbs, and Casey C. Fidler, for defendants-appellees.

STROUD, Judge.

This is Father Dennis Bossian's second appeal of the trial court's order entered on 17 February 2021; the first appeal was dismissed as interlocutory. *See Bossian v. Chica*, COA21-381, 281 N.C. App. 627, 867 S.E.2d 428, *disc. rev. denied*, 873 S.E.2d 10 (2022) (unpublished) ("*Bossian I*"). Because Father's complaint fails to state a claim upon which relief may be granted, the trial court did not err by granting Defendants' motion to dismiss. The trial court, however, did not make sufficient findings to support its imposition of sanctions under Rule 11 of our North Carolina Rules of Civil Procedure. As such, we vacate the trial court's award of sanctions and remand for entry of a new order with additional findings of fact.

I. Procedural and Factual Background

The relevant background preceding Father's first appeal was summarized in this Court's opinion:

> Dennis David Bossian ("[F]ather") appeals from an order granting Kimberly Ann Bossian ("[M]other") and Andrew Paul Chica ("[D]efendant Chica"; together with [M]other, "[D]efendants") a motion to dismiss, thus dismissing [F]ather's complaint, and allowing [D]efendants' motion for Rule 11 sanctions. On appeal, [F]ather contends the trial court erred in dismissing his complaint and in imposing Rule 11 sanctions.
>
> . . . .
>
> Father and [M]other were married on 22 August 1998 and had two children, "J.J." and "J.D." "On or about" 1 August 2013, [M]other filed for divorce from [F]ather.
>
> On 12 February 2015, the trial court entered an order granting [M]other primary physical custody of the children, while granting [F]ather, who lived in Rhode Island, visitation during the children's Spring Break holiday and for two weeks during the summer.
>
> On 22 February 2016, [F]ather and [M]other agreed to allow J.D., at J.D.'s request, to move to Rhode Island and live with [F]ather. Accordingly, J.D. moved to Rhode Island in July 2016 and lived there for approximately two years. In June 2018, J.D. flew to North Carolina to stay

with [M]other, who lived with [D]efendant Chica and J.J. Thereafter, J.D. never returned to Rhode Island.

On 11 March 2020, [M]other filed a motion for order to show cause and, in the alternative, a motion for contempt, in which [M]other alleged [F]ather had "willfully refused to make any child support payments since January of 2016," had "willfully refused to pay his half of the children's unreimbursed medical expenses," and had "willfully refused to pay the $1,800 distributive award" resulting from the sale of the former marital residence. On 1 May 2020, the trial court entered an order to appear and show cause against [F]ather.

The matter came on for hearing on 25 August 2020; [F]ather failed to appear. Then, on 18 September 2020, the trial court held [F]ather in contempt "for having willfully violated the trial court's Orders," stating he "may purge his contempt by paying [M]other child support arrears, past due medical expenses," and "the distributive award in the total amount of $1,800"; were he not to comply, [F]ather would face arrest. Additionally, the trial court found that, although its "Order was never modified and no motion to modify custody or child support was filed by either party," both [F]ather and [M]other agreed and confirmed that J.D. "resided with [F]ather from July of 2016 through June 19, 2018" and that, "in June of 2018, J.D. returned to [M]other's physical custody."

On 11 August 2020, [F]ather, acting *pro se*, filed a complaint against [D]efendants for "tortious interference with parental rights," libel per se, and "tortious interference with contract." Specifically, [F]ather alleged [D]efendants "knowingly, willfully, intentionally, and with reckless disregard induced J.D. to leave his home state of Rhode Island and take up residence in North Carolina," resulting in "the loss of the society and companionship" of J.D. for [F]ather. Father also alleged that [M]other published false statements when she "signed a verified complaint" alleging [F]ather had "willfully refused to make any child support payments since January of 2016," which, he argued, "would tend to impeach his reputation and credibility as a licensed attorney." Lastly, [F]ather alleged [D]efendant Chica had "willfully, intentionally, maliciously and without

> a proper societal motive interfered with the contractual 'consent agreement' entered into between" [F]ather and [M]other that allowed J.D.'s return to Rhode Island in 2016.
>
> On 19 November 2020, [D]efendants filed an answer and counterclaims for intentional infliction of emotional distress and "punitive damages related to intentional infliction of emotional distress." Therein, [D]efendants also made three motions: a motion for "gatekeeper order" to "prevent [F]ather's abuse of the judicial process," alleging that [F]ather "has a history of filing frivolous pleadings against" [M]other; a motion for Rule 11 sanctions, alleging that [F]ather had "filed this cause of action for the purpose of harassing the [D]efendants," since, they contend, "there is no binding and enforceable contract in existence" with which [D]efendant Chica could have tortiously interfered; and a motion to dismiss pursuant to North Carolina Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief can be granted.
>
> The matter came on for trial on 11 February 2021 in Wake County District Court, Judge Mangum presiding. By order entered 17 February 2021, the trial court granted [D]efendants' motion to dismiss [F]ather's complaint for failure "to allege facts sufficient to state his claims for relief," thus dismissing [F]ather's complaint, and granted [D]efendants' motion for Rule 11 sanctions, finding [F]ather's complaint was "not verified, not well grounded in fact, not warranted by existing law, and is done to harass" [D]efendants. The trial court then reserved "the right to consider [D]efendants' request for a Gate Keeper Order for any new filings of [F]ather against [D]efendants in Wake County Court."
>
> Father, through appellate counsel, gave notice of appeal on 16 March 2021.

Id., slip op. at 1-5 (ellipses, original brackets, and footnotes omitted).

On 1 February 2022, Father's first appeal was dismissed because the 17 February 2021 Order ("2021 Order") was an interlocutory order based upon Defendants' pending counterclaims. *Id.*, slip. op. at 7. Father also "failed to show that the trial court's order deprives him of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Id.* (quotation marks and brackets omitted). On

15 June 2022, the Supreme Court of North Carolina denied Father's petition for discretionary review of this Court's opinion dismissing the first appeal as interlocutory. *See Bossian v. Chica*, 873 S.E.2d 10 (N.C. 2022).

On 26 February 2024, Defendants filed a Notice of Voluntary Dismissal of their counterclaims, and on 15 March 2024, Father filed notice of appeal again from the trial court's 2021 Order. Based upon the dismissal of Defendants' counterclaims, at this point the trial court's 2021 Order became a final order as all claims had been disposed and no further action by the trial court was needed "to settle and determine the entire controversy." *Bossian I*, slip op. at 5 (citations and quotation marks omitted). As this appeal is not interlocutory and Father timely appealed after Defendants' filing of the Notice of Voluntary Dismissal, this Court has jurisdiction to consider Father's appeal. *See Barfield v. Matos*, 215 N.C. App. 24, 35, 714 S.E.2d 812, 820 (2011) ("As all of the pending claims, crossclaims, and counterclaims as to all parties have been disposed of either by order or by voluntary dismissal, the 8 April 2010 summary judgment order is a final and appealable order." (citation omitted)).

II. Motion to Dismiss under Rule 12(b)(6)

[1] Father contends the trial court erred in dismissing his claims against both Mother and Defendant Chica for tortious interference with parental rights and against Defendant Chica for tortious interference with contract.[1]

> The standard of review for an order granting a Rule 12(b)(6) motion to dismiss is well established. Appellate courts review de novo an order granting a Rule 12(b)(6) motion to dismiss.
>
> The word de novo means fresh or anew; for a second time[.] The appellate court, just like the trial court below, considers 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. In other words, under de novo review, the appellate court as the reviewing court considers the Rule 12(b)(6) motion to dismiss anew: It freely substitutes its own assessment of

1. Father's complaint also included a claim for libel *per se* against Mother, but he has not challenged the trial court's dismissal of this claim on appeal. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6).

> whether the allegations of the complaint are sufficient to state a claim for the trial court's assessment. Thus, 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, 878 S.E.2d 798, 800 (2022) (citations and quotation marks omitted).

A. Tortious Interference with Parental Rights

Father first contends that the trial court erred in dismissing his claims for tortious interference with parental rights. Father alleges many details about the custody dispute between himself and Mother, but in summary, he alleges Mother and Defendant Chica interfered with his parental relationship with J.D. when they "induced" J.D. to move from Father's home in Rhode Island to the home of Defendants in North Carolina. Father's complaint also alleges details regarding the 2015 Order[2] addressing custody of J.D. under North Carolina General Statute Chapter 50. The complaint alleges the trial court entered an order "on or about February 11, 2015," granting "joint legal custody of the minor children" to Mother and Father and granting Mother "primary physical custody of the minor children" with visitation for Father as set out in the 2015 Order. Father alleged the details of various emails between them regarding their agreement for J.D. to move to Rhode Island to live with Father and that ultimately Mother "signed the 'Consent to Modification of Custody' agreement after February 22, 2016 and before July 1, 2016 in the presence of a notary. As such, [Mother] & [Father] mutually agreed that the scheduled adversarial hearing before the Honorable Judge Anna Worley was no longer necessary." However, Father's complaint also reveals that no court order modifying the child custody provisions of the 2015 Order was ever entered.

The portion of the 2021 Order addressing Defendants' motion to dismiss stated as follows:

> Defendants' Motion to Dismiss claims filed by [Father] is GRANTED. [Father] failed to allege facts sufficient

2. In this opinion, we will refer to the 2015 Permanent Child Custody and Child Support Order as the "2015 Order."

> to state his claims for relief, and [Father's] claims for Tortious Interference with Parental Rights (as it relates to both Defendants), Libel Per Se (as it relates to [Mother]), [Father] failed to show that a contract exists, and Tortious Interference with Contract (as it relates to Defendant . . . Chica) are DISMISSED.

Father confidently asserts that the "tort of interference with parental relations" is "well-established in North Carolina, and throughout the entire country." In support of this argument, Father cites to various sources other than North Carolina cases or statutes, relying upon the Restatement (Second) of Torts and cases from various states which may or may not address situations similar to the facts of this case. In any event, this Court is bound by North Carolina law, and even if the tort of interference with parental rights exists, North Carolina law does not support Father's claim based upon the facts as alleged by Father.

Father appears to have a fundamental misunderstanding of the effect of the 2015 Order granting joint custody of the parties' two sons to Father and Mother. He argues at length that the agreement between him and Mother for J.D. to reside with him in Rhode Island – without any court-ordered modification of the 2015 Order – "is sufficient to confer a superior right of custody to one parent." But Father cites no legally relevant authority for this proposition, and it is incorrect. Of course, for purposes of *de novo* review of the 2021 Order allowing the motion to dismiss, we accept as true Father's allegation that he and Mother signed an agreement for J.D. to reside in Rhode Island, despite the absence of any written agreement between him and Mother in our record. In fact, Mother did not dispute that she had agreed for J.D. to reside in Rhode Island in 2016. But we review the trial court's legal conclusion that Father's complaint failed to state a claim for interference with parental rights *de novo*. *Id.* Although the law regarding the effect of a child custody order is well-established, this Court has previously addressed the effect of the very same 2015 Order as well as the informal agreement for J.D. to live in Rhode Island:

> *Both the Custody and Support Order and the Equitable Distribution Order have remained in effect without modification since February 12, 2015, and March 5, 2015, respectively. In January 2016, [Mother] and [Father] mutually agreed their younger son would move to Rhode Island with . . . [F]ather and [Father] would assume primary custody of him. The younger son resided in Rhode Island with [Father] from January 2016 until July 2018,*

> *at which time he returned to North Carolina to live with [Mother]. Neither parent sought permission from the trial court to modify the Custody and Support Order.*

Bossian v. Bossian, 284 N.C. App. 208, 210, 875 S.E.2d 570, 574 (2022), *disc. rev. denied*, 894 S.E.2d 751 (N.C. 2023) (emphasis added) ("*Bossian II*").

Although Mother and Father agreed for J.D. to reside in Rhode Island at all times relevant to Father's alleged claims, *Mother* always had primary physical custody of J.D. under the 2015 Order. The 2015 Order was never modified and it "remained in effect without modification since February 12, 2015." *Id.* Even if Mother "induced" J.D. to return to her home in North Carolina, she had a right to do so as she still had primary physical custody of J.D. under the 2015 Order.[3] And since Defendant Chica and Mother lived together in the same home, even if Defendant Chica joined in Mother's inducements of J.D. to return to North Carolina, his actions were also consistent with the 2015 Order.

The only North Carolina cases cited by Father to support his argument are *Howell v. Howell*, 162 N.C. 231, 78 S.E. 222 (1913), and *LaGrenade v. Gordon*, 46 N.C. App. 329, 264 S.E.2d 757 (1980). In *LaGrenade*, this Court summarized the father's common law "right to control of the child" described in 1913 in *Howell v. Howell*:

> The father of a minor child is its natural guardian, at common law, and his rights of control over the child is superior to that of the mother, in the absence of a court's contrary determination of custody. Thus, a father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child or abducting his child away from him or by harboring the child after he has left the house. In *Howell v. Howell*, *supra*, plaintiff husband had entered into a contract with his wife and her father that the parties' minor daughter might remain with the wife until the child was six years old. The husband subsequently obtained a divorce but no mention was made of custody of the child. When the child became six, according to plaintiff's complaint, the mother, with the aid of her father, removed the child

3. Father's complaint also alleged that the 2015 Order provided for J.D. to visit with Father at specific times, but if Father wished to enforce his visitation time with J.D., his remedy would have been by a motion in the cause to enforce the provisions of the 2015 Order at the relevant time, when J.D. was still a minor child.

> from the State. The Supreme Court held that a cause of action existed for abduction.

LaGrenade, 46 N.C. App. at 331, 264 S.E.2d at 758 (citations omitted).

Both *Howell* and *LaGrenade* were based upon ancient common law principles giving a child's father "rights of control over the child . . . superior to that of the mother, in the absence of a court's contrary determination of custody." *Id.* Thus, Father's argument has two fatal flaws. First, here the trial court made a "contrary determination of custody" in the 2015 Order, and the 2015 Order granted Mother primary physical custody of J.D. *Id.* In *Howell* and *LaGrenade*, there was no custody order in effect. *Id.* at 331-32, 264 S.E.2d at 758-59. Second, the common law granting a father rights "superior to that of the mother" as to the custody and control of his children, upon which *Howell*, *LaGrenade*, and Father's argument are based, has been abrogated by legislation, as discussed at length by the Supreme Court of North Carolina in *Rosera v. Blake*:

> In 1967, our General Assembly repealed all prior statutes governing the custody of minor children and enacted N.C.G.S. § 50-13.1 to -13.8, a statutory scheme under which all child custody actions are now to be brought. N.C.G.S. §§ 50-13.1 to -13.8 were enacted to eliminate conflicting and inconsistent custody statutes and to replace them with a comprehensive act governing all custody disputes. When enacted, N.C.G.S. § 50-13.2 directed the trial courts to award custody based upon what will best promote the interest and welfare of the child. Significant to our discussion here, the legislature further amended N.C.G.S. § 50-13.2 in 1977 to provide between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child.

Rosero v. Blake, 357 N.C. 193, 199, 581 S.E.2d 41, 45 (2003) (citations and quotation marks omitted).

Father's brief also refers at times to the tort of abduction of a child although his complaint does not mention abduction specifically. Most of the ancient common law cases addressing abduction address it as a criminal offense. *See, e.g.*, *State v. Burnett*, 142 N.C. 456, 55 S.E. 72 (1906). As a tort, some of the common law cases address abduction as a claim a father may bring, again based upon a father's superior rights at common law to the custody and control of a child. *See LaGrenade*,

46 N.C. App. at 332, 264 S.E.2d at 759. To the extent we can discern the elements of an ancient common law tort of abduction, it requires the "unlawful taking away or concealment of a minor child[.]" *Howell*, 162 N.C. at 234, 78 S.E. at 224. Father also cites to *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E.2d 521 (1981), and although this case may have involved a claim for abduction[4], the opinion addresses only personal jurisdiction as to one of the defendants under the long arm statute and procedural due process, not the substantive claims alleged in the plaintiff's complaint.

Even assuming North Carolina recognizes a claim for abduction by one parent against the other, Father's complaint has not alleged that J.D. was unlawfully taken away, by either Mother or Defendant Chica, as Mother had primary physical custody of J.D. under the 2015 Order. Certainly Father also had custodial rights under the 2015 Order and he would have had a legal basis to enforce his visitation time while J.D. was still a minor by filing a motion in the Chapter 50 proceeding, but that is not the issue before us. Father has not alleged that Mother or Defendant Chica "spirited the child away beyond the state to some place unknown to the plaintiff." *Howell*, 162 N.C. at 232, 78 S.E. at 223. Instead, he alleged that J.D. returned to North Carolina to reside with Mother, who had primary custody of J.D. Even taking the allegations of Father's complaint as true, he did not state a claim for abduction.

Thus, upon *de novo* review, the trial court did not err by dismissing Father's claim for tortious interference with parental rights under Rule 12(b)(6) because "the complaint on its face reveals that no law supports the plaintiff's claim[.]" *Scheerer v. Fisher*, 202 N.C. App. 99, 102, 688 S.E.2d 472, 474 (2010) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

---

4. In *Fungaroli*, the complaint alleged the plaintiff-mother had legal custody of the child and defendant-father

> acting in concert with both the codefendants, who are his parents, secretly left North Carolina with the minor child. They allegedly removed the child from this State for the purpose of defeating plaintiff's right to custody and in violation of G.S. 14-320.1. Thereafter, plaintiff allegedly went to the State of Virginia where defendants were residing with the child and demanded that they release the child to her. Plaintiff charged that the defendants refused to allow her even to see her child.

Fungaroli v. Fungaroli, 51 N.C. App. 363, 364, 276 S.E.2d 521, 522 (1981).

B. Tortious Interference with Contract

Father next contends the trial court erred in dismissing his claim for tortious interference with contract against Defendant Chica. In his complaint, Father alleged Defendant Chica was aware he and Mother had "expressly entered into a written and orally agreed upon contract" or "consent agreement" for J.D. to reside with him in Rhode Island. Defendants argue Father's complaint failed to allege several elements of this claim.

> The elements of a claim for tortious interference with contract are: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 368 N.C. 693, 700, 784 S.E.2d 457, 462 (2016) (citation and quotation marks omitted).

Specifically, Father's complaint alleged as follows:

> 74. On and after January, 2018, [Defendant Chica] knew that [Mother] and [Father] had expressly entered into a written and orally agreed upon contract or "consent agreement," that as the biological parents of J[.]D[.], was in their minor sons "best interest".
>
> 75. On and after January, 2018, in a series of affirmative acts, [Defendant Chica] willfully, intentionally, maliciously and without proper societal motive, interfered with the contractual "consent agreement" entered into between [Mother] and [Father].
>
> 76. At all times material hereto, [Defendant Chica] was an "outsider" to the contractual relationship between [Mother] and [Father] and the paternal relationship between J[.]D[.] and his biological father, [Father].
>
> 77. As a direct and proximate result of the defendants intentional, willful, reckless, malicious and bad faith interference with the verbal and written contractual "consent agreement" between [Mother] and [Father], [Father] has

> suffered and will continue to suffer from extreme mental anguish, loss of sleep, loss of the care, comfort, society and companionship of his youngest son, and has been otherwise injured and damnified.

We first note Father did not attach the alleged written portion of the contract to his complaint nor has it been presented to the Court in this or other proceedings between Father and Mother. *See Bossian II*, 284 N.C. App. at 219, 875 S.E.2d at 579. For purposes of Rule 12(b)(6), we take as true Father's allegation that he and Mother entered into a "verbal and written contractual consent agreement" for J.D. to live with Father. *See Taylor*, 382 N.C. at 679, 878 S.E.2d at 800. But the law is well established, as discussed above, that parents have no authority to modify a child support order or a child custody order by an informal agreement; a custody order must be modified by the trial court upon proper motion. *See Baker v. Showalter*, 151 N.C. App. 546, 551, 566 S.E.2d 172, 175 (2002) ("Individuals may not modify a court order for child support through extrajudicial written or oral agreements." (citation omitted)).

Father's complaint has failed to allege "a valid contract between [himself] and [Mother] which confers upon [himself] a contractual right against [Mother]." *Beverage Sys. of the Carolinas*, 368 N.C. at 700, 784 S.E.2d at 462 (citation and quotation marks omitted). Even if Father and Mother agreed for J.D. to reside in Rhode Island in 2016, this agreement did not confer any *contractual rights* to the physical custody of J.D. to Father. *Children* are not items of property to be possessed or owned based upon the provisions of a contract.

> We reiterate: to modify a child support order or a child custody order, a judicial modification by a court is required and individuals may not modify a court order for child support through extrajudicial written or oral agreements. It is well settled, no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court. Any extrajudicial written agreement between the parties intended to modify the court ordered custody arrangement is invalid and does not implicitly or otherwise modify the parties' court ordered child support obligations. Simply put, the parties do not possess the authority to

> modify a child custody and support order without court intervention.

Bossian II, 284 N.C. App. at 222, 875 S.E.2d at 581 (citations and quotation marks omitted).

Although this Court was addressing Father's child support obligation under the 2015 Order in our 2022 opinion, the same is true of the 2015 Order's provisions regarding child custody. Father has failed to plead the first element of tortious interference with contract, the existence of a valid contract, *Beverage Sys. of the Carolinas*, 368 N.C. at 700, 784 S.E.2d at 462; we need not address the other elements. The trial court properly dismissed this claim under Rule 12(b)(6).

III. Imposition of Sanctions under Rule 11

[2] Father contends the trial court erred in imposing sanctions under North Carolina Rule of Civil Procedure 11(a), "awarding costs and attorney fees in the amount of $9,026.70." The portion of the 2021 Order addressing Defendants' motion for sanctions stated as follows:

> 2. Defendants' Motion for Rule 11 Sanctions is GRANTED in the form of costs and attorneys fees in the amount of $9,026.70. [Father] shall pay said amount directly to Tharrington Smith, LLP, P.O. Box 1151, Raleigh, NC 27602 on or before May 1, 2021.
>
> 3. The Court finds that there are no probable grounds for relief in the Complaint.
>
> 4. [Father's] complaint is in violation of Rule 11 of the NC Rules of Civil Procedure as it is not verified, not well grounded in fact, not warranted by existing Law, and is done to harass the Plaintiff [sic].

Father also contends the 2021 Order "lacks findings to support an award of $9,026.70."

We review the trial court's decision to impose sanctions under Rule 11(a) *de novo* and we review the amount of sanctions for abuse of discretion:

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment

> or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Further, regarding the appropriateness of the amount imposed by the trial court, "an abuse of discretion standard is proper because the rule's provision that the court shall impose sanctions for motions abuses concentrates the court's discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions." *Id.* (emphasis in original) (citations, quotation marks, ellipses, and brackets omitted).

Rule 11(a) addresses pleadings, motions, and other papers signed by both attorneys and parties representing themselves, despite the title of the subsection referring only to "signing by attorney":

> (a) Signing by Attorney.— Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. *A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he 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, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate*

> *sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2023) (emphasis added).

This Court has noted that

> [i]t is well established there are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose . . . . A violation of any one of these requirements mandates the imposition of sanctions under Rule 11.
>
> . . .
>
> This court has held a two-step analysis is required when examining the legal sufficiency of a claim subject to Rule 11 inquiry. Initially, the court must determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, the second issue is whether, based on a reasonable inquiry into the law, the alleged offender formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. Rule 11 sanctions are appropriate where the offending party either failed to conduct reasonable inquiry into the law or did not reasonably believe that the paper was warranted by existing law.

Ward v. Jett Props., LLC, 191 N.C. App. 605, 607-08, 663 S.E.2d 862, 864 (2008) (citations and quotation marks omitted).

Father argues the trial court erred to the extent it ordered sanctions based upon his failure to verify the complaint. Father filed his pleadings in this action *pro se*, and as the trial court noted, he did not verify his complaint in his capacity as plaintiff, but he did sign the complaint indicating he was representing himself. Father is correct that there is no *requirement* for his complaint to be verified; Rule 11(a) itself states "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." N.C. Gen. Stat. § 1A-1, Rule 11(a); *see HBD, Inc. v. Steri-Tex Corp.*, 63 N.C. App. 761, 762, 306 S.E.2d 516, 517 (1983) ("In general, pleadings need not be verified and no lack of credibility will be implied by the absence of a verification of plaintiff's complaint." (citations omitted)). Mother has not

identified any statute or rule requiring that Father's complaint be verified, and we cannot identify any such requirement. Father's failure to verify the complaint is not a basis for sanctions under Rule 11(a). But Father did sign his complaint, and his signature as a party was a certification under Rule 11 that

> he 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, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a). Father's signature on his complaint was the relevant certification under Rule 11(a), even though he did not also verify the complaint, but he would not be subject to sanctions for being "*in violation* of Rule 11 of the NC Rules of Civil Procedure," (emphasis added), because the complaint "[was] not verified."

The trial court also awarded sanctions because the complaint was "not well grounded in fact" and "not warranted by existing Law." Regarding the claims stated in the complaint, Father argues that his claims were "in fact valid claims which should have survived the motion to dismiss." As discussed above, we disagree. Father's claims were not well-grounded in existing law or fact. His asserted legal basis for his claims were bits of the Restatement (Second) of Torts, mostly taken out of context, and cases from other states. Mother correctly notes that even the section of the Restatement relied upon by Father, "Causing Minor Child to Leave or not Return Home," does not support his contention that *North Carolina* recognizes a claim for intentional interference with parental rights as "the Restatement (Second) of Torts § 700 does not cite to any North Carolina cases[.]" The North Carolina cases Father relied upon, *LaGrenade* and *Howell*, entirely fail to support his arguments because there was a court order governing custody in this case. *See LaGrenade*, 46 N.C. App. at 331-32, 264 S.E.2d at 758-59. Father's arguments relied most heavily upon the purported validity of his "contract" with Mother for J.D. to live in Rhode Island, but this contract was not effective to change custody of J.D.[5]

---

5. In fact, we note Father has continued to assert the validity and effect of this "contract" in his brief in this appeal, filed after this Court issued its opinion in July 2022, stating:

Father is an attorney licensed in Rhode Island and Massachusetts but represented himself throughout most of this proceeding. However, even if he were not a licensed attorney, we hold all parties representing themselves to the same standard. *See Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999) ("Nevertheless, the Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them. Therefore, the rules must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel."). Father should have been well aware of the legal effect of the 2015 Order even before he was held in contempt of that order on 25 August 2021. If he was not already aware the 2015 Order was still in effect, he should have been put on notice of this fact by the trial court's issuance of an Order to Show Cause on 1 May 2020, a few months before he filed the complaint in this case.

We have already determined in our analysis of the trial court's dismissal of the complaint for failure to state a claim upon which relief may be granted that the complaint was not well-grounded in fact or warranted by existing law. However, "[w]e note that the mere fact that a cause of action is dismissed upon a Rule 12(b)(6) motion does not automatically entitle the moving party to have sanctions imposed." *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 561, 638 S.E.2d 260, 268 (2006).

The trial court also determined that the complaint was "done to harass" Defendants.

> Our Courts have held that even if a paper is well grounded in fact and law, it may still violate Rule 11 if it is served or filed for an improper purpose. Defined as any purpose other than one to vindicate rights or to put claims to a proper test, an improper purpose may be inferred from the alleged offender's objective behavior. Accordingly, under Rule 11, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. The movant's subjective belief that a

---

> Any extrajudicial written agreement between the parties intended to modify the court ordered custody arrangement is invalid and does not implicitly or otherwise modify the parties' court ordered child support obligations. Simply put, the parties do not possess the authority to modify a child custody and support order without court intervention.

Bossian II, 284 N.C. App. at 222, 875 S.E.2d at 581.

> paper has been filed for an improper purpose as well as whether the offending conduct did, in fact, harass movant is immaterial to the issue of whether the alleged offender's conduct is sanctionable. Improper purpose may, however, be inferred from the service or filing of excessive, successive, or repetitive papers or from continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate.

Ward, 191 N.C. App. at 609, 663 S.E.2d at 865 (citations and quotation marks omitted).

Here, the trial court did not make any findings as to the reasons for finding Father's purpose was to harass Defendants. "As a general rule, remand is necessary where a trial court fails to enter findings of fact and conclusions of law regarding a motion for sanctions pursuant to Rule 11." *Sholar Bus. Assocs., Inc. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000) (citation omitted). For example, in *Ward*, this Court upheld sanctions under Rule 11 where the trial court had "noted that plaintiff has filed at least forty-two actions in the past six years including a previous action alleging conduct identical to the instant case." *Ward*, 191 N.C. App. at 606, 663 S.E.2d at 864. Here, the trial court did not make findings regarding Father's improper purpose or harassment, although there was information or evidence before the trial court upon which it could make findings of fact. Therefore, we must remand for the trial court to make additional findings.

We also note that Father argues the trial court erred to the extent it relied upon Mother's counsel's argument regarding Father's previous lawsuit "against a different paramour of [Mother], causing [Mother] to spend thousands of dollars in legal fees." Father correctly notes that "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Yet Mother's brief argues "[t]here was evidence presented of [Father's] pattern of filing frivolous actions against" Mother "and now Defendant Chica," based specifically upon her counsel's *argument* to the trial court regarding a "jury trial [Father] initiated against an alleged paramour of [Mother]." If Mother's counsel's argument to the trial court was the only information before the trial court regarding Father's previous lawsuit against a "paramour" of Mother, Father is correct that the trial court could not base its determination of Father's improper purpose on factual information about a separate lawsuit stated only in counsel's argument where no testimony or evidence about the prior lawsuit was presented. Thus, as stated above, we must remand for the trial court to make additional findings.

IV. Sanctions under Rule 34

[3] As to Father's argument addressing Mother's counsel's argument regarding the previous lawsuit, we must also note that Father's reply brief grossly violates our Rules of Appellate Procedure by making arguments entirely outside the issues on appeal and not based upon the record on appeal. Specifically, Father makes factual assertions regarding his own attorney fees in the first interlocutory appeal of this case and argues that Mother and Defendant Chica were in violation of Rule 11 in bringing their counterclaims – dismissed before this appeal – against him. Father also makes additional factual assertions, not based upon the record, to case information "that became available online in Wake County on or about February 13, 2023" and even references to an alleged "domestic assault charge" against Mother.[6] Father claims that he "will decline the opportunity to ask this Honorable Court to consider these collateral matters," yet he still included them in his reply brief. We can discern no legitimate reason for Father to include these "collateral matters" in his reply brief. By addressing these entirely inappropriate matters in his reply brief before this Court, Father continues the same pattern he has pursued in the trial court in the filing of the complaint and discovery in this case.

Father's inclusion of these admittedly "collateral matters" in his reply brief is a gross violation of the Rules of Appellate Procedure. *See Sapia v. Sapia*, 294 N.C. App. 419, 422, 903 S.E.2d 444, 448 (2024) ("In violation of Rule 9(a) of the North Carolina Rules of Appellate Procedure, Wife's brief also refers to at least one document which was not included in our record, a Consent Order for Permanent Child Custody and Attorneys Fees." (citation omitted)). Father's reply Brief is particularly egregious as he seeks to present additional information about the prior lawsuit filed against Mother's "paramour" – going far beyond anything mentioned in Mother's counsel's argument before the trial court – while simultaneously arguing the trial court should not have considered Mother's counsel's arguments regarding the very same lawsuit. On our own initiative, we will impose "sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals." N.C. R. App. P. 25(b). Specifically, the portions of Father's reply brief addressing these "collateral matters" are "grossly lacking in the requirements of propriety,

---

6. Father is apparently referring to North Carolina's new electronic filing system, Enterprise Justice (Odyssey). The mere availability of case information in the Enterprise Justice system does not change how appeals are conducted by this Court under the Rules of Appellate Procedure in any way; the information presented by the parties to the Court of Appeals must be provided in accordance with the Rules of Appellate Procedure.

grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court." N.C. R. App. P. 34(a)(3). Pursuant to Rule 34(c), on remand, the trial court shall hold a "hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of this rule." N.C. R. App. P. 34(c). Specifically, the trial court shall award additional reasonable attorney fees related to this appeal. But as Father's appeal is not entirely without merit, the trial court may award no more than one-half of Mother's reasonable attorney fees related to the appeal but may award less, in its sole discretion.

Upon *de novo* review, we conclude the trial court did not err in finding that Father's claims were "not well grounded in fact" and "not warranted by existing Law." However, we must remand for additional findings of fact to address the basis for the trial court's determination that the complaint "[was] done to harass" Defendants. We also remand for the trial court to make additional findings regarding the amount of sanctions, including any sanctions related to violations of the Rules of Appellate Procedure in this appeal based upon Father's reply brief as noted above. Father did not make any specific argument on appeal regarding the amount of sanctions awarded by the trial court but only that the trial court did not make findings of fact as to how the amount was determined. We note that Mother's counsel submitted an affidavit for attorney fees to the trial court and the trial court awarded the amount stated in the affidavit. But we will not further address Father's argument as to the amount of sanctions awarded in the 2021 Order on appeal as we must remand for entry of a new order with additional findings as discussed above. The trial court shall on remand also make appropriate findings regarding the amount of any attorney fees and sanctions granted.

V. Conclusion

The trial court did not err in dismissing Father's claims for tortious interference with parental rights as these claims were not well founded in good, applicable North Carolina law, nor did the trial court err in dismissing Father's claim for tortious interference with contract. We vacate the trial court's award of sanctions in the amount of $9,026.70 and remand for entry of a new order with additional findings of fact supporting the sanctions under Rule 11(a) as noted above and awarding sanctions for Father's violation of the Appellate Rules in his reply brief. The trial court shall hold a hearing on remand as required by North Carolina Rule of Appellate Procedure 34(d) to address the amount of sanctions to be awarded under Rule 34.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge FLOOD concurs.

Judge MURPHY concurs in part and concurs in result only in part by separate opinion.

MURPHY, Judge, concurring in part and concurring in result only in part.

I fully join the Majority in its analysis of the Rule 34 violation in Part IV and tortious interference with contract in Part II-B. However, I cannot join the Majority in its analysis of the alleged torts in Part II-A, as I agree they have not been recognized by our Supreme Court, and concur therein in result only. Further, as discussed in more detail below, I join the Majority fully in Part III but write separately to discuss what Father did not argue on appeal and its impact on our review.

The Majority correctly recognizes that neither tortious interference with parental rights nor abduction have been established as common law tort claims by our Supreme Court. This should be the end of our discussion, and we should not analyze elements of a "claim" that does not exist. "[T]his Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature[.]" *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 126, 723 S.E.2d 352, 358 (2012). "This Court is an error-correcting court, not a law-making court." *Id.* at 127, 723 S.E.2d at 358. As a result, I do not join in the analysis of the alleged torts and concur in result only in part.

Finally, the consequences of Rule 11 sanctions in this published opinion, taken in passing, may impose a chilling effect on future litigants. However, it should be noted that Father made no argument on appeal that sanctions were not justified based on the complaint being a "good faith argument for the extension, modification, or reversal of existing law[.]" N.C.G.S. § 1A-1, Rule 11 (2023). He only argued that his claims were "filed based on a good faith interpretation of North Carolina law." If Father had argued that his filing was an attempt to start the process of having the North Carolina Supreme Court recognize his tort claims, I would have considered this portion of his appeal much differently. In our common law system, litigants cannot be afraid to bring good faith arguments at the fringes or beyond the fringes of what has already been recognized based upon the arguments of others in the past. This is how the common law develops and how it must continue to be developed.

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

No. COA24-523

Filed 17 December 2024

1. **Statutes of Limitation and Repose—constitutional claims—following decision that claims under State Tort Claims Act not permitted—not time-barred**

In an action asserting state constitutional claims, brought by an adult care home for disabled adults with mental illness and its owner (plaintiffs) against the division of the Department of Health and Human Services that provides regulatory oversight for such facilities (defendant) after the North Carolina Supreme Court issued an opinion in an earlier lawsuit between the parties—holding that plaintiffs' claims for negligent regulatory action could not be brought under the State Tort Claims Act (STCA)—the trial court erred in dismissing the complaint as time-barred where, although the applicable statutes of limitation for both negligence and constitutional claims were three years, they did not begin to run until the Supreme Court issued its decision differentiating general negligence claims as permissible under the STCA from "negligent regulation" claims as not thus permitted.

2. **Collateral Estoppel and Res Judicata—res judicata—claim splitting—not applicable—different exclusive jurisdictions for state tort and constitutional claims**

In an action asserting state constitutional claims, brought by an adult care home for disabled adults with mental illness and its owner (plaintiffs) against the division of the Department of Health and Human Services that provides regulatory oversight for such facilities (defendant) after the North Carolina Supreme Court issued an opinion in an earlier lawsuit between the parties—holding that plaintiffs' claims for negligent regulatory action could not be brought under the State Tort Claims Act (STCA)—plaintiffs were not barred from bringing their claims by the principle of res judicata or the prohibition on claim splitting because the exclusive jurisdiction of the applicable fora (the Industrial Commission for the STCA claims and the superior court for the state constitutional claims) precluded all of the claims from being brought together in a single action.

Appeal by Plaintiffs from an order entered on 4 October 2023 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 29 October 2024 in session at Duke University School of Law in the City of Durham pursuant to N.C. Gen. Stat. § 7A-19(a).

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

Robinson, Bradshaw & Hinson, P.A., by Adam K. Doerr and Demi Lorant Bostian, for defendant-appellee.

WOOD, Judge.

Plaintiffs appeal from an order granting a Motion to Dismiss Plaintiffs' complaint with prejudice filed by the Department of Health and Human Services ("DHHS"). Plaintiffs contend the trial court erred by finding that a statute of limitations barred their only remedy for the violation of their rights.

I. Factual and Procedural Background

Plaintiffs' complaint alleges the following: Cedarbrook is an adult care home in Nebo, North Carolina that provides a place of residence for disabled adults with mental illness who are stable in their recovery. Cedarbrook has been licensed to serve this population since 2002. DHHS is the state administrative agency that oversees health and human related services in North Carolina. The Division of Health Services Regulation ("DHRS") is the division of DHHS that provides regulatory oversight for healthcare and adult care facilities. The Adult Care Licensure Section ("ACLS") within DHRS oversees adult care facilities.

The complaint further alleges: ACLS conducts annual inspections of the Cedarbrook facility. In addition, the McDowell County Department of Social Services ("DSS") oversees Cedarbrook and makes site visits multiple times per month. From its founding in 2002 through 2015 Cedarbrook consistently received excellent scores from both agencies and had strong working relationships with each agency. Prior to November 2015, Cedarbrook had never been cited for regulatory violations by either agency.

On 6 November 2015, the United States Department of Justice ("USDOJ") issued an enforcement letter to the State of North Carolina. North Carolina previously had been cited for failure to provide mentally

ill adults with independent housing options, and the USDOJ demanded the State take corrective action. Three days after the USDOJ issued its enforcement letter, the ACLS began its annual inspection of Cedarbrook.

Plaintiffs allege the 2015 inspection differed dramatically from the prior thirteen evaluations. For instance, practices that had been in place for years at Cedarbrook and were previously praised by ACLS were assessed as severe violations. Additionally, ACLS alleged violations that had no basis in the governing administrative rules or statutes.

On 19 November 2015, ACLS issued a summary Suspension of Admissions against Cedarbrook preventing Cedarbrook from admitting new residents. On 17 December 2015, ACLS issued a Notice of Intent to Revoke Cedarbrook's license to operate but withdrew it on 16 May 2016. Notwithstanding ACLS' withdrawal of the Notice of Intent, Plaintiffs allege the Suspension of Admission caused a fifty percent (50%) reduction in the number of residents at Cedarbrook in six months.

Plaintiffs filed *Cedarbrook I* in 2016 with the Office of Administrative Hearings ("OAH"). The OAH issued a stay on 6 July 2016, enjoining the suspension of admission against Cedarbrook. ACLS took more than a month to lift the suspension, waiting until 12 August 2016 to do so. While the suspension was enjoined, ACLS issued penalties in excess of $340,000.00 to Cedarbrook. On the morning of trial at the OAH, ACLS agreed to withdraw all agency actions taken against Cedarbrook and reissue their Four-Star rating. However, Plaintiffs assert the suspension had caused the sale of Cedarbrook to fall through and the appraised value to decrease to the point that Cedarbrook could no longer be sold at the previously secured purchase price. ACLS' actions allegedly cost the facility over $500,000.00 in lost revenue, increased operating expenses and added attorney's fees, as well as costing $790,000.00 in proceeds from the lost sale.

On 25 October 2018 Plaintiffs filed *Cedarbrook II* with the Industrial Commission claiming DHHS engaged in negligent regulation under the State Tort Claims Act, N.C. Gen. Stat. § 143-291 *et seq.* ("STCA"). DHHS moved to dismiss the claim on the basis of sovereign immunity. On 13 March 2019, a Deputy Commissioner denied the motion and on 6 November 2020 the Industrial Commission affirmed the Commissioner's denial of the Motion to Dismiss allowing the suit to continue.

On 4 December 2020, DHHS filed notice of appeal to this Court. In an opinion issued on 21 December 2021, this Court affirmed the decision of the Full Industrial Commission. *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 281 N.C. App. 9, 868 S.E.2d

623 (2021). Based on the dissent in the opinion, DHHS appealed to the Supreme Court of North Carolina. On 16 December 2022, the Supreme Court reversed this Court finding that sovereign immunity applied and holding that "the theory that the agency regulated the entity in question in a negligent manner" is "not generally the type of decisions for which the State is liable to private citizens in tort." *Cedarbrook Residential Ctr., Inc. v. N.C Dep't of Health & Hum. Servs.*, 383 N.C. 31, 47, 50, 881 S.E.2d 558, 571, 573 (2022). The Supreme Court further stated that under the State Tort Claims Act, the State is only liable for negligence in instances where a "private person would be liable under the laws of North Carolina" and private persons do not exercise regulatory power and cannot be held liable for negligent regulation so neither can the State. *Id.* at 50, 881 S.E.2d at 573. On 1 January 2023 Plaintiffs petitioned the Supreme Court to rehear the case, but on 13 February 2023 the Supreme Court denied the petition.

Because the Supreme Court's decision removed the STCA as a remedy to negligent regulatory actions, Plaintiffs turned to assert constitutional claims that had been previously unavailable under the confines of North Carolina's STCA. On 30 March 2023, Plaintiffs filed the present complaint in McDowell County Superior Court.

On 15 June 2023, DHHS moved to dismiss the complaint arguing that the claims asserted are barred by the statute of limitations, the prohibition on claim splitting, and *res judicata*. The matter came on for hearing before Judge J. Thomas Davis on 25 September 2023. On 4 October 2023 the trial court granted DHHS' motion and entered the Dismissal Order. Plaintiffs timely appealed.

II. Analysis

Plaintiffs assert the trial court erred by granting DHHS' Rule 12(b)(6) Motion to Dismiss. We review *de novo* an order granting a Rule 12(b)(6) motion to dismiss. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). "In other words, under de novo review, the appellate court as the reviewing court considers the Rule 12(b)(6) motion to dismiss anew: It freely substitutes its own assessment of whether the allegations of the complaint are sufficient to state a claim for the trial court's assessment." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). The court must address "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." *Id.* at 679, 878 S.E.2d at 800 (citing *Bridges*, 366 N.C. at 541, 742 S.E.2d at 796).

Plaintiffs bring forth three separate claims under the North Carolina Constitution: (1) DHHS violated the Plaintiffs' right to the fruits of their

own labor, (2) DHHS interfered with their business which was a regulatory taking under law of the land, and (3) DHHS deprived Plaintiffs of their due process rights.

Defendant's Rule 12(b)(6) motion to dismiss alleged the claims should be dismissed because the claims violate the statute of limitations and are barred by claim splitting or res judicata.

In its ruling, the trial court stated:

> Great arguments, fascinating issue, but it's unfortunately going to be left to three guys in Raleigh to finalize this thing or settle it. I'm going to allow your motion to dismiss based on the statute of limitations on a constitutional claim. . . . [I]t started to run and it's run and I think the case law is not that it had to do with the Industrial Commission case. It's just stating what the law is. It's not any kind of modification or change that would have affected their equitable or legal rights in regard to the statute – or obligations in regard to the statute of limitations.

A. Statute of Limitations

[1] Plaintiffs and Defendant agree that the statute of limitations for both constitutional and negligence claims is three years. N.C. Gen. Stat. § 1-52 (2023); *McFadyen v. New Hanover Cnty.*, 273 N.C. App. 124, 131, 848 S.E.2d 217, 222 (2020). However, Plaintiffs contend that the statute of limitations did not accrue until the Supreme Court issued its decision in *Cedarbrook II*. We agree.

Chapter 1 of the North Carolina Statutes which sets the statute of limitations in N.C. Gen. Stat. § 1-52 clearly states "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, *after the cause of action has accrued*." N.C. Gen. Stat. § 1-15(a) (2023) (emphasis added). Therefore, the statute of limitations begins to run when the cause of action accrues.

> In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. The cause of action does not accrue until the injured party is at liberty to sue. The statute of limitations begins to run only when a party becomes liable to an action.

Raftery v. Wm. C. Vick Const. Co., 291 N.C. 180, 183, 230 S.E.2d 405, 407 (1976).

Here, Plaintiffs were not entitled to institute an action for constitutional claims until the North Carolina Supreme Court determined in *Cedarbrook II* that the State Tort Claims Act ("STCA") was not an adequate – and therefore the exclusive – remedy for the negligent regulatory actions of the DHHS. *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't. Health & Hum. Servs.*, 383 N.C. 31, 881 S.E.2d 558 (2022).

North Carolina law is clear that a litigant who has a remedy under state law cannot bring a constitutional or "*Corum*" claim to redress the same injury and seek the same remedy. *Washington v. Cline*, 385 N.C. 824, 826, 898 S.E.2 667, 669 (2024); *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Under state law, the purpose of the STCA was to "give greater access to the courts to plaintiffs in cases in which they [are] injured by the State's negligence." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 11, 727 S.E.2d 675, 683 (2012). Specifically, the North Carolina Industrial Commission was charged with "hearing and passing upon [such] tort claims against ... agencies of the State." N.C. Gen. Stat. § 143-291(a) (2023).

Prior to *Cedarbrook II* multiple cases from both the Supreme Court and Court of Appeals recognized that claims to recover for state agencies' negligent acts were within the scope of the STCA. *See Multiple Claimants v. N.C. Dep't. of Health & Hum. Servs.*, 361 N.C. 372, 646 S.E.2d 356 (2007) (allowing STCA claims for negligence in inspecting jails); *Ray v. N.C. Dep't. of Transp.*, 366 N.C. 1, 727 S.E.2d 675 (2012) (negligent narrowing of a roadway as an STCA claim); *Russell v. N.C. Dep't. of Env't & Nat. Res.*, 227 N.C. App. 306, 742 S.E.2d 329 (2013) (STCA claims for negligence, negligent misrepresentation and gross negligence); *Patrick v. N.C. Dep't. of Health & Hum. Servs.*, 192 N.C. App. 713, 666 S.E.2d 171 (2008) (STCA claim against DHHS for negligence in investigating reports of abuse); *Batts v. N.C. Dep't. of Transp.*, 160 N.C. App. 554, 586 S.E.2d 550 (2003) (allowing automobile passengers to assert negligence claim against NCDOT). Most significantly, in *Nanny's Korner* when addressing a plaintiff's constitutional claim against DHHS, this Court concluded that the constitutional claim failed because the plaintiff "had an adequate state remedy in the form of the Industrial Commission through the Torts Claim Act." *Nanny's Korner Day Care Ctr., v. N.C. Dep't. of Health & Hum. Servs.*, 264 N.C. App. 71, 80, 825 S.E.2d 34, 41 (2019) (rev.).

Defendant argues that Plaintiffs cannot rely on *Nanny's Korner* as an example of the existing state law at the time because it was not issued until after *Cedarbrook II* was filed; however, the decision was based on the Court's understanding of North Carolina statute at that

time which established that STCA claims bar constitutional claims on the same issue. *See* N.C. Gen. Stat. § 143.291(a) (2017). Notwithstanding their current argument, DHHS argued in *Nanny's Korner* that the constitutional claims in that case must be dismissed because the STCA provided a "sole and adequate remedy" for negligence claims against a state agency. *Nanny's Korner Day Care Ctr., v. N.C. Dep't of Health & Hum. Servs.*, 264 N.C. App. 71, 80, 825 S.E.2d 34, 41 (2019) (rev.) (appellate brief, 2018 WL 4869951) (citing N.C. Gen. Stat. § 143.291(a) (2015); *Taylor v. Wake Cnty.*, 258 N.C. App. 178, 186, 811 S.E.2d 648, 654 (2018); *Est. of Fennell v. Stephenson*, 137 N.C. App. 430, 437, 528 S.E.2d, 911, 915 (2000)).

Although the Supreme Court's decision in *Cedarbrook II* does not purport to overrule the previous law, they do state "we do not fault the Court of Appeals for relying upon *Nanny's Korner* as binding precedent," and the Court specifies that they "overrule [*Nanny's Korner*] to the extent it conflicts with this opinion." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't. of Health & Hum. Servs.*, 383 N.C. 31, 57, 881 S.E.2d 558, 577 (2022).

Not until our Supreme Court's decision in *Cedarbrook II* differentiated between the general negligence claims that are permissible under the STCA and "negligent regulation" claims which the Court viewed as discretionary decisions for which the State is not liable in tort negligence did Plaintiffs' constitutional claims accrue. *Id.* at 50, 881 S.E.2d at 573.

Once the Supreme Court removed the opportunity for the Plaintiffs to have their claims heard under the STCA, Plaintiffs were free to bring a constitutional "*Corum*" claim. If the "cause of action does not accrue until the injured party is at liberty to sue," then the cause of action here did not accrue until 16 December 2022, the date *Cedarbrook II* was decided. *Raftery v. Wm. C. Vick Const. Co.*, 291 N.C. 180, 183, 230 S.E.2d 405, 407 (1976).

As discussed supra, our Supreme Court denied Plaintiffs' petition for a rehearing of *Cedarbrook II* on 13 February 2023. The Plaintiffs followed with their *Corum* claims on 30 March 2023 only six weeks after the final denial and less than four months after the decision. Indisputably, Plaintiffs wasted no time in filing their complaint once the cause of action accrued.

B. Res Judicata and Claim Splitting

[2] Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a

> second suit based on the same cause of action between the same parties or their privies. Further, [t]he doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action.

Intersal, Inc. v. Hamilton, 373 N.C. 89, 107, 834 S.E.2d 404, 417 (2019) (internal citations and quotations omitted). Although Defendant claimed in their original Motion to Dismiss in Superior Court that "Cedarbrook's new complaint alleges precisely the same facts and seeks the same damages they sought in 2018," in both their written brief and oral argument before this Court, Defendant stated they were not raising *res judicata* and further noted to this Court that the court below did not rely on that theory for its decision.

Defendant did assert the issue of the prohibition on claim splitting to the court below and to this Court. Claim splitting is a common law rule which prohibits plaintiffs from splitting claims based on "the principle that all damages incurred as the result of a single wrong must be recovered in one lawsuit." *Reese v. Brooklyn Village, LLC*, 209 N.C. App. 636, 648, 707 S.E.2d 249, 257 (2011).

Neither the claim of *res judicata* nor claim splitting holds merit because Plaintiffs' claims could not have been brought together. When the exclusive jurisdiction of a forum precludes a claim from being brought the plaintiff cannot be barred from bringing it elsewhere based on *res judicata* or claim splitting concerns. *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 54-55, 571 S.E.2d 836, 842-43 (2002).

In the case sub judice, the Industrial Commission was the only competent jurisdiction in which Plaintiffs could bring the STCA claim. However, Plaintiffs were *simultaneously barred* from bringing direct constitutional claims to the Industrial Commission under N.C. Gen. Stat. § 7A-245(a)(4) because it does not have jurisdiction to hear such claims. "[T]he superior court division has original subject matter jurisdiction over constitutional claims[.]" *Gilbert v. N.C. State Bar*, 363 N.C. 70, 86, 678 S.E.2d 602, 612 (2009).

Since the two claims – one tort, the other constitutional – could not have been brought in the same jurisdiction, Defendant's assertion that Plaintiffs' claims were identical or a single wrong to be brought at one time necessarily fails.

III. Conclusion

Because Plaintiffs were not entitled to institute an action for constitutional claims until the North Carolina Supreme Court's decision

determined in *Cedarbrook II* the State Tort Claims Act was not an adequate – and therefore exclusive – remedy for the negligent regulatory actions of the DHHS, the cause of action did not accrue until the Court's ruling. Therefore, Plaintiffs were within the statute of limitations when they filed claims mere months after the *Cedarbrook II* decision.

Additionally, Plaintiffs are not barred from bringing the claim based on *res judicata* or claim splitting since the exclusive jurisdiction of the forum precluded both claims from being brought together.

REVERSED AND REMANDED.

Judges COLLINS and HAMPSON concur.

RICHARD DEVAYNE CREECH, PLAINTIFF
v.
TOWN OF CORNELIUS, ELECTRICITIES OF NORTH CAROLINA, INC., AND IAN CHARLES KENNER, DEFENDANTS

No. COA24-505

Filed 17 December 2024

1. Motor Vehicles—negligence—jury instruction—last clear chance—no error

In a tort action brought after a truck struck and injured plaintiff as he walked in an empty parking lot—in which the jury found that negligence by defendant (the truck driver) caused plaintiff's injuries, plaintiff was contributorily negligent, and defendant-driver had the last clear chance to avoid the collision—the trial court did not err in submitting the issue of last clear chance to the jury where the evidence, taken in the light most favorable to plaintiff, was sufficient as to each of the two disputed elements of that doctrine. The first disputed element—that a plaintiff's contributory negligence had placed him in a position from which he was powerless to extricate himself—was satisfied by evidence that plaintiff was struck after the truck entered the parking lot, drove safely past him, made a U-turn, and then approached him from behind. The second disputed element—that a driver had the time and means to avoid injury to a plaintiff by the exercise of reasonable care after he discovered, or should have discovered, the plaintiff's perilous position and his incapacity to escape it—was established where defendant-driver

turned into an empty parking lot with his headlights on and plaintiff in his plain view, with approximately twelve seconds passing before the truck turned around and struck plaintiff.

2. Motor Vehicles—special jury instruction—workers' compensation award to plaintiff—impact on tort damages award—no abuse of discretion

In a tort action brought after a truck (owned by one defendant) struck and injured plaintiff (a local television news reporter on a work assignment) as he walked in an empty parking lot, in which the jury found that negligence by a second defendant (a truck driver employed by a third defendant) caused plaintiff's injuries—resulting in an award of damages to plaintiff—the trial court did not abuse its discretion in declining to give defendants' requested special instruction pursuant to N.C.G.S. § 97-10.2(j) (which allows a trial court discretion to determine the amount of an employer's subrogation lien for the payment of compensation in workers' compensation cases). The court did instruct the jury about the workers' compensation benefits already received by plaintiff for the sole purpose of informing the jury that such amount would be deducted by the court from any amount of damages awarded to plaintiff in the tort action, a correct statement of the law as set forth in section 97-10.2(e).

Appeal by Defendants from judgment entered 19 September 2023 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 November 2024.

Maginnis Howard, by Charles G. Monnett III and Andrew S. O'Hara, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Linda Stephens, and McAngus Goudelock & Courie PLLC, by John P. Barringer and Meredith Cushing, for Defendants-Appellants.

COLLINS, Judge.

This appeal arises from an automobile accident where the driver of a truck hit and injured a pedestrian in a parking lot. The Town of Cornelius, Electricities of North Carolina, Inc., and Ian Charles Kenner (collectively "Defendants") appeal from the trial court's judgment entered upon a jury verdict finding the driver of the truck, Kenner, negligent in causing injury to the pedestrian, Plaintiff Richard Devayne Creech.

Defendants argue that the trial court erred by submitting the issue of last clear chance to the jury and by refusing to give their requested special jury instruction on N.C. Gen. Stat. § 97-10.2(j), which allows the trial court discretion to determine the amount of an employer's subrogation lien for the payment of compensation in workers' compensation cases. Because there was sufficient evidence to submit the issue of last clear chance to the jury and the trial court did not err by declining to instruct the jury on the trial court's discretionary authority under N.C. Gen. Stat. § 97-10.2(j), we affirm the trial court's judgment.

I. Background

In the early morning hours of 6 September 2017, Plaintiff was working as a morning news reporter for a local television station in Charlotte, North Carolina. Plaintiff had traveled to Huntersville, North Carolina, to report on a story. Standing in front of the Huntersville town hall building with a cameraman, Plaintiff recorded several "live shots" of the story.

After recording a shot at 6:06 a.m., Plaintiff walked across the street to a convenience store. When he left the convenience store, Plaintiff walked back across the street, past the town hall building, and toward the building's parking lot. The town hall building was to Plaintiff's left, and after passing the building, he turned left into the parking lot. Plaintiff testified that he wanted to walk around the parking lot "to continue to walk, just take steps."

Plaintiff walked into the parking lot at approximately 6:15 a.m. While listening to a news story on his phone, he walked along the white parking lines toward the back of the parking lot. When he reached the back of the parking lot, Plaintiff turned around and started walking back along the same white parking lines toward the entrance. At this point, there were no cars in the parking lot.

As Plaintiff was walking back toward the entrance, Kenner turned right into the town hall parking lot in his truck.[1] The truck's headlights "shined right on [Plaintiff's] face" as it turned into the lot. Plaintiff saw the truck enter the parking lot and thought the truck driver saw him. Kenner drove the truck toward the back of the parking lot, in the opposite direction Plaintiff was walking. When Kenner reached the rear of the parking lot, he made a U-turn and began driving toward Plaintiff. As Kenner prepared to check a mailbox located next to the

1. Kenner was employed by Electricities of North Carolina, Inc., and the Town of Cornelius owned the truck Kenner was driving.

building's entrance, he drove the truck to the far right side of the lot, along the white parking lines closest to the building. Plaintiff recounted the following:

> As I was walking, I remember looking at the truck and seeing it as it -- the bed of the truck go by. And then, out of my peripheral, it felt like something was happening. I really couldn't tell. And then as I looked, it started to turn and my thought was, "It's getting close enough," and before I could get that complete thought out, I was turning and it hit me.

The front of Kenner's truck hit Plaintiff in the legs and knocked him over. Kenner, realizing he had hit something but not knowing what, put the truck in reverse and backed over Plaintiff's leg. Approximately twelve seconds passed from the time Kenner turned into the parking lot to the time he first struck Plaintiff with his truck. Plaintiff was transported by ambulance to the hospital, where he spent several days. Plaintiff sustained a fractured tibia which required surgery and extensive physical rehabilitation.

Plaintiff commenced this action on 17 August 2020 by filing a complaint alleging negligence. The case came for trial on 14 August 2023. The jury found that Kenner's negligence caused Plaintiff's injuries, Plaintiff was contributorily negligent, and Kenner had the last clear chance to avoid the collision. The jury awarded Plaintiff $760,035.44. The trial court entered a judgment upon the jury's verdict. Defendants appeal.

II. Discussion

A. Last Clear Chance Instruction

[1] Defendants first argue that the trial court erred by submitting a last clear chance instruction to the jury.

"The issue of last clear chance must be submitted to the jury if the evidence, viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine." *Bass v. Johnson*, 149 N.C. App. 152, 158 (2002) (citation omitted). Whether the evidence is sufficient to require such an instruction depends upon the facts of each individual case. *Wray v. Hughes*, 44 N.C. App. 678, 682 (1980). We review the sufficiency of the evidence to support the instruction de novo. *See Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 341-42 (2008) (reviewing de novo the sufficiency of the evidence to withstand a motion for a directed verdict); *see also State v. Chevallier*, 264 N.C. App. 204, 214 (2019) (stating in a criminal context that "[w]e review *de*

novo properly preserved sufficiency-of-the-evidence challenges to jury instructions") (citation omitted); *see also Bass*, 149 N.C. App. at 158-59 (reviewing as a matter of law the sufficiency of the evidence to support an instruction on last clear chance).

The last clear chance doctrine "allows a contributorily negligent plaintiff to recover where the defendant's negligence in failing to avoid the accident introduces a new element into the case, which intervenes between the plaintiff's negligence and the injury and becomes the direct and proximate cause of the accident." *Outlaw v. Johnson*, 190 N.C. App. 233, 238 (2008) (quotation marks, brackets, and citation omitted). For cases involving a contributorily negligent pedestrian injured by the driver of a motor vehicle, there must be sufficient evidence of each of the following four elements:

> (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Clodfelter v. Carroll, 261 N.C. 630, 634-35 (1964) (citations omitted).

Defendants concede that sufficient evidence was presented to support the second element—that Kenner knew, or by the exercise of reasonable care could have discovered, Plaintiff's perilous position and his incapacity to escape from it before Plaintiff suffered injury at Kenner's hands. *See id.* Similarly, Defendants make no argument as to the fourth element—that Kenner negligently failed to use the available time and means to avoid injury to Plaintiff, and for that reason struck and injured Plaintiff. *Id.* Accordingly, only the first and third elements are at issue here.

The first element requires sufficient evidence that the plaintiff's "prior contributory negligence had placed him in a position from which he was powerless to extricate himself." *Nealy v. Green*, 139 N.C. App.

500, 505 (2000) (brackets and citation omitted). "The situation is not one of true helplessness, as the injured party is in a position to escape. Rather, the negligence consists of failure to pay attention to one's surroundings and discover his own peril." *Williams v. Odell*, 90 N.C. App. 699, 704 (1988) (citations omitted).

"Cases discussing this first element have consistently distinguished between situations in which the injured pedestrian was facing oncoming traffic and those in which the pedestrian was not." *Nealy*, 139 N.C. App. at 505. Accordingly, our courts have determined that the last clear chance instruction is not warranted when there is evidence showing that an injured pedestrian was facing oncoming traffic and could have extricated himself from his dangerous position. *See Williams*, 90 N.C. App. at 702-04 (the pedestrian was facing oncoming traffic as she was leaning against the rear of her vehicle, parked on the shoulder of highway); *Clodfelter*, 261 N.C. at 635 (the pedestrian was walking on the side of the highway, facing the defendant's approaching automobile). On the other hand, our courts have determined that "evidence tending to show the injured pedestrian either was not facing oncoming traffic or did not see the approaching vehicle" is sufficient to satisfy the first element. *Nealy*, 139 N.C. App. at 505-06 (the pedestrian "was walking with his back to traffic and did not turn when defendant's vehicle approached"); *see also Watson v. White*, 309 N.C. 498, 505 (1983) (the pedestrian was crossing a highway and did not see the defendant's vehicle approach); *Williams v. Spell*, 51 N.C. App. 134, 136 (1981) (the pedestrian, who was walking with his back to traffic when injured, "placed himself in a position of helpless peril"); *Outlaw*, 190 N.C. App. at 240 (the pedestrian did not see the vehicle approaching).

Here, the evidence presented indicates that Plaintiff was put in a perilous position when Kenner made the U-turn and started driving the truck back toward Plaintiff. At that point, Plaintiff was walking with his back to the truck and, "by failing to pay attention to his surroundings and discover his own peril," placed himself in a dangerous position of which he did not realize until it was too late. *Nealy*, 139 N.C. App. at 506 (quotation marks, brackets, and citations omitted).

Defendants contend that Plaintiff, through the exercise of reasonable care, could have escaped from his position of peril by getting out of the parking lot as soon as he saw the truck turn in. At that point, however, Plaintiff did not believe he was in danger because the truck's headlights had shined on him before it began traveling in the direction opposite of Plaintiff. *See id.* at 506 (reasoning that "the pedestrian who did not apprehend imminent danger could not reasonably have been

expected to act to avoid injury") (quotation marks and citations omitted). Plaintiff did not see Kenner turn the truck around and thus did not see the truck approaching him in time to remove himself from the dangerous situation. When viewed in the light most favorable to Plaintiff, the evidence was sufficient to support a reasonable inference that Plaintiff "placed himself in a position of peril from which he could not escape by the exercise of reasonable care[.]" *Clodfelter*, 261 N.C. at 634 (citations omitted).

The third element requires sufficient evidence that "the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it[.]" *Id.* at 635. This element is established where "there was an appreciable interval of time between [the] plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence." *Mathis v. Marlow*, 261 N.C. 636, 639 (1964) (citation omitted). It "must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Id.* (quotation marks and citation omitted). Our courts have emphasized that even in situations where the defendant-motorist never saw the endangered pedestrian, a last clear chance instruction is warranted when there is evidence showing that the defendant-motorist had an unobstructed view of the pedestrian and thus should have observed the pedestrian in time to avoid injury. *See Earle v. Wyrick*, 286 N.C. 175, 178 (1974) (defendant-motorist had a clear and unobstructed view of pedestrian walking in the street at night although the defendant saw pedestrian "only a split second before the impact"); *see also Exum v. Boyles*, 272 N.C. 567, 577 (1968) (although the defendant-motorist did not actually see the pedestrian until it was too late to avoid injury, had he maintained a lookout in the direction of his travel, the defendant could have observed the pedestrian's perilous position in time to avoid striking him).

Here, the evidence indicates that Kenner turned into an empty parking lot with his headlights on, Plaintiff was in his plain view, and approximately twelve seconds elapsed between the time Kenner turned in and the time he first struck Plaintiff. Viewed in the light most favorable to Plaintiff, the evidence indicates that had Kenner maintained a lookout in the direction of his travel, he could have observed Plaintiff's presence in the parking lot and had ample time to avoid striking him.

Kenner also had the means to avoid injury. At the time of the collision, the parking lot was empty. Had Kenner merely swerved to his

left or right, he could have avoided hitting Plaintiff and would not have put anyone else in danger. Accordingly, when viewed in the light most favorable to Plaintiff, the evidence was sufficient to support a reasonable inference that Kenner "had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it[.]" *Clodfelter*, 261 N.C. at 635 (citations omitted).

As Plaintiff presented sufficient evidence supporting a reasonable inference of each element of the last clear chance doctrine, the trial court did not err by submitting the issue to the jury.

B. Special Jury Instruction

[2] Defendants next argue that the trial court erred by refusing to include in its charge to the jury their requested special instruction on N.C. Gen. Stat. § 97-10.2(j), which allows the trial court discretion to determine the amount of an employer's subrogation lien for the payment of compensation in workers' compensation cases.

A trial court has "wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Murrow v. Daniels*, 321 N.C. 494, 499-500 (1988) (quotation marks and citation omitted). A trial court's charge to the jury is to be reviewed "contextually and in its entirety." *Bass*, 149 N.C. App. at 160 (citation omitted). The trial court's refusal to give a requested charge "is not error where the instructions fairly represent the issues" and will not be overturned absent an abuse of discretion. *Osetek v. Jeremiah*, 174 N.C. App. 438, 440 (2005) (citations omitted).

In this case, two specific portions of N.C. Gen. Stat. § 97-10.2 were at issue in the jury instruction on workers' compensation:

> (e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court *shall* instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff.
>
> . . . .

> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, *in his discretion*, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and the employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C. Gen. Stat. § 97-10.2(e), (j) (2023) (emphasis added).

Defendants concede that their argument regarding this issue mirrors the argument advanced, and rejected, in *Peay v. S. & D. Coffee, Inc.*, 278 N.C. App. 605 (2021). Although *Peay* is an unpublished opinion and is not controlling legal authority, N.C. R. App. P. 30(e)(3), we find its reasoning persuasive.

Here, the trial court instructed the jury that the amount of workers' compensation benefits already received by Plaintiff was given to the jury "for the sole purpose of informing [them] that such amount will be deducted by the [c]ourt from any amount of damages you award the Plaintiff." The trial court further instructed that "[u]nder North Carolina law, the [c]ourt is required to deduct this amount from any amount of damages" the jury awards. This instruction was a correct statement of the law. *See* N.C. Gen. Stat. § 97-10.2(e) ("In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff.").

Defendants requested the trial court also instruct the jury on the language of subsection (j), so that the jury may be informed of the law giving a trial court discretion to alter the workers' compensation award. Denying Defendants' request, the trial court emphasized the discretionary nature of the language of subsection (j). The court reasoned that it "kind of tracks with, if it's something that the judge has discretion on, then . . . I'm not going to allow the attorneys to try to telegraph what that would be, because it's not certain, and it's confusing to the jury." We agree with the trial court's reasoning.

Subsection (j) makes clear that the trial court has discretion in determining whether to alter the workers' compensation award. *Id.* § 97-10.2(j) ("[T]he judge shall determine, in his discretion, the amount, if any, of the employer's lien."). This action does not occur automatically; rather, a party must apply to the resident superior court judge in the appropriate county. *Id.* Accordingly, it was not an incorrect statement of the law for the trial court to omit subsection (j) from its jury instruction. We therefore conclude that the trial court did not err by denying Defendants' requested special instruction.

III. Conclusion

Because Plaintiff presented sufficient evidence supporting a reasonable inference of each element of the last clear chance doctrine, the trial court did not err by submitting the issue to the jury. Furthermore, the trial court did not err by denying Defendants' request for a special instruction on N.C. Gen. Stat. § 97-10.2(j). We affirm the trial court's judgment.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

IN RE H.G.

[297 N.C. App. 41 (2024)]

IN THE MATTER OF H.G., S.G. & E.G.

No. COA24-283

Filed 17 December 2024

1. Appeal and Error—failure to appeal—issues not raised in prior appeal—waiver

In a child abuse and neglect matter, respondent-father waived his right to appeal the trial court's decision to eliminate reunification from the permanent plan, and the issue of whether respondent received notice of the possibility that reunification efforts could cease, where he had the opportunity to raise those issues in a prior appeal but chose not to.

2. Child Abuse, Dependency, and Neglect—disposition order—elimination of reunification—not prohibited by statute—notice to parent not required

In a child abuse and neglect matter, the trial court did not abuse its discretion by eliminating reunification from a child's permanent plan in its disposition order because, contrary to respondent father's contention, N.C.G.S. § 7B-901(d) did not prohibit the court from eliminating reunification even after having previously determined that reunification efforts were not required at the initial disposition hearing. Further, there was no statutory requirement to provide respondent with notice that reunification could be eliminated from the permanent plan.

3. Child Abuse, Dependency, and Neglect—new adjudication and disposition orders—based on prior hearing—within trial court's discretion

In a child abuse and neglect matter that had been remanded back to the trial court for additional findings of fact, the trial court did not abuse its discretion by entering new adjudication and disposition orders (in which it once again eliminated reunification from the permanent plan based on respondent's sexual abuse of the child) without holding a new evidentiary hearing and instead relying on the transcript of a prior hearing—a decision which the appellate court had left to the trial court's discretion on remand.

Appeal by respondent-father from orders entered 27 October 2023 by Judge Angela C. Foster in District Court, Guilford County. Heard in the Court of Appeals 6 November 2024.

Robert W. Ewing, for respondent-appellant father.

Administrative Office of the Courts, Guardian Ad Litem Program Division, by Michelle FormyDuval Lynch, for guardian ad litem.

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

ARROWOOD, Judge.

Respondent-father appeals from orders on adjudication and disposition filed 27 October 2023 continuing custody of his daughter, H.G.,[1] with the Guilford County Department of Health and Human Services ("DHHS"), suspending visitation between respondent-father and H.G., and relieving DHHS of the obligation to make further reunification efforts between respondent-father and H.G. For the following reasons, we affirm the district court's orders.

I. Factual Background

On 27 March 2019, the trial court filed petitions for nonsecure custody of three adopted children of respondent-father: H.G., then aged 9, S.G., then aged 14, and E.G., then aged 15.[2] In an exhibit attached to the juvenile petition, DHHS noted a report from both S.G. and E.G. stating that they had been verbally and physically abused by their father, all of which respondent-father denied. There was also report of respondent-father's nephew inappropriately touching S.G. and E.G. During a forensic interview, H.G. said that she had witnessed respondent-father's abuse but had not been abused herself. All three children were placed in a children's home and continued to attend school.

The trial court entered an adjudication and disposition order on 26 June 2019 finding that E.G. and S.G. were abused, neglected, and dependent, and that H.G. was neglected and dependent. The trial court ordered custody for the juveniles to remain with DHHS, visitation to remain suspended with "no contact under any circumstances, pending further orders of the Court[,]" and that DHHS "shall cease further reunification efforts with [respondent-father] at this time." Respondent appealed the order on 25 July 2019.

---

1. Initials are used for all minors to protect their identities.

2. Respondent-father adopted these children on 26 June 2012 as a single parent adoption, when the children were aged 2, 7, and 8, respectively.

While the appeal was pending, the trial court conducted a permanency planning hearing on 18 September 2019, finding that the primary plan should be reunification with a secondary plan of adoption, and continuing custody with DHHS. The court conducted a visitation review hearing on 13 December 2019; there, the court made findings of fact that included allegations H.G. made concerning respondent-father. H.G. told a social worker that respondent showered with her and touched her "private area." Neither S.G. nor E.G. wished to have visitation with respondent. Custody of the children remained with DHHS and respondent-father was not granted any visitation.

Respondent's appeal was heard by this Court on 10 June 2020. *In re H.A.G.*, 272 N.C. App. 446, 2020 WL 3721834 (unpublished). We found that the trial court erred by admitting testimony from the supervisor of Spencer Brooks, a social worker with DHHS. *Id.* at *1, 4. The supervisor was the only individual who testified at the adjudicatory hearing, and she testified to the out-of-court statements made by the juveniles to Brooks. *Id.* at *4, 5. We determined that the statements did not fall into any exception to the hearsay rule, and prejudiced respondent-father. *Id.* at *5. We accordingly reversed the trial court's adjudication and disposition, *id.*, and the trial court dismissed the juvenile petitions and dissolved the nonsecure custody order as of 27 July 2020.

The next day, 28 July 2020, DHHS took out new juvenile petitions for S.G., E.G., and H.G. alleging they were abused, neglected, and dependent. An attached exhibit described an interview with H.G. conducted 8 July 2020 regarding possible sexual abuse by respondent-father where she stated "she slept in the same [bed] as [respondent-father] . . . with a night gown and no underwear[,]" which "made her feel uncomfortable[,]" but that she did so "because there was no more room for [her] to sleep in." The exhibit also summarized interviews with E.G. and S.G. where they described further abuse by respondent-father, including that respondent-father "slept and showered with [H.G.] from a young age up until they were removed from his care[,]" and "put an ointment on [H.G.]'s vagina until she was at least 9 years old although she was capable of doing this herself[,]" as well as abused by respondent-father's nephew who allegedly touched E.G. and S.G.'s private areas on multiple occasions. The trial court entered orders for nonsecure custody returning custody of the juveniles to DHHS that same day.

At an adjudication hearing on 15 September 2021, all three children were found to be abused, neglected, and dependent. The trial court made findings summarizing the allegations from the new petitions and attached exhibits, including H.G.'s description of sleeping in

respondent-father's bed, showering with him, and respondent's touching of her "private areas[,]" as well as E.G. and S.G.'s statements that respondent-father's nephew sexually assaulted them when they were 14 and 12 years old respectively and respondent-father's nephew was 28 years old.

Following the adjudication, DHHS moved for bifurcation of the disposition hearings. DHHS stated that respondent-father agreed it was in the best interest of S.G. and E.G. to remain in foster care; both children expressed no desire for reunification and stated that they would run away if they were returned to respondent-father, and E.G. would soon reach the age of majority. However, respondent-father sought reunification and to regain custody of H.G., who was 12 years old at the time of the motion and according to DHHS had a "drastically different" proposed plan from the other two juveniles. E.G. reached the age of majority on 5 December 2021, and DHHS was relieved of her custody. The court granted a bifurcation of the trials on 5 January 2022.

Following H.G.'s disposition hearing on 30 March 2022, the trial court entered a disposition order summarizing H.G.'s placement status and CPS history. The trial court found that respondent-father had entered into a case plan with DHHS on 24 March 2022, requiring him to maintain safe and appropriate housing, maintain income to provide for himself and his children, and participate in parenting assessment training and education, a mental health assessment, and a substance abuse evaluation. The trial court further found that "due to the evidence presented of sex abuse, reunification is not a viable plan for this juvenile." Accordingly, the trial court continued custody of H.G. with DHHS, relieved DHHS of the obligation to make further reasonable efforts towards reunification, and found that the plan of reunification was not in the best interest of the juvenile. At this hearing, respondent-father's counsel stated that she disagreed with ceasing reunification efforts, given that she had not had notice that this would be decided at the disposition; she understood "statutorily" DHHS's arguments, but believed "that's something that should have been discussed in advance at a team meeting." Defendant appealed this order 15 July 2022.

Respondent-father's second appeal in this matter was heard by this Court on 28 August 2023; we vacated the district court's order and remanded to allow the district court to make the necessary findings of fact. *In re H.A.G.*, 290 N.C. App. 552, 2023 WL 6119972 at *5. We determined that the findings of fact challenged by respondent-father "merely display[ed] the conflicts of evidence." *Id.* The trial court found that all the witnesses were credible and reliable—including respondent, who

denied the worst allegations—so we were therefore "unable to determine how the trial court came to its ultimate findings of fact regarding abuse." *Id.* However, we determined that reversal was not necessary, and instead remanded for the trial court to make the appropriate findings of fact, permitting the trial court to "hold an additional hearing on evidentiary matters." *Id.*

On 10 and 11 October 2023, the trial court conducted a hearing on remand to discuss the procedural posture of the case. The trial court subsequently entered new adjudication and disposition orders again concluding that H.G. would remain in the custody of DHHS, there would be no visitation between respondent-father and H.G., and that reunification efforts could cease. Respondent-father gave notice of appeal 20 November 2023.

II. Discussion

Respondent-father's sole issue on appeal is whether the trial court abused its discretion at the dispositional phase of the case by eliminating reunification as the permanent plan, arguing the trial court lacked statutory authority and failed to give respondent-father appropriate notice. For the following reasons, we find no abuse of discretion.

A. Failure to Appeal

[1] The events that gave rise to this appeal initially occurred at the 30 March 2022 disposition hearing. In its disposition order, the court found that reunification was not a viable plan for H.G. due to respondent's sexual abuse. The trial court also relieved DHHS of any obligation to make further reunification efforts. Respondent-father's trial counsel noted her disagreement with ceasing reunification efforts, stating, "I don't believe I had notice of that at a prior meeting, so we didn't really discuss that at a meeting." The decision to eliminate reunification at the disposition and the lack of notice serve as the bases for respondent's appeal, which he argues is a violation of N.C.G.S. § 7B-901.

However, we note that respondent had an opportunity to appeal the failure to give notice and elimination of reunification in his 15 July 2022 appeal, but apparently chose not to do so. Rather, he appealed only the "trial court's adjudicatory findings of fact and conclusions." *In re H.G.*, 290 N.C. App. 552, 2023 WL 6119972 at *2. We dismissed a respondent's constitutional challenge of a statute in *In re Estate of Lunsford*, 160 N.C. App. 125 (2003) (*rev'd on other grounds*, 359 N.C. 382 (2005)), where he made that argument for the first time in his second appeal. *Lunsford*, 160 N.C. App. at 129 n.1. Relying on *Lunsford*¸ we later held that "[w]hen a party fails to appeal a ruling on a particular issue, he is then bound by

that failure and may not revisit the issue in subsequent litigation." *Hill v. Hill*, 181 N.C. App. 69, 76–77 (2007).

In the case *sub judice*, respondent-father failed, in his 2022 appeal, to appeal the issues he now challenges. Had he chosen to make a more comprehensive appeal in 2022, this case would have concluded with our ruling in 2023 and provided H.G. a finality in this custody dispute she has not yet been afforded. However, because the issues asserted were unchallenged from the prior order, we find that this constitutes waiver and respondent-father has no right to appeal the lack of notice and elimination of reunification.

B. Disposition Hearing

[2] Assuming, *arguendo*, that respondent's appeal is properly before the court, we address respondent's arguments that elimination of reunification was not authorized by statute, and that respondent failed to receive proper notice.

"The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion." *In re A.P.W.*, 378 N.C. 405, 410 (2021) (citation omitted). "Under an abuse of discretion standard, we must determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Stephens v. Stephens*, 213 N.C. App. 495, 503 (quotation marks and citation omitted).

We recently addressed the competency of a court to eliminate reunification as a permanent plan in *In re R.G.*, 292 N.C. App. 572 (2024). There, a mother had appealed a permanency planning order ("PPO") on the grounds that this order had eliminated reunification as part of the plan, a decision she was statutorily authorized to appeal. *Id.* at 577. We held to the contrary:

> Mother did not have a right to appeal the Initial PPO pursuant to N.C.G.S. § 7B-1001(a)(5), because N.C.G.S. § 7B-906.2(b) operates to exclude reunification as a permanent plan once the trial court makes findings of aggravated factors under N.C.G.S. § 7B-901(c) at disposition. There is no required delay between the trial court's dispositional order and first permanency planning order for the court to eliminate reunification from the permanent plans for a juvenile after the trial court makes dispositional findings of the specific, statutorily prescribed circumstances under N.C.G.S. § 7B-901(c).

Id.

Here, respondent-father states that § 7B-901(d) "does not permit the trial court to eliminate reunification as a permanent plan for a juvenile when it determines that reunification efforts are not required at the initial disposition hearing." Respondent-father's contention, however, is flatly contradicted by our holding in *In re R.G.* that expressly permits this mechanism.

Our holding also serves to answer respondent-father's contention that he was not given proper notice of the permanency planning hearing that would be occurring as part of the disposition. While we agree that N.C.G.S. § 7B-901(d) requires notice be given before conducting a permanency planning hearing, our holding in *In re R.G.*, as well as the relevant statute, contradict respondent's characterization that H.G.'s disposition hearing was a permanency planning hearing. "The plain language of N.C.G.S. § 7B-906.2(b) now permits trial courts to exclude reunification from the permanent plans for a juvenile at any time, including immediately following disposition, and need not be a permanent plan for a juvenile, at all, if findings were made under N.C.G.S. § 7B-901(c)." *In re R.G.*, 292 N.C. App. at 579. N.C.G.S. § 7B-906.2 provides six permanent plan that the court "shall adopt" at "any permanency planning hearing": reunification, adoption, guardianship, custody, Another Planned Permanent Living Arrangement, or reinstatement of parental rights. N.C.G.S. § 7B-906.2. Thus, while the decision to eliminate reunification will ultimately affect the resultant PPO, that decision does not turn a disposition into a permanency planning hearing, since a hearing requires the establishment of a plan, not merely the elimination of one option, which may be done at any time.

We note that even respondent's counsel at trial admitted there was no statutory basis for requiring notice: "I understand that statutorily they didn't need to. It's just something that we do typically discuss in advance say at a team meeting." Custom is not a substitute for statutory compliance. We find that the court did not abuse its discretion in eliminating reunification and declining to provide notice.

C. Trial Court's Denial of New Hearing

[3] Finally, respondent-father appears to take issue with the trial court's decision to draft an order based on the transcript from the 2022 hearing, rather than conduct a new hearing and receive new evidence. Respondent notes that he "was not given the opportunity to present evidence concerning the permanent plan for Heather based on the current circumstances." In our 2023 opinion remanding this matter to the trial court, we left it to the discretion of the trial court to "hold an additional hearing on evidentiary matters." *In re H.G.*, 290 N.C. App. 552, 2023

WL 6119972 at *5. Further, the evidence that respondent would have brought before the court could not have changed the court's finding that respondent had sexually abused H.G., which was the sole basis for its elimination of reunification.[3] We note that N.C.G.S § 7B-901(c) does not require the trial court to abandon reunification efforts, even after a finding of aggravated circumstances, if the court "concludes that there is compelling evidence warranting continued reunification efforts . . . ." N.C.G.S § 7B-901(c). However, it is clear that the court was satisfied that the evidence presented at the 2022 disposition hearing provided proper grounds for the elimination of reunification efforts, given that it declined the optional, additional hearing, and we do not find the trial court abused its discretion in so deciding.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges COLLINS and HAMPSON concur.

3. Respondent's brief lists actions that respondent has taken since the 2020 custody action, including a Parenting Assessment Training and Education pre-test, a Parenting Psycho-Sexual Evaluation, mental health assessment, and participation in shared parenting with H.G.'s placement provider.

IN RE K.J.D.

[297 N.C. App. 49 (2024)]

IN THE MATTER OF K.J.D.

No. COA24-444

Filed 17 December 2024

1. **Termination of Parental Rights—failure to make reasonable progress—supported by findings of fact**

   Where a juvenile was initially adjudicated dependent as the result of domestic violence between respondent-mother and the juvenile's father, but his removal from respondent-mother's care and custody was also the result of substance abuse concerns, the district court's adjudication that respondent-mother's willful failure to make reasonable progress in correcting the conditions that led to the child's removal—a ground permitting the termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(2)—was supported by its findings of fact that, over the nearly two-year period the child had been in the custody of the county department of social services, respondent-mother had consistently failed to comply with drug screens or to address her substance abuse issues, and, despite having completed domestic violence classes, continued to be involved in domestic violence situations.

2. **Termination of Parental Rights—best interest of the child—statutory factors—likelihood of adoption—other parent's rights not terminated**

   The district court did not abuse its discretion in determining that the termination of respondent-mother's parental rights was in the best interest of her minor son in light of its findings of fact reflecting consideration of each of the statutory factors set forth in N.C.G.S. § 7B-1110(a)—including the likelihood of adoption of the juvenile—despite the court's decision not to terminate the parental rights of the child's father, because termination of respondent-mother's parental rights increased the likelihood that the child would be adopted and thus aided in the achievement of his permanent plan.

Appeal by Respondent-Mother from Order entered 2 February 2024 by Judge Kimberly Gasperson-Justice in Polk County District Court. Heard in the Court of Appeals 6 November 2024.

Lisa Noda for Respondent-Appellant Mother.

Hanna Frost for Petitioner-Appellee Polk County Department of Health and Human Services.

Shannon Phillips for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from an Order terminating her parental rights in her minor child, Kade.[1] The Record before us tends to reflect the following:

On 1 February 2021, Polk County Department of Social Services (DSS) received a report concerning an incident of domestic violence between Respondent-Mother and Father[2] that occurred in the presence of Kade, who was six years old at the time. DSS began providing in-home case management to Respondent-Mother on 18 March 2021. On 31 March 2021, Respondent-Mother signed an In-Home Family Services Agreement whereby she agreed to certain conditions, including obtaining therapy. On 14 April 2021, Respondent-Mother disclosed another incident of domestic violence had occurred in Kade's presence. Two days later, on 16 April 2021, Respondent-Mother signed a Temporary Parental Safety Agreement to address domestic violence concerns. Under this agreement, Respondent-Mother agreed, in part, "Parents will not smoke in the home or around [Kade]. Parents will ensure to have a sober caregiver if they will use."

Additional instances of domestic violence in Kade's presence occurred on 19 May 2021 and 21 June 2021. On 26 May 2021, DSS filed a Petition alleging Kade was a neglected and dependent juvenile. On 28 July 2021, Kade was adjudicated dependent and placed in DSS custody. Under the resulting Order, Kade was physically placed with Respondent-Mother and Father on a fifty-fifty basis. Following the dispositional hearing on 10 August 2021, the trial court ordered Respondent-Mother to: "complete Triple P parenting classes and demonstrate what is learned with Kade"; submit to random drug screens as requested by DSS within 48 hours of request; obtain a substance abuse assessment, follow all recommendations, and successfully complete the program; obtain a mental health assessment, follow all recommendations, and successfully complete the program; attend Kade's medical appointments as often as possible and engage in his medical care; maintain "stable, crime and drug free housing" for Kade; be employed

1. A pseudonym agreed upon by the parties.

2. Father is not a party to this appeal.

full-time and have employment for six months or longer; and obtain a domestic violence assessment and follow all recommendations. In its Order, the trial court noted DSS had terminated Respondent-Mother's unsupervised visits with Kade due to concerns about her boyfriend. On 20 August 2021, DSS placed Kade with a Foster Mother, in whose custody he remained throughout the duration of this case.

At the 22 March 2022 permanency planning review hearing, the trial court observed Respondent-Mother continued to report incidents of domestic violence between herself and Father. These incidents occurred in February 2022 and on 1 March 2022. The trial court noted Sandra Halford, the director of Respondent-Mother's domestic violence intervention program, had reported that although Respondent-Mother had completed some of her domestic violence classes, she "does not follow through with skills learned and does not apply skills to her life."

Respondent-Mother tested positive for methamphetamine and amphetamine on 16 September 2021, positive for codeine on 7 October 2021, and positive for methamphetamine and amphetamine on 8 November 2021. Respondent-Mother did not submit to any drug screens from 8 November 2021 until 1 March 2022 despite multiple requests. On 23 March 2022, Respondent-Mother again tested positive for amphetamine and methamphetamine.

At the 8 November 2022 permanency planning review hearing, the trial court found Respondent-Mother had completed her domestic violence classes; however, the trial court noted the program director, Halford, had observed "she does not follow through with skills learned and does not apply skills to her life." Respondent-Mother's drug screen was negative on 18 July 2022, but she tested positive for methamphetamine on 24 August 2022. The trial court ordered Respondent-Mother to complete a new mental health and substance abuse assessment and comply with all recommendations based on its Finding that DSS had determined her previous assessment "was not accurate or factual. Respondent-Mother lied during her assessment and denied substance abuse issues despite them being prevalent throughout the life of the case." Respondent-Mother had not completed a new mental health and substance abuse assessment as of the hearing on the Motion to terminate her parental rights.

On 13 April 2023, DSS filed a Motion to terminate both parents' parental rights. The adjudication hearing on the Motion occurred on 25 July and 28 November 2023. The evidence presented at the trial included testimony from two DSS employees—Lisa Condrey, a social

worker and Rebecca Warner, a child support case manager—as well as Sandra Halford, the director of the domestic violence intervention program Respondent-Mother had attended. Both parents also testified.

Based on the evidence presented, the trial court found grounds existed to terminate both parents' parental rights in Kade. As to Respondent-Mother, the trial court found grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), and (6). The case proceeded to disposition on 28 November 2023. The trial court found it was in the juvenile's best interest to terminate Respondent-Mother's parental rights, but it determined it was not in the juvenile's best interest to terminate Father's parental rights. The trial court entered an Order terminating Respondent-Mother's parental rights on 2 February 2024. Respondent-Mother timely filed Notice of Appeal on 13 February 2024.

Issues

The issues on appeal are whether the trial court: (I) erred in finding grounds existed to terminate Respondent-Mother's parental rights; and (II) abused its discretion in finding termination of Respondent-Mother's parental rights was in Kade's best interest.

Analysis

I. Termination of Respondent-Mother's Parental Rights

[1] Respondent-Mother contends the trial court erred in determining grounds existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), and (6). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019) (citations omitted).

"At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists." *In re O.J.R.*, 239 N.C. App. 329, 332, 769 S.E.2d 631, 634 (2015) (citations omitted); *see also* N.C. Gen. Stat. § 7B-1109(f) (2023). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009) (citation and quotation marks omitted). On appeal, this Court reviews "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. 403, 407, 831 S.E.2d 54, 58-59 (2019) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). We review the trial court's

Conclusions of Law *de novo*. *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014).

Respondent-Mother challenges the trial court's adjudication of willful failure to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). Section 7B-1111(a)(2) authorizes the termination of parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2023).

> To terminate rights on this ground, the court must determine two things: (1) whether the parent willfully left the child in foster care for more than twelve months, and if so, (2) whether the parent has not made reasonable progress in correcting the conditions that led to the removal of the child from the home.

In re C.M.S., 184 N.C. App. 488, 494, 646 S.E.2d 592, 596 (2007).

In the context of Section 7B-1111(a)(2), willfulness means something less than willful abandonment, which involves purpose and deliberation. *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995). "Voluntarily leaving a child in foster care for more than twelve months or a failure to be responsive to the efforts of DSS are sufficient grounds to find willfulness." *In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d at 596. "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *In re Nolen*, 117 N.C. App. at 699, 453 S.E.2d at 224. "Similarly, a parent's prolonged inability to improve his or her situation, despite some efforts and good intentions, will support a conclusion of lack of reasonable progress." *In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d at 596 (citation omitted). Our Supreme Court has held "that 'parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)' provided that 'the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home.' " *In re T.M.L.*, 377 N.C. 369, 379, 856 S.E.2d 785, 793 (2021) (quoting *In re B.O.A.*, 372 N.C. 372, 384, 831 S.E.2d 305, 313-14 (2019)).

In the present case, the minor child was placed in foster care on 20 August 2021. At the time of the termination hearing on 25 July 2023, Kade had been in foster care for nearly two years. To correct the conditions that led to Kade's removal, the trial court ordered:

> 8. The Respondent Parents shall each cooperate with [DSS] and comply with the following:
>
> a. They will complete Triple P parenting classes and demonstrate what is learned with the juvenile;
>
> b. They will submit to random drug screens at a facility approved by [DSS], including hair, urine and saliva, as requested by [DSS] within forty-eight (48) hours of the request;
>
> c. They will obtain a substance abuse assessment and follow all recommendations and successfully complete the program, sign a release to allow [DSS] access to those records of attendance and attend a program that is certified;
>
> d. They will obtain a mental health assessment and follow all recommendations and successfully complete the program and sign a release to allow [DSS] access to those records of attendance and compliance with the program;
>
> e. They will attend the juvenile's medical appointments as often as possible and engage in the medical care/needs of the juvenile, including any mental health or counseling appointments;
>
> f. They will each maintain stable, crime and drug free housing for the juvenile;
>
> g. They will be employed full-time and have employment for 6 months or longer to show they can provide for themselves and the juvenile.
>
> . . . .
>
> 10. Respondent Mother shall obtain a domestic violence assessment and follow all recommendations.

Respondent-Mother challenges Findings 52 and 56(b), which provide:

> 52. Respondent Mother has acted inconsistently with her parental rights and obligations towards the juvenile. Efforts to reunite the juvenile with Respondent Mother would clearly be unsuccessful and inconsistent with the health and safety of the juvenile.

. . . .

56. Grounds for termination of the parental rights of the Respondent Mother . . . to her minor child exist in that:

. . . .

b. Pursuant to NCGS § 7B-1111(a)(2), Respondent Mother has willfully left the minor child in foster care or placement outside of the home for more than 12 months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the minor child.

Respondent-Mother also contends the trial court overreached its authority by expanding the case plan beyond the conditions that led to Kade's removal by adding substance abuse conditions, and it failed to find a nexus between the substance abuse component and removal.

Our Supreme Court has stated that, when a juvenile is found to have been abused, neglected, or dependent, "the trial judge has the authority to order a parent to take any step needed to remediate the conditions that led to or contributed to either the juvenile's adjudication or the decision to divest the parent of custody." *In re B.O.A.*, 372 N.C. at 381, 831 S.E.2d at 312 (quotation marks omitted). "Put another way, the trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home." *Id.* Here, Respondent-Mother contends the trial court abused its authority by introducing a substance abuse component to her case plan without evidence that she "used substances prior to Kade coming into custody, or that any alleged drug use affected Kade in any way."

This case is similar to *In re B.O.A.*, and we think it instructive. The minor child in *In re B.O.A.* was removed from the parents because she was present during a domestic violence incident between them. 372 N.C. at 373, 831 S.E.2d at 307. The respondent-mother's parental rights were terminated based on N.C. Gen. Stat. § 7B-1111(a)(2), citing her failure to make reasonable progress on parts of her case plan, including addressing substance abuse and mental health issues. *Id.* at 375-76, 831 S.E.2d at 307-08. Our Supreme Court concluded, however, "nothing in the relevant statutory language suggests that the only 'conditions of removal' that are relevant to a determination of whether a particular parent's

parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) are limited to those which are explicitly set out in a petition seeking the entry of a nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile." *Id.* at 381, 831 S.E.2d at 311. Indeed, "the relevant statutory provisions appear to contemplate an ongoing examination of the circumstances that surround the juvenile's removal from the home and the steps that need to be taken in order to remediate both the direct and indirect underlying causes of the juvenile's removal[.]" *Id.* at 381-82, 831 S.E.2d at 312.

Here, although Kade was adjudicated dependent based on instances of domestic violence between Respondent-Mother and Father, he initially remained placed with both parents on a split schedule. At the hearing on DSS's Motion to terminate Respondent-Mother's parental rights, SW Condrey testified "upon further investigation throughout some subsequent domestic violence altercations, it was determined the parents also struggled with substance use issues." On 15 and 16 April 2021, Father and Respondent-Mother, respectively, signed a Temporary Parental Safety Plan with DSS. Under the Agreement, Respondent-Mother agreed to the following as an immediate action step to keep the juvenile safe: "Parents will not smoke in the home or around [Kade]. Parents will ensure to have a sober caregiver if they will use."

While the juvenile was still placed with his parents, DSS attempted to conduct several home visits at Respondent-Mother's residence in response to a report by Father that Kade had told him Respondent-Mother's new boyfriend had stayed the night with them and slept in the same bed. During one attempted home visit on 19 July 2021, Respondent-Mother's boyfriend answered the door, and the DSS social worker—SW Corn—observed he was "slurring his words and speaking in long run-on sentences that were hard to comprehend." SW Corn had observed men's clothing in a laundry basket on a previous attempted home visit, and Respondent-Mother's boyfriend had answered the door and stated Respondent-Mother was at work, while he remained in her residence with his two children. Additionally, on 19 July 2021, SW Corn asked Respondent-Mother to submit to a drug screen by 21 July 2021. On 20 July 2021, Respondent-Mother told SW Corn she had smoked marijuana and would fail a hair follicle drug test. Respondent-Mother did not complete a drug screening until 23 July 2021, and her hair screening "pinged"[3] for "either amphetamine and/or methamphetamine."

3. Although this term is used multiple times in trial court Orders and court reports submitted by DSS, it is not defined at any point in the Record or in briefing to this Court.

Thus, we conclude Kade was removed from Respondent-Mother based on both instances of domestic violence between Respondent-Mother and Father, as well as substance abuse concerns. Therefore, the trial court did not overreach its authority by imposing requirements related to Respondent-Mother's substance abuse in the permanency plan.

DSS asked Respondent-Mother to complete drug screens on numerous occasions. The trial court's unchallenged Findings of Fact establish:

> 30. Both Respondent Parents were requested to pursue mental health assessment and therapy. Neither parent has done so and neither parent has dealt with the major issue of drug dependence which has been at the heart of their failure to effectively pursue reunification with their child.
>
> 31. Respondent Mother did not find an individual therapist. She did find a therapist to do family sessions with but did not reach out to set up times and has not completed her trauma focused therapy.
>
> . . . .
>
> 38. Throughout the course of this matter, DSS has required drug screens from both parents resulting in several positive drug screens for methamphetamine, amphetamine and THC.
>
> 39. When she actually complied with requests for drug screens, Respondent Mother tested positive for methamphetamine, amphetamine or THC at various times from September 16, 2021 until August 24, 2022. After August 2022, Respondent Mother refused drug screens or failed to respond to requests for the same on almost all occasions requested until January 9, 2023 when she tested positive for THC.
>
> 40. Respondent Mother did not submit any drug screens from November 8, 2021, to March 1, 2022, despite being asked a minimum of ten times.
>
> 41. Respondent Parents did submit to drug screens on March 23, 2022, with Respondent Mother being positive for amphetamines and methamphetamine[.]
>
> 42. After March 2022, Respondent Mother continued to fail to comply with drug screen requests except for one negative test on July 18, 2022 and a test that was positive

> on August 24, 2022 for methamphetamine. She has had only one negative drug screen during the full course of this matter, refuses to believe she has a drug problem and has consistently refused to take responsibility for her drug usage.
>
> . . . .
>
> 50. Respondent Mother has acted inconsistently with her parental rights and obligations towards her child and has demonstrated over the course of the twelve months pendency of this case that she is incapable of providing adequate parenting for this child. Respondent Mother has not cooperated with drug screenings requested by [DSS]. She has not completed parenting classes. Respondent Mother has not completed or been actively engaged in substance use services.

These Findings show Respondent-Mother consistently failed to comply with drug screenings or address her substance use issues. The trial court's Findings also establish Respondent-Mother failed to undertake significant steps to address issues around domestic violence, including doing either individual or family therapy. Further, although Respondent-Mother completed domestic violence classes, incidents of domestic violence continued between her and Father, and "[h]er instructor indicated that her continued domestic violence involvement indicated she had not benefitted from the classes." These Findings, which are based on court reports prepared by DSS and the GAL, as well as testimony from DSS social workers at trial, support the trial court's conclusion that Respondent-Mother failed to make reasonable progress in addressing the conditions that led to the juvenile's removal.[4]

II. Best Interests

[2] Respondent-Mother contends the trial court abused its discretion in determining terminating her parental rights was in Kade's best interest. Respondent-Mother argues the trial court failed to consider the effect of its decision not to also terminate Father's parental rights, which she contends effectively negates the likelihood Kade will be adopted.

A finding that termination of parental rights is in the best interest of the minor child is reviewed for abuse of discretion. *In re Shepard*, 162

4. Because we conclude this ground has sufficient support in the trial court's Findings, we need not address Respondent-Mother's arguments as to the remaining termination grounds found by the trial court under N.C. Gen. Stat. § 7B-1111(a)(1), (3), and (6).

N.C. App. 215, 222, 591 S.E.2d 1, 6 (2004). "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 C.J.H.*, 240 N.C. App. 489, 492-93, 772 S.E.2d 82, 86 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). "The trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard." *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (citations omitted); *see also Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) ("As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." (quoting *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000)).

Our statutes provide:

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. . . . In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (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, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2023). "[T]he language of [N.C. Gen. Stat. § 7B-1110(a)] requires the trial court to 'consider' all six of the listed factors[;]" however, "the court must enter written findings in its order concerning only those factors that are relevant." *In re D.H.*, 232 N.C. App. 217, 220-21, 753 S.E.2d 732, 735 (2014) (citations and quotation marks omitted).

The trial court's Findings of Fact in support of its Conclusion that terminating Respondent-Mother's parental rights was in Kade's best interest are as follows:

59. Testimony was offered by Lisa Condrey, along with the DSS and Guardian ad Litem Court Reports which were received into evidence in support of this disposition.

60. There are no relatives that have been identified as possible kinship or adoptive placement options.

61. The juvenile has been placed with licensed foster parent, [Foster Parent], since August 2021. He has formed a close bond with [Foster Parent] and with the other children living in the home. He is doing well in school and has been to medical and dental appointments. He also attends weekly therapy. [Foster Parent] is willing to provide him a permanent home.

62. [A.B.], the father of the juvenile's half-sister . . .[,] has expressed his interest in being a placement and possible adoptive home for the juvenile, if the juvenile becomes eligible for adoption. The home has been approved for visits by SC DSS and the juvenile has been visiting with [A.B.] every other weekend and has formed a strong bond with [A.B.] and [half-sister].

63. The juvenile reports that he feels comfortable in the home of [A.B.] and enjoys being able to visit his sister.

64. The best interests of the minor child require that an Order of Termination of Parental Rights be entered as to the Respondent Mother[.]

65. Due to her continued refusal to take responsibility for not doing what she should have to pursue reunification, the court does not believe that Respondent Mother will make the effort to conquer her substance abuse and demonstrate she can provide a safe and stable home for the child at any time in the foreseeable future.

66. The Court has considered all of the factors set forth in NCGS § 7B-1110(a) in making its determination of the best interests of the minor child and the Court is keenly aware of the need for permanence for this child after all this time he have [sic] been under DSS protective custody and in foster care.

Respondent-Mother only challenges Findings 64 and 65. In support of these Findings, the trial court had before it significant evidence

regarding Respondent-Mother's continued substance abuse issues and other challenges to achieving reunification. Respondent-Mother acknowledged she had not pursued any substance abuse treatment despite repeated positive drug tests. Indeed, Respondent-Mother testified that, despite testing positive on numerous drug screenings throughout the case, "I don't believe I have a substance abuse issue" and "I don't believe drugs are an issue in my life."

Further, although Respondent-Mother completed the domestic violence classes set out in her case plan, SW Condrey testified that "following her completion of the class, there continued to be domestic violence incidents, so it didn't appear that the skills learned from the group were carried over into life." Respondent-Mother confirmed she had not sought additional resources to address domestic violence, although they were recommended to her. Additionally, DSS determined Respondent-Mother's mental health assessment was not accurate. She was asked to complete another but had not complied at the time of the hearing on the Motion to terminate her parental rights. Respondent-Mother also testified she had not engaged in any mental health services. This evidence is competent to support the trial court's dispositional findings. Based on these Findings, the trial court did not abuse its discretion in determining termination of Respondent-Mother's parental rights was in the juvenile's best interest.

Our Supreme Court addressed a similar set of facts in *In re E.F.*, in which the trial court terminated the respondent-mother's parental rights but did not terminate the juvenile's father's parental rights. 375 N.C. 88, 846 S.E.2d 630 (2020). The trial court's findings of fact as to the juvenile's best interests noted termination of respondent-mother's parental rights would aid in the juvenile's adoption, and the juvenile had a strong bond with proposed adoptive parents. *Id.* at 92, 846 S.E.2d at 633. The respondent-mother argued: "[b]ecause [the father] retained his parental rights in these children, respondent contends the evidence did not show a high likelihood that they would be adopted or that terminating her parental rights would facilitate their adoption." *Id.* Our Supreme Court concluded that the mere fact the juvenile's father's parental rights remained at the time of the termination hearing did not render the trial court's findings as to the juvenile's best interests erroneous. *Id.* at 93, 846 S.E.2d at 633. The Court reasoned: "Subsection (a)(2) refers to the 'likelihood'—not the certainty—of the children's adoption. Similarly, subsection (a)(3) asks whether terminating respondent's parental rights would '*aid in the accomplishment of* the permanent plan for the juvenile[s].' Unquestionably, the termination of respondent's parental rights was a

necessary precondition of the children's adoption." *Id.* (citations omitted) (emphasis in original).

Respondent-Mother raises the same argument here. Consistent with the Supreme Court's reasoning, here, termination of Respondent-Mother's parental rights was a necessary precondition to Kade's adoption and would aid in achieving the permanent plan for Kade regardless of the status of Father's parental rights. Respondent-Mother attempts to distinguish the instant case from *In re E.F.* by pointing to the fact that in *In re E.F.*, DSS decided not to proceed against one of the parents on the day of trial, while here DSS proceeded against both parents but the trial court determined it was not in Kade's best interests to terminate Father's parental rights. We are not persuaded this distinction is material to our analysis.

In both cases, the substantive issue is that one parent retains their parental rights and ability to work toward reunification while the other does not—the difference is only in how that situation arose. Regardless of the way this outcome arises, the factual situation remains the same. The core question for the Supreme Court in *In re E.F.* was whether the trial court abused its discretion in finding terminating one parent's parental rights was in the juvenile's best interest where the other parent retained their parental rights. The question is the same here. Whether Father retains his parental rights, without a doubt terminating Respondent-Mother's parental rights increases the likelihood of Kade's adoption and thus aids in achieving his permanent plan. The core issue Respondent-Mother's arguments in briefing raise speaks more to a sense that it was unfair for the trial court to find it in Kade's best interest to terminate her parental rights but not Father's. We are, however, constrained to consider only Respondent-Mother's case in light of the relevant precedent. Thus, we conclude the trial court did not abuse its discretion in determining terminating Respondent-Mother's parental rights was in Kade's best interest.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order terminating Respondent-Mother's parental rights in Kade.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

IN RE M.R.B.

No. COA24-484

Filed 17 December 2024

Termination of Parental Rights—notice requirement—notice given less than thirty days before hearing—continuance denied—harmless error analysis—no prejudice

The trial court's order terminating respondent mother's parental rights to her child was affirmed where, although the department of social services (DSS) did not provide the statutorily required notice of thirty days (N.C.G.S. § 7B-1106.1) and the hearing was held before the time to file a written response had expired, there was no evidence that the error caused respondent prejudice. Respondent did not contend that she was not served with or had no actual notice of the motion to terminate her parental rights; DSS provided all the elements of notice required by statute for the initial notice and the notice of hearing, though notice was untimely; there was no proffer by respondent of a responsive pleading or what affirmative defenses respondent would have asserted had she been given the full amount of time to file one; and respondent did not object to the lack of notice until the morning of the hearing when she asked for a continuance.

Judge COLLINS dissenting.

Appeal by Respondent-Mother from orders entered 30 January 2024 by Judge Marion M. Boone in Stokes County District Court. Heard in the Court of Appeals 6 November 2024.

Jennifer O. Michaud for Petitioner-Appellee Stokes County Department of Social Services.

James N. Freeman, Jr., for Guardian ad Litem.

Garron T. Michael for Respondent-Appellant Mother.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from an Adjudication Order in Proceeding to Terminate Parental Rights adjudicating grounds to terminate her

parental rights to her minor child, Megan,[1] and a Disposition Order in Proceeding to Terminate Parental Rights concluding it was in the best interest of the minor child to terminate Respondent-Mother's parental rights in Megan. The Record before us reflects the following:

On 31 May 2022, the Stokes County Department of Social Services (DSS) filed a petition alleging Respondent-Mother and Father[2] were the biological parents of Megan. The petition further alleged Megan—who was approximately five years old—was a neglected juvenile.

On 11 August 2022, the trial court held an adjudication and disposition hearing on the petition alleging Megan's neglect. Respondent-Mother was not present but was represented by counsel. Megan was adjudicated to be a neglected juvenile. At disposition, the trial court established a permanent plan of reunification with the parents.

On 9 September 2022, Respondent-Mother formally entered a case plan with DSS. The trial court held a permanency planning hearing on 27 October 2022; Respondent-Mother was, again, not present but was represented by counsel. During the hearing, the trial court set reunification with a concurrent plan of adoption as the permanent plan for Megan.

The trial court held another permanency planning hearing on 23 February 2023, at which Respondent-Mother was also not present but was represented by appointed counsel. At the hearing, the trial court found Respondent-Mother had not made sufficient progress on her case plan, but the trial court maintained the permanent plan of reunification with a concurrent plan of adoption for Megan. The trial court ordered Respondent-Mother to resume visitation with Megan after she entered into a new visitation agreement with DSS.

On 5 July 2023, Respondent-Mother's appointed counsel moved to withdraw from further representation. The trial court granted the motion on 14 July 2023. The trial court appointed new counsel for Respondent-Mother on 18 July 2023.

On 10 August 2023, the trial court held a permanency planning hearing at which Respondent-Mother was again absent for the hearing but apparently arrived later. Respondent-Mother was, however,

---

1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

2. Father was a named respondent to the juvenile petition filed in this case but is not a party to this appeal.

represented by counsel. The trial court found Respondent-Mother had not made sufficient progress on her case plan and concluded that Megan's primary permanent plan should be changed to adoption with a concurrent plan of reunification. The trial court ordered a Termination of Parental Rights Filing Status Hearing for 12 October 2023.

The trial court held the status hearing on 12 October 2023. Respondent-Mother was present for this hearing. The same day, DSS filed a Motion to Terminate Respondent-Mother's and Father's Parental Rights.

On 2 November 2023 DSS filed a notice of its decision to terminate Respondent-Mother's and Father's parental rights ("TPR Notice"), pursuant to N.C. Gen. Stat. § 7B-1106.1. The TPR Notice stated, "A written response to the Motion must be filed with the clerk within 30 days after service of the Motion and Notice, or the parental rights of the mother and father may be terminated." The TPR Notice also stated, "The date, time, and place of the Pre-trial Hearing and Adjudication Hearing is November 29th, 2023 at 9:00 a.m. in the Courtroom at the Stokes County Government Center in Danbury, North Carolina." (emphasis in original).

At the hearing on 29 November 2023, Respondent-Mother's counsel moved to continue the hearing because the 30-day period to which Respondent-Mother was entitled to file a written response had not yet expired. He also explained that he had been unable to contact Respondent-Mother prior to that day. Father joined in the motion to continue, DSS opposed the motion, and the Guardian ad Litem ("GAL") took no formal position on the motion. After a discussion between counsel and the trial court, the trial court denied Respondent-Mother's motion to continue. The trial court held a pre-trial hearing and then proceeded with the adjudication hearing.

At that hearing, the trial court heard testimony from a DSS social worker, and Respondent-Mother testified in her own defense. At the conclusion of the evidence, the trial court concluded DSS had met its burden in establishing that grounds existed for the termination of Respondent-Mother's and Father's parental rights.

The trial court proceeded to the disposition hearing. At the conclusion of this hearing, the trial court concluded terminating Respondent-Mother's and Father's parental rights was in Megan's best interest. The trial court entered its written orders including orders on the pre-trial, adjudication, and disposition hearings on 30 January 2024. Respondent-Mother timely appealed.

Issue

The sole issue on appeal is whether the trial court prejudicially erred in denying Respondent-Mother's oral motion for continuance and proceeding on the Motion to Terminate Parental Rights prior to the expiration of the 30 days in which Respondent-Mother may have filed a written response following service of the TPR Notice.

Analysis

Respondent-Mother contends the trial court erred in denying her motion to continue the termination proceedings where DSS failed to comply with the notice requirements provided by N.C. Gen. Stat. § 7B-1106.1. Specifically, Respondent-Mother argues DSS' failure to comply with those notice requirements deprived her of the statutorily allowed 30-day timeframe to file a written response to the Motion to Terminate Parental Rights where the TPR Notice issued less than 30 days prior to the hearing. Both DSS and the GAL concede the error but argue it was not prejudicial. Indeed, there was error. However, on the facts of this case, the error was not prejudicial.

When, as here, termination of parental rights proceedings are initiated by motion in a pending abuse, neglect, or dependency case, the movant is required to prepare a notice directed to certain listed individuals or entities, including—relevant to this case—the parents of the juvenile. N.C. Gen. Stat. § 7B-1106.1(a) (2023). The Notice is required to contain the following information:

> (1) The name of the minor juvenile.
>
> (2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.
>
> (3) Notice that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.
>
> (4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.
>
> (5) Notice that the date, time, and place of any pretrial hearing pursuant to G.S. 7B-1108.1 and the hearing on

> the motion will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.
>
> (6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

N.C. Gen. Stat. § 7B-1106.1(b) (2023).

Of relevance to this case is section 7B-1106.1(b)(5) requiring: "Notice that the date, time, and place of any pretrial hearing pursuant to G.S. 7B-1108.1 and the hearing on the motion will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed." N.C. Gen. Stat. § 7B-1106.1(b)(5) (2023). The implication of this provision appears to be that the movant would be required to subsequently serve a notice of hearing after the filing of a response to the motion to terminate parental rights or upon the expiration of time to do so.

We have previously held when the movant—here, DSS—fails to provide the statutorily required notice, it is necessarily prejudicial error, and a new hearing is required. *In re Alexander*, 158 N.C. App. 522, 526, 581 S.E.2d 466, 469 (2003). There, the department conceded it had failed to prepare the statutorily required notice compliant with N.C. Gen. Stat. § 7B-1106.1(b) (2023). *Id.* at 524, 581 S.E.2d at 468.

On the other hand, we have also held that the failure to timely serve the subsequent notice of hearing identifying the date, time and place of the hearing upon the filing of a response or expiration of time to do so is error, but subject to a harmless error analysis where notice was, in fact, given. *In re T.D.W.*, 203 N.C. App. 539, 545, 692 S.E.2d 177, 181 (2010). In that case, the department mailed the subsequent notice of hearing to the respondent less than 30 days prior to the hearing and well after the time for responding to the motion had expired. *Id.* at 545-46, 692 S.E.2d at 181. Indeed, the respondent did not appear for the hearing. *Id.* Nevertheless, where the respondent—notwithstanding her non-appearance—failed to demonstrate prejudice from the belated service of the subsequent notice of hearing, we determined the late notice was harmless error. *Id.*

In this case, on 12 October 2023, the trial court held a hearing on the status of the filing of the Motion to Terminate Parental Rights, at which both Respondent-Mother and her trial counsel were present. The Motion was filed the same day. However, the TPR Notice failed to issue. Instead, the TPR Notice did not issue until 2 November 2023. The TPR Notice included the information required by section 7B-1106.1(b) but

also included the specific date, time, and place of the hearing. As such, the TPR Notice effectively collapsed the requirements of both notices into the single notice. However, this TPR Notice was both belatedly issued after the filing of the Motion to Terminate Parental Rights to the extent it was the notice required by section 7B-1106.1 and prematurely issued to the extent it was the notice of hearing contemplated by section 7B-1106.1(b)(5) prior to the expiration of time to respond to the Motion to Terminate Parental Rights. Ultimately, the hearing was noticed for and occurred on 29 November 2023. Respondent-Mother and her counsel were both present and Respondent-Mother testified in support of her case.

While this case does not squarely fall under either *Alexander* or *T.D.W.*, ultimately, here, DSS did provide all the elements of both the notice required by section 7B-1106.1 and the subsequent notice of hearing. Respondent-Mother received all the statutory elements of notice to which she was due. DSS' error was in the timing and way it gave that notice. This is unlike *Alexander* where Respondent did not receive the elements of notice and more akin to *T.D.W.* where notice of hearing was given untimely. As such, to the extent there was any error in denying the Motion to Continue based on the untimely notice(s), this Court must determine whether the error resulted in prejudice to Respondent-Mother.

Respondent-Mother's argument primarily rests on the fact she was not afforded a full 30 days following issuance of the TPR Notice to file a responsive pleading. However, while the motion to continue was initially grounded on the basis additional time was needed so they "could" file a response to the motion, no responsive pleading was proffered. Moreover, while Respondent-Mother also contends she was foreclosed from asserting affirmative defenses, no articulation of those defenses is provided. Respondent-Mother advances no argument as to how the filing of a responsive pleading would have impacted either the process or the outcome of the hearing. Respondent-Mother does not contend the trial court limited her defense of the action or precluded her from offering any evidence in support of her case at the hearing.

Respondent-Mother and her trial counsel were present for the status hearing on 12 October 2023 on the filing of the Motion to Terminate Parental Rights. The Motion was filed the same day. Respondent-Mother does not contend she was not served or did not have actual notice of the filing of the Motion. The hearing occurred on 29 November 2023—48 days after the filing of the Motion. Critically, at no time—either following filing of the Motion or issuance of the later TPR Notice—did Respondent-Mother object to the lack of notice or its contents or move

for a continuance of the hearing to permit time for a responsive pleading. Instead, no motion was raised until the morning of the hearing when everyone was present and prepared to proceed.

Moreover, while trial counsel raised the 30-day time to file a response, the oral motion to continue was primarily premised on counsel's inability to contact Respondent-Mother. Counsel conceded, however, Respondent-Mother could have contacted him. Nevertheless, Respondent-Mother did testify in support of her case. On appeal, Respondent-Mother does not challenge either the adjudication of grounds to terminate her parental rights or the disposition terminating her parental rights.

Thus, Respondent-Mother, on the facts of this case, has failed to demonstrate prejudice from the untimely TPR Notice. *See In re T.D.W.*, 203 N.C. App. at 545-46, 692 S.E.2d at 181. Therefore, any error resulting from the TPR Notice was harmless. Consequently, in turn, the trial court did not commit prejudicial error in denying Respondent-Mother's oral motion to continue.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Adjudication Order in Proceeding to Terminate Parental Rights and Disposition Order in Proceeding to Terminate Parental Rights are properly affirmed.

AFFIRMED.

Judge ARROWOOD concurs.

Judge COLLINS dissents by separate opinion.

COLLINS, Judge, dissenting.

Because DSS failed to provide the statutorily required notice and the trial court violated the statutory mandate when it held the TPR hearing before Mother's 30-day time period in which to file a responsive brief expired, I respectfully dissent.

DSS filed a TPR Notice, pursuant to N.C. Gen. Stat. § 7B-1106.1(b), on 2 November 2023. The TPR Notice stated, "A written response to the Motion must be filed with the clerk within 30 days after service of the Motion and Notice, or the parental rights of the mother and father may

be terminated." The TPR Notice also stated, "The date, time, and place of the Pre-trial Hearing and Adjudication Hearing is November 29th, 2023 at 9:00 a.m. in the Courtroom at the Stokes County Government Center Danbury, North Carolina." The TPR Notice thus allowed Mother only 27 days to file a written response.

DSS erred in three ways: First, DSS conflated the notice and information required in the first notice by N.C. Gen. Stat. § 7B-1106.1(b) with the notice and information in the second notice required by § 7B-1106.1(b)(5). Second, the information included in the first notice about the "the date, time, and place of any pretrial hearing . . . and the [termination] hearing" should have been included in a second notice sent to Mother after her response was filed or 30 days had passed. However, DSS never sent a second notice. Third, the date of the termination hearing set forth in the singular notice sent violated § 7B-1106.1's mandate that Mother have 30 days to respond to the TPR motion.

I disagree with the majority opinion's conclusion that this case is more similar to *In re T.D.W.* than *In re Alexander*. This case is more similar to *Alexander* because there was a "total failure" to provide the second notice *and* "a failure to provide important components" of the second notice–specifically, a hearing date that complied with the mandatory provisions of the statute–in the singular notice that was sent. *In re T.D.W.*, 203 N.C. App. at 544. Thus, the issue here was not merely that DSS's notice was untimely, but also that it failed to include some of the required elements of notice. Accordingly, DSS's failure to comply with N.C. Gen. Stat. § 7B-1106.1 cannot "be excused on the grounds that the parent who did not receive the required notice was not prejudiced." *Id.*

Moreover, even when applying a harmless error analysis in this case, the prejudice to Mother here is self-evident: Mother received *at least* three fewer days to meet with her attorney and prepare her response and defense, time to which she was statutorily entitled. This obvious prejudice can be seen in all types of hypothetical situations. Take, for example, an attorney for an appellant in this Court who shows up to Court three days before their response brief is due for the purpose of moving for an extension of time to file the brief. Not only is the extension denied, but the attorney is required to participate in oral argument on the spot, having not yet met with their client and not filed a brief. I think it would be difficult to find any appellate attorney who would not think this prejudicial on its face.

Here, had DSS sent a proper first notice, Mother would have had 30 days in which to file her response, and DSS would have had to wait

for Mother's response before setting a date, time, and place for the TPR hearing and sending out a second notice containing that information. Furthermore, Mother had to participate in a TPR hearing for which she was not prepared. Mother's attorney made a motion to continue, explaining to the trial court that the time for Mother's response had not yet expired and that they "need[ed] a continuance . . . so that [they] could file a response." Mother's attorney informed the trial court at the hearing on the motion to continue that he had not been in contact with her before that date as her phone had stopped working, he had not "been able to file anything up until this point," and that Mother "hasn't really had a chance to work with me on this . . . ." This evidence amply supports that Mother was prejudiced by DSS's failure to provide the statutorily required notice.

Further, the trial court violated the statutory mandate in N.C. Gen. Stat. § 7B-1106.1(a), (b)(2), and (b)(5) when it held the TPR hearing 27 days after the TPR Notice was filed, depriving Mother of the full 30-day time period in which to file her response. N.C. Gen. Stat. § 7B-1106.1(a) provides that DSS "shall prepare a notice" directed to Mother and that the notice "shall notify the person . . . to whom it is directed to file a written response within 30 days after service of the motion." N.C. Gen. Stat. § 7B-1106.1(a). N.C. Gen. Stat. § 7B-1106.1(b) provides that the notice required by subsection (a) "shall" include, *inter alia*, the following: notice "must be filed with the clerk within 30 days after service of the motion and notice," N.C. Gen. Stat. § 7B-1106.1(b)(2), and notice "will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed." N.C. Gen. Stat. § 7B-1106.1(b)(5). "This Court has held the General Assembly's use of the word 'shall' establishes a mandate, and failure to comply with the statutory mandate is reversible error." *In re Alexander*, 159 N.C. App. at 525. Moreover, "[a] trial court may also abuse its discretion if it . . . fails to comply with a statutory mandate." *In re B.E.*, 375 N.C. 730, 745 (2020) (citations omitted).

DSS argues that Mother and her attorney *could* have prepared in the days leading up to the hearing. The point is, Mother did not have to. Three different subsections of N.C. Gen. Stat. § 7B-1106.1 mandate that a parent be given 30 days to respond to a motion to terminate their parental rights. *See* N.C. Gen. Stat. § 7B-1106.1(a), (b)(2), and (b)(5). Mother was entitled to rely upon the 30 days afforded to her by statute. The trial court thus abused its discretion when it denied Mother's motion to continue and failed to follow the mandate set forth in N.C. Gen. Stat. § 7B-1106.1. It further erred by finding that "all . . . notice requirements

have been met" and that "[t]he time for the mother to file a responsive pleading has not yet expired, however, the mother is present in Court today and is not prejudiced by her failure to file a responsive pleading as of today's hearing." N.C. Gen. Stat. § 7B-1106.1 does not permit the trial court to truncate Mother's 30-day time period in which to file a response.

KURT LUDACK, Plaintiff/Father
v.
CHRISTINA LUDACK, Defendant/Mother

No. COA24-486

Filed 17 December 2024

1. Child Custody and Support—custody—consideration of statutory factors—sufficiency of findings

In its order granting joint legal and physical custody to a child's mother and father, the trial court entered numerous findings of fact showing that it addressed the factors in N.C.G.S. § 50-13.2, including those that detailed each parent's personal relationship with the child, financial means, housing situation, work schedule, and type of activities engaged in with the child. The trial court's findings supported its conclusions that the child's best interest would be served by having the parents share joint legal and physical custody and for her to attend schools in the school district where her mother lived.

2. Child Custody and Support—custody—delay in entry of permanent order—remedy—petition for writ of mandamus or other action

In a child custody proceeding, although the father argued on appeal that the trial court's lengthy delay before entering a permanent written custody order was prejudicial, the Court of Appeals—following the same rule adopted by the Supreme Court in termination of parental rights cases—held that the proper remedy would have been to request expedited entry at the trial court level, such as by making a motion or petitioning for a writ of mandamus, rather than waiting to raise the issue for the first time on appeal. Here, after the trial court held an evidentiary hearing on child custody, the parties appeared in court multiple times during the thirty-eight months that passed between the hearing and entry of the order, during which either party could have requested entry of a written order.

3. Child Custody and Support—custody—conversion of temporary order to permanent by operation of time—delay in seeking permanent custody—remand required

In a child custody proceeding in which the father argued that the court's temporary custody order (granting a mother and father joint legal and physical custody and setting forth a detailed custody schedule) had converted to a permanent order by operation of time, where the trial court's subsequent permanent custody order (entered thirty-eight months after an evidentiary hearing, which kept joint custody but changed the custody schedule) did not indicate the effect that the mother's twenty-five-month delay in seeking permanent custody had on the temporary order, the matter was remanded for the trial court to hold a hearing to determine whether the temporary order had become permanent.

Appeal by Father from order entered 16 November 2023 by Judge K. Dean Black in Lincoln County District Court. Heard in the Court of Appeals 22 October 2024.

The Jonas Law Firm, P.L.L.C., by Rebecca J. Yoder, for Plaintiff-Appellant.

Christina Lee Ludack, pro se Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Kurt Ludack ("Father") appeals from the trial court's order granting Defendant Christina Ludack ("Mother") and Father joint legal and physical custody of their minor child. Father contends the trial court (1) failed to make sufficient, statutorily required findings of fact to support its custody determination; (2) entered its written custody order after a prejudicially long delay; and (3) did not consider whether the temporary custody order became permanent as an operation of time. We remand to the trial court for the sole purpose of considering whether the temporary custody order became permanent.

I. Factual and Procedural Background

Father and Mother were married from 2012 to 2019, and one child was born to the marriage, Arisa.[1] Father and Mother separated in 2017.

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

On 6 February 2018, Father filed a complaint for child custody, and later amended it to include a claim for equitable distribution. On 5 March 2018, Father and Mother entered into a Temporary Custody Consent Order (the "Temporary Order"), under which each would have legal and physical custody of Arisa. The Temporary Order established a rotating "2-2-3" equal custody schedule whereby Arisa would stay with parent A for two days, then stay with parent B for two days, then return to parent A for three days, and then restart and continue the pattern.

Father and Mother divorced in September 2019, but did not resolve permanent custody of Arisa at that time.

On 20 August 2020, Mother filed a notice of hearing on permanent child custody. On 3 September 2020, the trial court held a hearing on the permanent custody of Arisa and a pending motion for contempt. Between September 2020 and September 2023, the parties repeatedly returned to court on motions for contempt for a party's failure to adhere to the Temporary Order.

Over three years after the permanent custody hearing, Mother filed a notice of hearing for entry of a written permanent custody order. The trial court held the hearing on 29 September 2023 to discuss entry of the order, but the trial court did not endeavor to collect additional evidence at that time.

On 16 November 2023, the trial court entered a written Permanent Child Custody Order (the "Permanent Order"), granting joint legal and physical custody of Arisa to Father and Mother, but establishing a new custody schedule. The Permanent Order determined Arisa would attend school in the district where Mother lived, that Father would have custody of Arisa every other week from Thursday to Sunday, and Mother would have custody all other times.

Father timely appeals.

II. Analysis

Father contends the trial court erred because the court failed to make statutorily required findings of fact to support its custody determination, and because the Permanent Order was entered after a prejudicially long delay. Father also asserts the Permanent Order did not address whether the Temporary Order became permanent by operation of time.

A. Required Findings of Fact

[1] Father's first argument does not challenge the substance of any of the trial court's findings, but rather contends they are insufficient

to satisfy the court's statutory duty to make sufficient findings of fact. Following a child custody hearing, the trial court is statutorily required to enter a written order determining child custody, including written findings of fact that reflect its consideration of factors relevant to the child's safety and the best interest of the child:

> In making [its child custody] determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party. An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child.

N.C. Gen. Stat. § 50-13.2(a) (2023). "The requirement for appropriately detailed findings is . . . not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (citations and internal marks omitted).

Father contends this case is analogous to, and controlled by, our decisions in *Aguilar v. Mayen*, 293 N.C. App. 474, 901 S.E.2d 662 (2024), and *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977), where this Court vacated custody orders because they failed to make required findings of fact in compliance with section 50-13.2(a). In *Aguilar*, the trial court entered a written order granting sole custody to the mother based upon two findings of fact, total:

> 3. That the minor child has been well cared for through her life, solely by Mother for the first year of her life, then jointly by the Mother, Father, and Father's wife for the next 6 months.
>
> 4. That it would be in the minor child's best interest that her care, custody and control be placed with the Mother with the Father having substantial visitation.

Aguilar, 293 N.C. App. at 479, 901 S.E.2d at 666. Our Court held, even though the trial court's two findings were supported by the evidence presented and "[t]he transcript [was] replete with evidence from which findings could be made," the two findings were nonetheless insufficient to show the trial court followed section 50-13.2(a)'s mandate to make written findings as to its consideration of all relevant factors. *Id.* at 482,

901 S.E.2d at 668. The Court vacated and remanded the custody order for sufficient findings of fact. *Id.*

In *Montgomery*, the trial court entered a written order granting sole custody to the father following a total of five findings of fact:

> IV. Based upon the greater weight of the evidence, the finding of fact is that at and during the time of separation the wife herein . . . was hospitalized and by necessity the husband . . . had the custody of the two (2) minor children and moved from Stokes County to Forsyth County.
>
> V. That the wife . . . has now recovered from her illness and is fully capable of caring for the children properly and is a fit and proper person to provide to wholesome home life that is conducive to the well-being of the minor children.
>
> VI. The father has cared for the children during his former wife's illness and it is found as a fact that this has been satisfactory for the welfare of the children.
>
> VII. Both children are regular in their attendance of school and the boy has made satisfactory progress in his school work and activities; the girl is an exceptional student and her school work has been highly satisfactory.
>
> VIII. It was admitted by both parents during testimony that each was a fit and proper person to have custody of the children.

Montgomery, 32 N.C. App. at 156, 231 S.E.2d at 28. This Court vacated and remanded the order, explaining only that the order "contain[ed] no findings . . . which support the award of custody . . . to [the father]." *Id.* at 158–59, 231 S.E.2d at 29.

Aguilar and *Montgomery* are distinguishable from the present case. In *Aguilar*, the two findings established a single fact—that all parties adequately cared for the minor child—which was insufficient to support a grant of sole custody to one parent. *Aguilar*, 293 N.C. App. at 482, 901 S.E.2d at 668. In *Montgomery*, the trial court's five findings summarily expressed the same, singular sentiment—that the mother and the father were appropriate and able caregivers for the minor child—and were likewise held insufficient. *Montgomery*, 32 N.C. App. at 157, 231 S.E.2d at 29.

The trial court, here, made a total of nineteen findings of fact in its Permanent Order. The first six findings establish the court's jurisdiction

and the terms of the Temporary Order. The court then laid out thirteen findings regarding Mother and Father's current fitness to have custody of Arisa:

> 7. Father has a loving relationship with [Arisa] and spends time with [Arisa] doing outdoor activities. Father is also involved in [Arisa's] studies and helps her with her homework.
>
> 8. Mother has a loving relationship with the minor child and spends time with the minor child cooking and doing other fun activities. Mother is involved in the minor child's studies and helps her with her homework.
>
> 9. Father has a three-bedroom home he bought in Huntersville through a BA loan, stating he knew someone who knew the owner. He is employed at Sid Harveys in Charlotte, works both at his office and at home, and sometimes takes [Arisa] with him to work. He earns $50,000.00 per year.
>
> 10. Mother is employed with SPC Mechanical as a Property Manager at Charlotte Convention Center where she has a flexible work schedule and is off work every Friday and frequently works from home.
>
> 11. Mother lives in a three-bedroom home with her two children. [Arisa] has her own room and enjoys an excellent relationship with her half-brother who is an honor roll student at Balls Creek Elementary.
>
> 12. [Arisa] has her own room at Father's residence and has age-appropriate toys.
>
> 13. Father and [Arisa] enjoy camping trips in the camper, building "forts" in her bedroom, playing in a pool, and going to birthday parties. [Arisa] enjoys riding her bicycle. She has friends near his home.
>
> 14. [Father] felt it was not in [Arisa's] best interest to go to Balls Creek Elementary due to his online research of school rankings from a website called "schooldigger.com." That website ranked Balls Creek Elementary School in the top 25% of all elementary schools in North Carolina and ranked Grand Oak Elementary in the top 6% of all elementary schools in North Carolina.

> 15. [Father] also looked at Lincoln Center as a possible school because he thought it was a good school and it was halfway between his new home in Huntersville and Mother's home in Sherill's Ford.
>
> 16. [Arisa] is now enrolled at Balls Creek Elementary School. Mother's son, [Arisa's] step-brother, currently attends Balls Creek.
>
> 17. On a typical non-working day, Mother gets up between 5 and 5:30 a.m., does some chores and starts a big breakfast. They live at the lake and do a lot of water activities like fishing, swimming, tubing, boating, and kayaking. [Arisa] likes reading, playing with her Barbies, walking to the community dock, riding her bicycle, and riding her electric scooter. She has friends in her neighborhood that she plays with.
>
> 18. Mother had a good support group. Her parents live five minutes away and help her with her children. They do a lot of activities together.
>
> 19. The parties are fit, proper and suitable persons to have joint physical and legal custody of [Arisa] and it is in [Arisa's] best interest to award joint legal and physical custody of [Arisa] to Mother and Father.

The court then made two substantive conclusions of law: (1) that it is in [Arisa's] best interest for Mother and Father to share joint legal and physical custody; and (2) that it is in [Arisa's] best interest to attend Balls Creek Elementary School, and to thereafter attend schools in the same school district.

The trial court's findings of fact show that it considered factors relevant to Arisa's safety and express substantive considerations beyond whether the parties are simply appropriate and able caregivers, and we can properly review its findings and conclusions on appeal. The findings reflect (1) each parent's personal relationship with Arisa; (2) each parent's ability to financially provide for Arisa; (3) each parent's housing circumstances; (4) the amount of time and kinds of activities each parent usually has with Arisa; and (5) each parent's ability to spend time with Arisa with respect to their work schedule. The record evidence does not show any indication that these parties have a history of domestic violence.

Notably, it is apparent from the record before this court and from the language of the trial court's findings and conclusions of law that a

focally relevant issue to be resolved by the child custody proceedings was which school Arisa would attend. Four of the trial court's findings reference Arisa's school placement and the evidence presented by each party concerning her school's fitness. The court's findings show it considered and weighed Arisa's current placement at Balls Creek Elementary, that her step-brother also attends Balls Creek, and Father's research of school ratings, and determined that it would be in Arisa's best interest to remain in the school district covering Balls Creek. Its conclusion that it is in Arisa's best interest to be in Mother's physical custody during the school-week rationally follows therefrom.

B. Prejudicial Delay in Entry of Order

[2] Father also contends the trial court erred because there was a prejudicial, thirty-eight-month delay between the permanent custody hearing and the entry of its written Permanent Order.

There are no general, statutorily prescribed timeliness requirements for the entry of written orders following civil proceedings. Likewise, neither our legislature nor our Courts have spoken specifically to the timeliness of written orders following child custody proceedings under section 50-13.2. However, our Courts have ruled on this issue in the similar context of written orders on child custody determinations following termination of parental rights hearings. We find these rulings instructive.

In the context of child custody determinations rendered from termination of parental rights proceedings, it is statutorily mandated that the trial court's child custody determination "be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." N.C. Gen. Stat. § 7B-1110 (2023). Our Courts have repeatedly addressed the question of prejudicial delay in the entry of orders pursuant to section 7B-1110. Initially, the Courts developed a rule whereby the length of the delay would be weighed against the practical, prejudicial effects the delay caused on the case, with any delay of six months or more often being held prejudicial. *See In re T.H.T.*, 362 N.C. 446, 451, 665 S.E.2d 54, 57 (2008) (discussing prior appellate prejudicial delay jurisprudence). However, beginning in 2008, our Supreme Court held that vacating or reversing an order solely based upon prejudicial delay, a matter collateral to the substance of the order and its underlying proceedings, is not a proper remedy. *Id.* at 452–53, 665 S.E.2d at 58–59. Our Supreme Court in *T.H.T.* reasoned that "[w]hen the integrity of the trial court's decision is not in question, a new hearing serves no purpose, but only 'compounds the delay[.]' " *Id.* at 453, 665 S.E.2d at 59 (citation omitted).

Rather, the *T.H.T.* Court held, "[m]andamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute" and "is an appropriate and more timely alternative than an appeal." *Id.* at 454, 455, 665 S.E.2d at 59, 60. The Court further explained that "the availability of the remedy of mandamus ensures that the parties remain actively engaged in the district court process and do not 'sit back' and rely upon an appeal to cure all wrongs." *Id.* at 455, 665 S.E.2d at 60. Our Courts have since declined to reverse or vacate section 7B-1110 orders solely on the grounds of the trial court's prejudicial delay, instead requiring that the party have taken some actions to expedite entry of the order at the trial court level. *See Matter of C.R.L.*, 377 N.C. 24, 28, 855 S.E.2d 495, 498 (2021) (overruling prejudicial delay argument where the father did not move for writ of mandamus during trial court's thirty-three-month delay in entering order pursuant to section 7B-1110).

We hold that the same rule should apply in the present context. If a party would like to hold the court accountable to its statutory duty to enter a written order under section 50-13.2(a), and impose timeliness, the proper remedy is not to argue prejudicial delay for the first time on appeal. Rather, the party should file a writ of mandamus, or employ another method of requesting the court act, in the trial court. Though there is no statutorily mandated deadline for the entry of orders under section 50-13.2(a), the resulting custody determinations have similar effect on the child and the ultimate determination turns on the same cornerstone, qualitative principle: the best interest of the child at the time of the hearing. *See* N.C. Gen. Stat. § 50-13.2(a); N.C. Gen. Stat. § 7B-1110. Further, our legislature chose not to mandate any timeliness requirement for written orders under section 50-13.2; it would be illogical to implement a stricter standard of prejudicial delay in this context.

Here, the trial court conducted an evidentiary hearing on child custody on 3 September 2020. The court then entered its written Permanent Order based on the circumstances existing in 2020 on 16 November 2023. The record is unclear specifically what proceedings and motions may have occurred during the thirty-eight-month delay, but it does show the parties came before the court multiple times. Despite these appearances, neither party addressed the court's delay until Mother finally moved for a hearing to request the trial court enter its written order after approximately thirty-six months. Either party could have made this motion at an earlier time. If either party had desired the court to enter its written order in a timelier manner, it should have moved for a hearing on entry of the order or filed a writ of mandamus at the trial court level.

C. Conversion of Child Custody Orders

[3] Lastly, Father contends the Temporary Order may have become a permanent custody order by operation of time. " 'A temporary custody order may become permanent by operation of time, when neither party sets the matter for a hearing within a reasonable time[.]' " *Lawrence v. Lawrence*, 294 N.C. App. 355, 362, 903 S.E.2d 374, 380 (2024) (quoting *Eddington v. Lamb*, 260 N.C. App. 526, 529, 818 S.E.2d 350, 353 (2018)). What constitutes a reasonable time is a fact-specific question to be assessed on a case-by-case basis. *See LaValley v. LaValley*, 151 N.C. App. 290, 293 n.6, 564 S.E.2d 913, 915 n.6 (2002). While modification of a temporary custody order requires only an assessment of the best interests of the child, modification of a permanent custody order requires the movant to also show a substantial change of circumstances warranting modification. *Id.* at 292, 564 S.E.2d at 914–15.

Here, the Temporary Order was entered in March 2018 and Mother moved to calendar a hearing for permanent custody in August 2020, about twenty-five months later. *See LaValley*, 151 N.C. App. at 293, 564 S.E.2d at 915 (holding that a twenty-three-month delay between entry of the temporary custody order and a party's motion to calendar a permanent custody hearing was not reasonable). The Permanent Order does not include a finding reflecting whether the trial court considered the effect of the parties' delay in moving for entry of a permanent custody order on the status of the Temporary Order. We remand to the trial court for a hearing solely to determine whether the Temporary Order became permanent by operation of time, and, if so, whether Mother presented evidence of a substantial change of circumstances.

III. Conclusion

We hold the trial court's findings of fact were sufficient to comply with N.C. Gen. Stat. § 50-13.2(a), and that its thirty-eight-month delay in entering a written order after the 3 September 2020 hearing was not an unfairly prejudicial delay. We vacate the Permanent Order and remand to the trial court for a hearing on the sole issue of whether the Temporary Order was converted to a permanent order by operation of time.

VACATED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

MECKLENBURG COUNTY, O/B/O, SHANNON HERRON, PLAINTIFF
v.
KEDRIC R. PRESSLEY, DEFENDANT

No. COA24-328

Filed 17 December 2024

Child Custody and Support—child support—modification—self-employed parent's income—depreciation expenses—sufficiency of findings

The trial court abused its discretion by modifying defendant father's child support obligation without making sufficient findings regarding depreciation expenses (claimed by defendant as deductions on his personal tax returns), which it excluded when calculating defendant's gross income from self-employment. Since the trial court did not make a finding that it was treating the depreciation as accelerated (versus straight-line), or that the depreciation was inappropriate for income determination pursuant to the North Carolina Child Support Guidelines, the trial court's findings lacked sufficient specificity to support its conclusions. Therefore, the court's modification order was reversed and the matter was remanded for additional findings.

Judge STROUD dissenting.

Appeal by defendant from order entered 14 September 2023 by Judge Dennis J. Redwing in Mecklenburg County District Court. Heard in the Court of Appeals 22 October 2024.

Myers Law Firm, PLLC, by Matthew R. Myers, for defendant-appellant.

Cavanaugh Hamrick & McCarthy, PLLC, by Brandon T. McCarthy, for plaintiff-appellee.

FLOOD, Judge.

Defendant Kedric R. Pressley appeals from the trial court's order modifying his child support payment. On appeal, Defendant argues the trial court abused its discretion in modifying the amount of child support without making sufficient findings of fact. Upon review, we agree and conclude the trial court's order is not supported by sufficient findings

of fact regarding depreciation expenses. Accordingly, we reverse and remand for further findings of fact.

I. Factual and Procedural Background

Defendant and Sharon Herron ("Plaintiff") are the parents of two minor children, both born in 2011. Defendant and Plaintiff were never married. Defendant is a self-employed dump truck owner and operator.

In 2019, the trial court entered an order requiring Defendant to pay $50.00 per month in child support. Several years later, in 2022, Plaintiff filed a motion for modification of child support and for attorney's fees.

The trial court heard Plaintiff's motion on 16 August 2023. At the hearing, Plaintiff introduced Defendant's tax returns for 2021 and 2022, wherein Defendant claimed depreciation deductions regarding his business expenses on Schedule C of his personal tax returns. The trial court determined that it would consider Defendant's tax returns for the purposes of establishing income, but it would "not accept[]" the depreciation expenses. The depreciation expenses were thus added back to Defendant's gross receipts, which resulted in Defendant's gross monthly income being set at $4,783.83. The trial court thereafter ordered Defendant to pay $905.35 per month in child support.

Defendant timely appealed to this Court.

II. Jurisdiction

This Court has jurisdiction to review a final order from a district court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Head v. Mosier*, 197 N.C. App. 328, 332, 677 S.E.2d 191, 195 (2009) (citation omitted). "The standard of review for findings made by a trial court sitting without a jury is whether any competent evidence exists in the record to support said findings." *Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007) (citation and internal quotation marks omitted). The trial court is required to "make findings of those specific facts which support its ultimate disposition of the case . . . to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

Additionally, "the trial court must articulate its rationale with sufficient specificity to facilitate effective appellate review." *Craven Cnty. ex rel. Wooten v. Hageb*, 277 N.C. App. 586, 591, 861 S.E.2d 571, 575 (2021) (citation omitted) (remanding where the trial court's findings on the defendant's income, including the defendant's depreciation expenses, were "more conclusory than explanatory" and "offer[ed] us no basis for review of the trial court's application of the law to the evidence presented").

IV. Analysis

On appeal, Defendant argues Findings of Fact 22, 25, 26, 27, and 29 are not supported by competent evidence, and thus, the trial court abused its discretion in modifying the amount of child support. Specifically, Defendant contends the trial court failed to "make the required distinctions between straight-line and accelerated depreciation deductions as required" when calculating Defendant's income, and therefore the challenged findings are not supported by competent evidence. While we disagree the trial court must make findings as to any required distinctions between straight-line and accelerated depreciation deductions, we agree that the trial court abused its discretion, as its findings are not supported by competent evidence.

"This Court has established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Holland v. Holland*, 169 N.C. App. 564, 568, 610 S.E.2d 231, 234 (2005) (citation and internal quotation marks omitted). Under the North Carolina Child Support Guidelines, child support obligations are "based upon net income converted to gross annual income[.]" N.C. Child Support Guidelines, Income (1) (2023). The Guidelines state that income "means a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business[.]" N.C. Child Support Guidelines, Income (1). The Guidelines further provide:

> Gross income from self-employment . . . is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Ordinary and necessary business expenses *do not include* amounts allowable by the Internal Revenue Service for the *accelerated component of depreciation expenses*, *investment tax credits*, *or any other business expenses determined by the court to be inappropriate for determining gross income.* In general, income and expenses from self-employment

> or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes.

N.C. Child Support Guidelines, Income (2) (2023) (emphasis added).

In *Lawrence v. Tise*, we considered whether the trial court properly treated depreciation expenses from the defendant's income per the Guidelines when setting a child support order. 107 N.C. App. 140, 147, 419 S.E.2d 176, 181 (1992). In *Lawrence*, the trial court "did not consider any depreciation in computing [the] defendant's rental property losses"; it did, however, determine "the amount of depreciation claimed by [the] defendant on his income tax returns, but [the record was] not clear whether the [trial] court considered the depreciation in computing defendant's monthly gross income." *Id.* at 148, 419 S.E.2d at 181.

We remanded the matter for a new trial because we were "unable to ascertain how the trial court treated [the defendant's] depreciation[.]" We explained that the "findings . . . [we]re not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing [the defendant]'s gross income," and "to the extent, if any, the trial court considered depreciation, the record d[id] not reveal whether the depreciation claimed by [the] defendant was straight[-]line or accelerated." *Id.* at 148, 419 S.E.2d at 181; *see also Cauble v. Cauble*, 133 N.C. App. 390, 398, 515 S.E.2d 708, 714 (1999) (affirming the trial court's disallowance of depreciation where the findings articulated that the trial court disallowed "in the interest of justice," such that there was no abuse of discretion in applying the Guidelines).

Here, the trial court found that Defendant claimed $41,707.00 as depreciation expenses as part of his business expenses in 2021, and $37,409.00 in 2022. The trial court found and concluded in Finding of Fact 22:

> [Defendant] presented evidence that his 2022 business-related expenses totaled $80,323,13 *exclusive* of depreciation. The [trial c]ourt is using [Defendant]'s tax returns and not accepting the deduction for as [sic] "Depreciation and section 179 expense deduction" and is not considering the actual expenses introduced into evidence.

The trial court then made the following findings of fact:

> 25. [Defendant's] depreciation expense(s) for 2021 and 2022 should be added back in for the purpose of calculating his gross income in those years.
>
> 26. Adding back [Defendant's] claimed depreciation expense in 2021 results in [Defendant] having gross monthly income in 2021 of $4,810.41 per month.
>
> 27. Adding back [Defendant's] claimed depreciation expense in 2022 results in [Defendant] having gross monthly income in 2022 of $4,757.25 per month.
>
> . . . .
>
> 29. [Defendant's] average gross monthly income from 2021 and 2022 is $4,783.83 and that figure is appropriate for the [trial c]ourt to use in determining [Defendant's] prospective child support obligation to [Plaintiff].

As in *Lawrence*, where this Court could not determine how the trial court treated the defendant's depreciation, we are "unable to ascertain how the trial court treated depreciation" and whether the trial court properly treated the depreciation as set by the Guidelines. *See Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181. Although *Lawrence* does not require the trial court to distinguish between types of depreciation, its holding does require the trial court to provide a reviewing court with findings of fact such that the reviewing court has the ability to "ascertain how the trial court treated [the defendant's] depreciation[.]" *See id.* at 148, 419 S.E.2d at 181.

While evidence presented by Defendant may tend to show he was taking accelerated depreciation, which would make the trial court's actions proper, as accelerated depreciation is not allowed to be included per the Guidelines, *see Lawrence*, 107 N.C. App. at 147, 419 S.E.2d at 181, the trial court did not make a finding of fact that it was treating the depreciation as accelerated, and we cannot make that finding for it. *See In re L.C.*, 293 N.C. App. 380, 385, 900 S.E.2d 697, 710 (2024) ("[T]his Court cannot assume findings of fact the trial court did not make, even if there is evidence to support such findings."). When stating it was going to look only at the tax returns, the trial court explained that "[i]f certain things were important, the accountant would've been here. And I am just not going to entertain that, otherwise." The trial court made no finding that the depreciation was inappropriate for income calculation and articulated no rationale as to why it declined to accept the depreciation on the tax returns. *See* N.C. Child Support Guidelines, Income (2);

see also Cauble, 133 N.C. App. at 399, 515 S.E.2d at 714; *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575.

Here, the trial court failed to "articulate its rationale with sufficient specificity to facilitate effective appellate review[,]" such that we cannot conclude there was no abuse of discretion in applying the Guidelines. *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575; *see also Cauble*, 133 N.C. App. at 399, 515 S.E.2d at 714. We therefore hold the trial court failed to make findings of fact to support its ultimate disposition that would "allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *See Coble*, 300 N.C. at 712, 268 S.E.2d at 189; *see also Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575.

While depreciation other than accelerated may be "determined by the [trial] court to be inappropriate for determining . . . income[,]" the trial court here made no findings that Defendant's depreciation was inappropriate for income determination. *See* N.C. Child Support Guidelines, Income (2); *see also Cauble*, 133 N.C. App. at 399, 515 S.E.2d at 714; *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575. Because the findings of fact made by the trial court "are not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing [Defendant's] gross income," remand is necessary. *See Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181; *see also Cauble*, 133 N.C. App. at 399, 515 S.E.2d at 714; *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575; *Holland*, 169 N.C. App. at 571, 610 S.E.2d at 236. Thus, we reverse and remand.

V. Conclusion

Upon review, we conclude the trial court abused its discretion in modifying the amount of child support Defendant must pay, where it failed to support its order with sufficient findings of fact as to how it treated the depreciation to support its conclusion for not accepting any of the depreciation. We therefore reverse and remand for further findings of fact, consistent with this opinion.

REVERSED AND REMANDED.

Judge MURPHY concurs.

Judge STROUD dissents in separate opinion.

STROUD, Judge, dissenting.

Because the trial court's findings of fact are supported by the evidence and the calculation of Defendant's gross income was done in accord with the North Carolina Child Support Guidelines, I respectfully dissent.

As the majority opinion notes, Defendant contends the trial court failed to " 'make the required distinctions between straight-line and accelerated depreciation deductions as required' when calculating Defendant's income, and therefore the challenged findings are not supported by competent evidence." In fact, the trial court's failure to distinguish between straight-line and accelerated depreciation was Defendant's primary argument in this appeal. He argued specifically as follows:

> Finding of Fact #22 did not make any distinction between straight-line deductions or accelerated deductions. Findings of Fact #25, #26, #27, and #29 are all based on the trial court's decision to use the tax returns and exclude the depreciation deduction. However, these Findings do not make the required distinctions between straight-line and accelerated depreciation deductions as required by *Holland*. Fu[r]thermore, the trial court did not make any other Findings about the nature of the depreciation listed on [Defendant's] Schedule C. *There was not any evidence presented about what the depreciation was related to, so the trial court could not have made the required Findings.* The trial court also did not make any Findings about how it was exercising its discretion in ruling on the deductibility of the straight-line depreciation as a reasonable and necessary business expense. Since the trial court failed to make the necessary Findings, Findings of Fact #22, #25, #26, #27 and #29 are not supported by competent evidence.

(Emphasis added.)

The majority opinion rejects Defendant's argument, stating that it disagrees that "the trial court must make findings as to any required distinctions between straight-line and accelerated depreciation deductions[.]" But then it holds that the trial court abused its discretion because its findings "are not supported by competent evidence." This statement is mystifying, as the findings are clearly supported by Defendant's income tax returns and the amounts stated in the findings are taken from those income tax returns. Later, despite the majority's disagreement with Defendant's argument that "the trial court must make

findings as to any required distinctions between straight-line and accelerated depreciation deductions," the majority then remands for the trial court to do just that, stating that "the trial court did not make a finding of fact that it was treating the depreciation as accelerated, and we cannot make that finding for them."

The majority is correct that if the evidence was presented to the trial court, "we cannot make that finding" for the trial court. But here, the evidence was not presented to the trial court, nor did Defendant make an argument regarding his depreciation expenses before the trial court. In fact, Defendant argued to this Court that he did not present this evidence: "There was not any evidence presented about what the depreciation was related to, so the trial court could not have made the required Findings." The trial court's findings were supported by the evidence and it made sufficient findings of fact to allow appellate review, and that is all the law requires.

Any failure in the findings of fact to make a distinction between straight-line and accelerated depreciation was not the trial court's failure; instead, Defendant failed to present evidence to support his contention on appeal that the trial court was essentially required to treat his depreciation as straight-line depreciation and to allow him a deduction from his gross income – but that is his argument on appeal. There is no need for remand for additional findings of fact regarding depreciation because the trial court's Order adequately addressed the evidence presented and the arguments Defendant made to the trial court. We should not ask the trial court to make additional findings of fact on remand based upon non-existent evidence or to address arguments a party did not make at the trial.

The majority also noted the trial court's findings of fact regarding depreciation. Findings 22, 25, 26, 27, and 29 noted Defendant presented evidence including his business-related expenses, his income tax returns, and his depreciation expense as shown on the income tax returns for 2021 and 2022. Although the majority states that these "findings *are not supported by competent evidence*" (emphasis added), the only actual problem with the findings the majority identifies is the trial court's failure to make a finding classifying Defendant's depreciation as accelerated or straight-line. The numbers stated in these findings are clearly supported by the evidence and Defendant does not contend on appeal they are not. Defendant just wanted the trial court to use different numbers based upon different evidence – his own copies of receipts and other financial records – instead of his professionally-prepared income tax returns. The trial court's decision to rely upon the tax returns is a

judgment regarding the weight and credibility of the evidence, which is determined solely by the trial court. *See Berry v. Berry*, 257 N.C. App. 408, 417, 809 S.E.2d 908, 914 (2018) ("It is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." (citations, quotation marks, and brackets omitted)).

The majority relies upon *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992), to remand for additional findings regarding depreciation. But the Order on appeal is unlike the order in *Lawrence*. *See id*. In *Lawrence*, the trial court apparently reduced the defendant's gross income based on depreciation and the plaintiff appealed, contending that under the Child Support Guidelines, accelerated depreciation should not be deducted from the defendant's gross income for purposes of child support. *See id*. at 144-45, 419 S.E.2d at 179-80. This Court remanded for additional findings for several reasons. *See id*. at 148, 419 S.E.2d at 181. First, this Court was "unable to ascertain how the trial court treated depreciation." *Id*. Here, we can ascertain how the trial court treated depreciation. Findings 22, 25, 26, and 27 address the gross income amounts, the depreciation amounts, and the fact that the trial court was "not accepting the deduction for as (sic) 'Depreciation and section 179 expense deduction[.]' " The trial court's explanation of its treatment of depreciation was adequate; in fact, it was more detailed than the finding this Court found to be adequate in *Cauble v. Cauble*, 133 N.C. App. 390, 515 S.E.2d 708 (1999), where the trial court simply disallowed the depreciation "in the interest of justice."[1]

In *Cauble*, this Court reversed and remanded for a new calculation of child support based upon the trial court's failure to consider the "defendant's 100% ownership interest in Fun Park" and thus the findings were not specific enough "to indicate to this Court whether the trial court properly applied the Guidelines in computing [the defendant's] gross income." *Id*. at 399-400, 515 S.E.2d at 714. But this Court *rejected* the defendant's contention regarding the trial court's treatment of depreciation expenses related to another business entity the defendant owned, Stanly Farm. *See id*. at 398, 515 S.E.2d at 713. The defendant contended that the trial court erred because it "failed to deduct from the income of Stanly Farm the reasonable and necessary expenses of depreciation and

1. In *Cauble*, the trial court stated more detail about the "bad debt," but the only basis stated for disallowing the depreciation was "in the interest of justice." 133 N.C. App. at 398-99, 515 S.E.2d at 714. So based on *Cauble*, it would appear the trial court could comply with the majority's directions on remand if it simply adds the words "in the interest of justice" to finding of fact 22. *See id*.

bad debt incurred in an accrual accounting tax computation;" this Court found his argument "unpersuasive" and explained:

> Under the Guidelines, the trial court is accorded the discretion to discern those business expenses which are "inappropriate for determining gross income for purposes of calculating child support." In the case *sub judice*, the trial court disallowed "*in the interest of justice*" deductions of $71,886.68 in bad debt and $6,447.53 in depreciation taken by Stanly Farm in 1996. The court stated in its order that the bad debt "did not represent cash dollars flowing out of Stanly Farm during 1996." The court also noted that
>
> > since June 1, 1983, Stanly Farm had taxable income each calendar year, with the exception of 1996, which tax return shows a taxable income loss of $1,498.71.
>
> In light of such findings, as well as those specifying the retained earnings and cash on hand of Stanly Farm, we cannot say the trial court's disallowance of Stanley Farm's claimed bad debt and depreciation expenses in computing [the] defendant's gross income from the corporation was "manifestly unsupported by reason."

Id. at 398-99, 515 S.E.2d at 713-14 (citations, ellipses, and brackets omitted).

Here, the trial court's findings indicate it relied upon Defendant's income tax returns and made findings as to his gross monthly income, based upon his income tax returns, with the exclusion of his depreciation deductions as shown on the income tax returns. The trial court acted fully within its discretion as to the evidence it relied upon and these findings are supported by the evidence.

Another difference between this case and *Lawrence* is that here the trial court's Order is clear that it did not allow the depreciation deduction. In *Lawrence*, this Court stated that "it is not clear whether the court considered the depreciation in computing [the] defendant's monthly gross income."[2] *Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181. The lack of clarity in the findings was also the problem in *Craven Cnty. ex*

2. It appears that the lack of clarity in how the trial court treated depreciation may have been a result of the complexity of the calculation of the defendant's income in *Lawrence*, as there were findings addressing multiple income sources including

rel. Wooten v. Hageb, 277 N.C. App. 586, 861 S.E.2d 571 (2021), also cited by the majority. In *Hageb*, this Court addressed many issues on appeal but the reason for remand was the lack of findings addressing many factors, including depreciation. *See id.* at 590, 861 S.E.2d at 574-75. The only findings in *Hageb* relevant to the child support calculation were:

> 7. Father is self-employed and has a gross income of $19,454.39 per month.
>
> 8. Mother is self-employed and has a gross income of $1,800.00 per month.
>
> Handwritten next to finding of fact #7, the trial court added: "The Court reviewed tax returns provided by Father. Income from Father's business for gaming and lottery was not included."
>
> Following the court's ninth and final typed finding of fact, two additional findings were handwritten:
>
> 10. Father was given credit for one biological child in his home as his name was listed as the father on the birth certificate. The other birth certificate provided did not have Father's name listed as the child's father.
>
> 11. Father shows significant personal expenses as business expenses on his tax returns.
>
> The trial court did not attach a Child Support Guidelines Worksheet to the order.

Id. at 587-88, 861 S.E.2d at 573 (brackets omitted).

This Court stated the findings were "more conclusory than explanatory; they offer us no basis for review of the trial court's application of the law to the evidence presented. *Id.* at 590, 861 S.E.2d at 574. This Court also noted as an "example" that order did not address depreciation at all, and this Court stated that "we are unable to ascertain how the trial court treated depreciation[.] Thus, the findings in this regard are

---

> (1) wages and salaries for 1990, 1989, and 1988; (2) losses from real estate investments for 1990, 1989, and 1988; (3) interest income for 1990, 1989, and 1988; (4) dividend income for 1990, 1989, and 1988; (4) non-reimbursed employee expenses for 1990, 1989, and 1988; and (5) 'severance pay' for 1989.

Lawrence, 107 N.C. App. at 146-47, 419 S.E.2d at 180-81.

not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing Father's gross income, and remand is necessary." *Id.* (citation and quotation marks omitted). But in the case before us, it is very clear that the trial court considered the depreciation and did not "accept the deduction" for depreciation as shown on Defendant's income tax returns.

Last, the *Lawrence* Court noted that "[i]n any event, to the extent, if any, the trial court considered depreciation, the record does not reveal whether the depreciation claimed by [the] defendant was straight line or accelerated." *See Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181. The majority focuses on the language from *Lawrence* as to this Court's inability "to ascertain how the trial court treated depreciation" and to determine "whether the trial court properly treated the depreciation as set by the Guidelines." *Id.* But here, the Order states clearly *how* the trial court treated the depreciation – it did not allow this deduction – and the trial court properly considered the depreciation based on the Guidelines, based upon the evidence presented at the trial. Defendant's failure to present any evidence to support a finding that the depreciation was straight-line depreciation and not accelerated depreciation is simply not a reason for remand. Defendant testified, but he did not testify about how the depreciation was calculated. Defendant's income tax returns including Schedule C and Form 4562 "Depreciation and Amortization" were presented as evidence. On the tax returns, Defendant claimed both "special depreciation allowance for qualified property (other than listed property) placed in service during the tax year" and Modified Accelerated Cost Recovery System (MACRS) depreciation. According to the instructions for Form 4562, "The Modified Accelerated Cost Recovery System (MACRS) is the current method of *accelerated asset depreciation* required by the tax code." *Instructions for Form 4562*, Internal Revenue Service (2023) (emphasis added). Thus, Defendant's evidence tends to show he was taking accelerated depreciation. Under the Child Support Guidelines, as noted by *Lawrence*,

> [s]pecifically excluded from ordinary and necessary expenses is the accelerated component of depreciation expenses or any other business expense determined by the Court to be inappropriate for determining gross income for purposes of calculating child support. Thus, accelerated depreciation is expressly not allowed as a deduction from a parent's income.

Lawrence, 107 N.C. App. at 147, 419 S.E.2d at 181 (quotation marks and ellipses omitted).

Defendant's brief states, quite accurately, "[t]here was *no evidence* presented as to what assets were listed as 'depreciation and section 179 expense deduction' on Father's tax returns. There are no Findings of Fact as to what these deductions are related to." (Emphasis added.) But despite his failure to present evidence on this issue, he has presented the issue to this Court on appeal and argues the trial court erred by not making findings on the very thing about which he presented "no evidence." Mother responds, also accurately, that "Defendant had [his] returns professionally prepared and offered *no evidence* as to whether he and his accountant considered calculated (sic) the figures on the tax return as straight-line or accelerated depreciation." Mother also notes that in *Holland*, cited by Defendant, evidence was presented as to straight-line and accelerated depreciation, and on remand to entry of a new order on another basis, this Court directed that the trial court address that evidence. *See Holland v. Holland*, 169 N.C. App. 564, 568-69, 610 S.E.2d 231, 235 (2005) ("Accordingly, we reverse and remand the order for findings concerning [the] plaintiff's 2002 income and for the entry of a child support order on that basis. [The p]laintiff also asserts the trial court erred in its method of computing his income from his 2001 tax return. Since it is likely to recur upon remand, we deem it necessary to address this issue.").

If Defendant wanted the trial court to consider "what assets" were addressed by the depreciation expenses on his own income tax return, Defendant could have presented that evidence. He did not, nor did he make any argument to the trial court on this issue. Defendant did not testify or argue to the trial court that his depreciation expense, or any portion of the expense, should be treated as straight-line depreciation. Instead, before the trial court, Defendant presented voluminous evidence of income and expenses of his business including copies of bank statements, invoices, and receipts and argued that his net income should be calculated based on his exhibits *instead* of relying on his federal income tax returns.[3] The only other argument Defendant made on appeal is that the trial court's Order was "[w]hen the amount of [Defendant's] income and the child support amount are considered in light of *the actual facts*, it is clear that the Order is an abuse of discretion." (Emphasis added.) Defendant then contends the trial court should have based its findings

3. As to these exhibits, Defendant's counsel argued, "These are the actual expenses that he has. *The accountant is not here to explain what goes into accounting and how that works*. So, I think if you want to look at it, the best way is to look, these were his actual expenses. And that comes out again to $1,759, $1,760 per month for 2022." (Emphasis added.)

on "the actual facts" found in his business records instead of using his income tax returns. But again, the trial court is the sole judge of the weight and credibility of the evidence. *See Berry*, 257 N.C. App. at 417, 809 S.E.2d at 914. The trial court did not abuse its discretion by relying upon Defendant's income tax returns. And if there was any question as to the type of depreciation shown by Defendant's evidence, the burden was on him if he wished to show the depreciation shown on his income tax returns should be treated differently. The trial court noted as much after rendering its ruling. In response to Defendant's counsel's question regarding how the trial court was considering "Defendant's Exhibit number 5," which was his listing of his business expenses, the trial court stated:

> I am going to go by what the tax return says, period. And you alluded to that, in passing, about the accountant is not here. If certain things were important, the accountant would've been here. And I am just not going to entertain that, otherwise. Okay? Thank you.

On appeal, Defendant has not directed us to any evidence in the transcript or the 148 pages of exhibits, including financial records and income tax returns, where we might find evidence the trial court could have relied upon to find the depreciation was straight-line depreciation and not accelerated depreciation. Nor has he directed us to any evidence which would support some other finding as to his gross income, other than his financial records he wanted the trial court to use in lieu of his income tax returns—and those records do not mention depreciation.

For all these reasons, this case is quite different from *Lawrence* and *Hageb*. The trial court's findings are supported by the evidence, and it is not the trial court's job to ascertain how Defendant's depreciation on his income tax return was calculated and whether it was actually straight-line deprecation where Father admittedly presented no evidence which would allow the trial court to make this determination. The trial court's findings state how it treated depreciation and based upon the evidence presented, it treated the depreciation properly under the Guidelines. Under *Lawrence*, *Cauble*, *Hageb*, and the Child Support Guidelines, the trial court's Order should be affirmed. I therefore respectfully dissent.

ORSBON v. MILAZZO

[297 N.C. App. 96 (2024)]

R. ANTHONY ORSBON, AS GUARDIAN AD LITEM FOR
PATRICIA BOSWORTH-JONES, PLAINTIFF
v.
MATTHEW TAYLOR MILAZZO AND CITY OF CHARLOTTE, DEFENDANTS

No. COA23-1170

Filed 17 December 2024

1. Immunity—public official—distinguished from public employee —negligence action

In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court erred in granting judgment on the pleadings in favor of the city's Senior Engineer Project Manager and Engineer Project Manager (defendants), whom plaintiff (the pedestrian's guardian ad litem) alleged had failed to implement safety measures at the intersection. Specifically, the court erred in finding that defendants were entitled to public official immunity when, in fact, they were merely public employees, since neither the state constitution nor any statute (including the City Code of Ordinances) created their positions or delegated statutory authority to them, and therefore they could not exercise a portion of sovereign power.

2. Negligence—accident at an intersection—design of intersection, crosswalk, and pedestrian signals—city's duty of care to injured pedestrian—summary judgment

In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court properly granted summary judgment to defendant-city, finding that no genuine issue of material fact existed in that the city did not breach its duty of care to the injured pedestrian. Importantly, the intersection design—including the pedestrian signals and crosswalk—complied with state law and specifically with the Manual on Uniform Traffic Control Devices (MUTCD), and the city's decision to install Leading Pedestrian Intervals (LPIs)—timing devices that allow pedestrians to cross before drivers get a green light—in accordance with routine retiming was reasonable, especially where the installation of LPIs was entirely optional under the MUTCD. Further, the city did not delay

unreasonably in addressing any safety concerns, as it installed a "No Turn on Red" sign three days after receiving a resident's complaint and later expedited the installation of an LPI following the accident.

3. Negligence—accident at an intersection—city's actions before the accident—proximate cause of pedestrian's injuries—summary judgment

In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court properly granted summary judgment to defendant-city, finding that no genuine issue of material fact existed as to proximate cause. Specifically, the city's actions were not the proximate cause of the pedestrian's injuries where: (1) the injuries were not foreseeable given that, for ten years prior to the accident, there were no pedestrian-related accidents at that intersection and only two left-turn vehicle accidents; (2) the intersection's design complied with North Carolina law, which requires drivers turning left on a circular green light to yield to pedestrians; (3) the city promptly addressed a resident's safety complaint about the intersection by installing a "No Turn on Red" sign within three days; and most importantly, (4) it was the driver's negligence that caused the pedestrian's injuries.

Judge THOMPSON dissenting.

Appeal by plaintiff from order entered 7 June 2023 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 May 2024.

Comerford Chilson & Moser, LLP, by Zachary M. Harris, W. Thompson Comerford, and John A. Chilson, for plaintiff-appellant.

The Law Offices of Lori Keeton, by Lori R. Keeton, for defendants-appellees.

O'Malley Tunstall, PC, by Peter J. Tomasek, Amiee A. Nwabuike, for amicus curiae North Carolina Advocates for Justice.

White & Stradley, PLLC, by J. David Stradley, for amicus curiae North Carolina Advocates for Justice.

Cranfill Sumner LLP, by Steven A. Bader, for amicus curiae North Carolina Association of Defense Attorneys.

FLOOD, Judge.

Plaintiff R. Anthony Orsbon appeals from the trial court's order granting Defendants Geoffrey Sloop and Saleem Barakzai's motion for judgment on the pleadings and Defendant City of Charlotte's motion for summary judgment. After careful review, we conclude the trial court erred in granting Defendants Sloop and Barakzai's motion for judgment on the pleadings because Defendants Sloop and Barakzai are not public officials, and therefore not entitled to public official immunity. The trial court, however, did not err in granting Defendant City's motion for summary judgment, because there is no genuine issue of material fact, and Defendant City is entitled to judgment as a matter of law. We therefore affirm in part, reverse in part, and remand for further proceedings.

I. Factual and Procedural Background

On 9 May 2021, Patricia Bosworth-Jones, a pedestrian, was crossing the intersection of Archdale Drive and Park South Drive in Charlotte, North Carolina (the "Intersection") via a marked crosswalk upon receiving a "Walk" signal. Defendant Matthew Taylor Milazzo, after stopping his vehicle on a red light at the Intersection, received a circular green light, turned left, and struck Bosworth-Jones in the marked crosswalk, causing devastating injuries, including a traumatic brain injury.

Prior to the accident, in July 2020, the Intersection received pedestrian signals and a crosswalk. The Intersection was designed so that the crosswalk "Walk" signal would turn on simultaneously with the circular green light for left turning traffic, a design contemplated by North Carolina law and the Manual on Uniform Traffic Control Devices ("MUTCD").[1] Defendant Milazzo, following the accident, testified he did not understand that a circular green light meant turning vehicles must yield the right of way to oncoming traffic and pedestrians.

---

1. North Carolina law specifically requires drivers turning left on circular green lights to yield to pedestrians who lawfully cross the intersection: "When the traffic signal is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law." N.C. Gen. Stat. § 20-158(2a).

Section 4D.04 of the MUTCD states: "Vehicular traffic facing a CIRCULAR GREEN signal indication is permitted to proceed straight through or turn right or left or make a U-turn movement[.] Such vehicular traffic, including vehicles turning . . . left . . . shall yield the right-of-way to (a) Pedestrians lawfully within an associated crosswalk[.]"

Between May 2010 and 2021, there were no pedestrian accidents at the Intersection, and only two left-turn accidents involving motor vehicles. On 30 October 2022, Defendant City received an online complaint about the Intersection, which requested "pedestrian cross walk timing to be adjusted to run when cars are not driving through [the I]ntersection[,]" expressing concern that "[i]ndividuals and families are put in danger when crossing the street while cars are turning into the same lane." In response to the complaint, Defendant Barakzai, Engineer Project Manager for Defendant City, based on his experience, installed a "no Turn on Red" sign at the Intersection, and no further complaints or additional communications following up on the complaint were received by Defendant City.

In 2019, Defendant City adopted its "Vision Zero Action Plan" (the "Action Plan") to address and eliminate serious traffic injuries and fatalities. The Action Plan included a tool, a Leading Pedestrian Interval ("LPI"), to help eliminate serious pedestrian injuries and fatalities. LPIs are timing devices that give pedestrians a "Walk" signal several seconds before a driver gets a green light. Installation of LPIs at intersections is not required under any national standards or under the MUTCD. Defendant City, however, set a goal of installing LPIs at certain intersections during retiming of the intersections, which occurs every two years. Under the goal set by Defendant City, the Intersection was scheduled to have received an LPI at retiming in 2022.

On 28 July 2022, Plaintiff filed suit in Mecklenburg County Superior Court as guardian ad litem of Bosworth-Jones, asserting negligence as to Defendant Milazzo, and "[n]egligence as to [Defendant City], Defendant Sloop[, Senior Engineer Project Manager] (individually and in his official capacity), and Defendant Barakzai (individually and in his official capacity)." Plaintiff's theory of negligence was the failure to include an LPI at the crosswalk. In his complaint, Plaintiff also asserted that Defendant City had waived its governmental immunity. Prior to these events, in October 2009, the city council of Charlotte passed a resolution waiving Defendant City's sovereign immunity from civil liability in tort.

On 27 October 2020, Defendants filed a motion for judgment on the pleadings. On 3 January 2023, the matter came on for hearing in Mecklenburg County Superior Court, and by order entered 24 January 2023, the trial court granted Defendants Sloop and Barakzai's motion for judgment on the pleadings, finding they were public officials rather than public employees, but denied Defendant City's motion for judgment on the pleadings. On 13 April 2023, Defendant City filed a motion for summary judgment, which came on for hearing on 24 May 2023 in

Mecklenburg County Superior Court. By order entered 7 June 2023, the trial court granted Defendant City's motion for summary judgment, concluding that "there is no genuine issue as to any material fact, and Defendant City . . . is entitled to judgment as a matter of law." Plaintiff timely filed written notice of appeal from this order.

II. Jurisdiction

This Court has jurisdiction to review Plaintiff's appeal as an appeal from a final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, Plaintiff alleges the trial court erred in: (A) granting judgment on the pleadings in favor of Defendants Sloop and Barakzai because Defendants Sloop and Barakzai are not public officials entitled to sovereign immunity, and (B) granting summary judgment in favor of Defendant City because there are genuine issues of material fact from which a jury could reasonably conclude Defendant City violated its duties to Bosworth-Jones. We address each argument, in turn.

A. Motion for Judgment on the Pleadings

[1] Plaintiff first argues that Defendants Sloop and Barakzai are not public officials, and therefore not entitled to public official immunity, because their positions were "neither created by statute nor the constitution, do[] not involve the use of discretionary decision making, and do[] not exercise 'a legally significant portion of sovereign power in the performance of their duties.' " We agree.

"Judgment on the pleadings is appropriate where the pleadings fail to reveal any material issue of fact with only questions of law remaining." *Bauman v. Pasquotank Cnty. ABC Bd.*, 270 N.C. App. 640, 642, 842 S.E.2d 166, 168 (2020) (citation and internal quotation marks omitted). "Granting judgment on the pleadings is not favored by law and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant." *Id.* at 642, 842 S.E.2d at 168 (citation and internal quotation marks omitted).

"This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* at 642, 842 S.E.2d at 168 (citation omitted).

It has long been established that "[w]hen a governmental worker is sued individually, or in his or her personal capacity, our courts

distinguish between public employees and public officers in determining negligence liability." *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1993) (citation omitted). "[A] public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Isenhour v. Hutto*, 350 N.C. 601, 609, 517 S.E.2d 121, 127 (1999). A public "employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Id.* at 610, 517 S.E.2d at 127 (citation omitted). An individual will not enjoy public official immunity if his or her action "was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Bartley v. City of High Point*, 381 N.C. 287, 294, 873 S.E.2d 525, 533 (2022) (citation omitted).

Our Supreme Court has recognized "several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127. "Discretionary acts are those requiring personal deliberation, decision and judgment"; duties are ministerial when they are "absolute and involve merely the execution of a specific duty arising from fixed and designated facts." *Id.* at 610, 517 S.E.2d at 127 (citations and internal quotation marks omitted) (cleaned up). "Who[]ever is asserting public official immunity must show all three factors of the *Isenhour* test exist." *Baznik v. FCA US, LLC*, 280 N.C. App. 139, 142, 867 S.E.2d 334, 336 (2021).

A person occupies a position created by statute if the position "ha[s] a clear statutory basis." *Id.* at 142, 867 S.E.2d at 337 (citation omitted). If, however, "a statute expressly creates the authority to delegate a duty, [and the] person or organization who is delegated [a duty] . . . performs the duty on behalf of the person or organization in whom the statute vests the authority to delegate[,]" their position is sufficient to meet the first of the three factors for a public official. *Cline v. James Bane Home Bldg., LLC*, 278 N.C. App. 12, 24, 862 S.E.2d 54, 63 (2021). Sovereign power can be exercised only if it is granted by statute or the North Carolina Constitution: "a defendant claiming themself a public official for immunity purposes must show that they have exercised a portion of some power that only the sovereign may exercise, as granted to the sovereign by either the Constitution or a statute." *McCullers v. Lewis*, 265 N.C. App. 216, 224–25, 828 S.E.2d 524, 533 (2019).

In *Cline*, this Court considered on first impression whether an "Environmental Health Administrator" was a position created by statute,

and held the defendant failed to establish the position was created by statute because the statute did not "provide a clear statutory basis for the position . . . nor allow a person or organization created by statute to delegate any statutory duties to [the position]." 278 N.C. App. at 23, 25–26, 862 S.E.2d at 63, 65. In *Baznik*, this Court considered whether a North Carolina Department of Transportation ("NCDOT") "Division Traffic Engineer" and a "Division Sign Supervisor" held positions created by statute, and held that the statutes presented by the defendant did not delegate "statutory authority to employees of NCDOT." 280 N.C. App. at 143, 867 S.E.2d at 337.

Relevant to this matter before us, North Carolina law provides that "[a] city shall have general authority and control over all public streets [and] sidewalks[.]" N.C. Gen. Stat. § 160A-296(a) (2023). The Charlotte City Code of Ordinances authorizes the director to:

> Determine and provide for the installation, removal, relocation and change of official traffic control devices in accordance with accepted traffic engineering principles and standards. All traffic control devices shall conform to the manual and specifications approved by the state board of transportation or a resolution adopted by the city council. All traffic control devices so erected and not inconsistent with the provisions of state law or this chapter shall be official traffic control devices.

Charlotte, N.C., Code of Ordinances § 14-36(1) (2024).

Here, Defendants failed to present a statute that creates the positions held by Defendants Sloop, Senior Engineer Project Manager, or Barakzai, Engineer Project Manager, or one that "delegates such statutory authority to employees," because Ordinance § 14-36 fails to create the positions held by Defendants Sloop and Barakzai or delegate statutory authority to them. *See Baznik*, 280 N.C. App. at 143, 867 S.E.2d at 337; *Cline*, 278 N.C. App. at 25, 862 S.E.2d at 65; *cf. Baker v. Smith*, 224 N.C. App. 423, 428–30, 737 S.E.2d 144, 148–49 (2012) (holding that an assistant jailer has a delegated statutory authority where the constitutionally-created Sheriff has the authority to "appoint a deputy or employ others to assist him in performing his official duties" (emphasis omitted)). Further, because Defendants have failed to demonstrate the positions held by Defendants Sloop and Barakzai were created by statute, they cannot have exercised a portion of sovereign power. *See McCullers*, 265 N.C. App. at 224–25, 828 S.E.2d at 533; *Baznik*, 280 N.C. App. at 143, 867 S.E.2d at 337. Neither the first nor second factor of the *Isenhour* test was met, and we need not reach the third factor. *See* 350

N.C. at 610, 517 S.E.2d at 127; *see also Cline*, 278 N.C. App. at 26, 862 S.E.2d at 65 ("As the first factor is not met, we need not reach the other two *Isenhour* factors.").

Because Defendants have not shown that "all three factors of the *Isenhour* test" were met, Defendants have failed to demonstrate that Defendants Sloop and Barakzai are public officials subject to public official immunity.[2] *Baznik*, 280 N.C. App. at 142, 867 S.E.2d at 336; *see Isenhour*, 350 N.C. at 609–10, 517 S.E.2d at 127. Accordingly, the trial court erred in holding Defendants Sloop and Barakzai enjoyed public official immunity. *See McCullers*, 265 N.C. App. at 224–25, 828 S.E.2d at 533; *Baznik*, 280 N.C. App. at 143, 867 S.E.2d at 337.

B. Summary Judgment

Plaintiff next contends the trial court erred in granting summary judgment in favor of Defendant City because "there are genuine disputes of material fact from which a jury could reasonably conclude that [Defendant City] . . . breached the duty it owed to . . . Bosworth-Jones . . . by instructing her to cross into a dangerous situation." We disagree.

The "standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation marks omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* at 573, 669 S.E.2d at 576.

To make out a *prima facie* case of negligence, "a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury." *Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729–30 (2015) (citation omitted). Because Defendant City did not breach its duty to Bosworth-Jones nor did it proximately cause her injuries, Plaintiff cannot show that Defendant City was negligent.

---

2. Defendants, citing to *Reid*, suggest that even if Defendants Sloop and Barakzai are public employees, they are not liable in their individual capacities because they did not "directly participate in the events that caused [Bosworth-Jones'] injuries[.]" The parties, however, did not argue Defendants Sloop's and Barakzai's liability in their individual capacities before the trial court. *See In re J.B.*, 257 N.C. App. 299, 303, 809 S.E.2d 353, 356 (2018) ("A contention not raised at the trial court may not generally be raised for the first time on appeal.").

1. Breach of Duty of Care

[2] Plaintiff argues Defendant City breached its duty of care to Bosworth-Jones "to reasonably install and maintain the pedestrian signal by instructing her to cross into a dangerous situation."

"Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance." *Wilkerson v. Norfolk S. Ry. Co.*, 151 N.C. App. 332, 340, 566 S.E.2d 104, 110 (2002) (citation omitted) (cleaned up). "If a plaintiff does not allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit." *Id.* at 341, 566 S.E.2d at 110 (citation omitted).

A city "shall have general authority and control over all public streets, sidewalks, alleys, bridges[,]" and that authority and control includes "(1) [t]he duty to keep the public streets, sidewalks, alleys, and bridges in proper repair[,]" and "(2) [t]he duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions[.]" N.C. Gen. Stat. § 160A-296(a), (a)(1)-(2) (2023).

"[A] municipality which is under a duty to conform its traffic control devices to the MUTCD and which has also waived immunity for civil liability in tort is subject to possible liability for designing or installing a traffic control device not in substantial conformity with MUTCD specifications." *Lonon v. Talbert*, 103 N.C. App. 686, 692, 407 S.E.2d 276, 281 (1991). Generally, however, "[a]bsent a statute imposing liability, cities acting in the exercise of police power . . . conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit . . . are not liable for the tortious acts of their officers or agents." *Id.* at 691, 407 S.E.2d at 280 (citation and internal quotation marks omitted). The "installation, maintenance and timing of traffic control signals at intersections are *discretionary* governmental functions[,]" and where traffic signals are in compliance with controlling authorities, a city is not under an "obligation" to make discretionary changes to improve safety that were not otherwise required. *Talian v. City of Charlotte*, 98 N.C. App. 281, 286–87, 390 S.E.2d 737, 741 (1990) (emphasis added); *see also Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 173–74, 293 S.E.2d 235, 236–37 (1982) (holding that a municipality is not negligent when, absent an abuse of discretion, it exercises a discretionary power).

In *Talian*, the plaintiffs brought suit against the city of Charlotte for damages arising out of a traffic accident, arguing the city of Charlotte negligently failed "to install a protected left turn signal" at the intersection where the accident occurred. 98 N.C. App. at 283, 390 S.E.2d at 738. This Court found that "[t]he undisputed evidence of record showed that

the traffic signal in place at the time of the collision complied with all requirements of federal, state, and local law and was in proper working order[,]" and that the plaintiffs "failed to offer evidence legally sufficient to support a finding of negligence[.]" *Id.* at 289, 390 S.E.2d at 742. This Court also addressed the plaintiffs' argument that failure to install a new signal within a reasonable time "after the decision to do so was made" constituted negligence, concluding that a "[m]ere delay in meeting a recognized need does not, without more, establish that the delay was unreasonable[.]" *Id.* at 288–89, 390 S.E.2d at 742. This Court concluded that, as a result, the "trial court did not err in granting a directed verdict for [the] defendant." *Id.* at 289, 390 S.E.2d at 742.

Here, Plaintiff correctly alleged that Defendant City "has waived any and all such governmental and/or sovereign immunity . . . by the act of purchasing (or otherwise procuring, obtaining, or having in place) liability insurance[.]" *See Wilkerson*, 151 N.C. App. at 340, 566 S.E.2d at 110. Thus, Defendant City could in theory be held liable for negligence towards Plaintiff. *See id.* at 340, 566 S.E.2d at 110. It is undisputed, however, that LPIs are optional under the MUTCD. Just as the Court in *Talian* found that the traffic signals "were in proper working order and complied in every way with all requirements of the MUTCD," so here has Plaintiff presented no evidence the traffic signals installed at the Intersection were not in compliance with the MUTCD or the North Carolina Traffic Signal Manual at the time of the accident. *See* 98 N.C. App. at 288, 390 S.E.2d at 741. Furthermore, just as the Court in *Talian* held that the plaintiffs "failed to offer evidence legally sufficient to support a finding of negligence," because the evidence demonstrated that the traffic signal "complied with all requirements of federal, state, and local law[,]" so here has Plaintiff failed to offer evidence legally sufficient to support a finding of negligence by Defendant City. *See id.* at 289, 390 S.E.2d at 742.

Additionally, Defendant City did not delay in installing the LPI, much less unreasonably delay in doing so. In *Talian*, the left turn signal was to be installed "in about a year" from December 1982, but its installation was delayed until July 1984, about one month after the accident. *Id.* at 283–84, 288–89, 390 S.E.2d at 739, 742. Here, by contrast, the LPI was scheduled to be installed at retiming in 2022, about one year after the accident, but its installation was in fact *moved up* following the accident.[3] *See id.* at 288–89, 390 S.E.2d at 742. Defendant City's decision to

3. Although Defendant City installed an LPI at the Intersection nine days after the accident, Defendant City should not be penalized for choosing to install an optional traffic

install LPIs at retiming rather than upon initial installation of a new signal, or even following a resident's complaint about an intersection, was reasonable, because the decision ensured the LPI installation projects were completed in an organized fashion and allowed for intersection timing data to be collected concurrent with installation. The decision here to install the LPI at retiming was a component of Defendant City's "exercise of discretion[,]" and even had there been a delay in installing the LPI, such "[m]ere delay [by Defendant City] in meeting a recognized need d[id] not, without more, establish that the delay was unreasonable[.]" *See id.* at 289, 390 S.E.2d at 742.

Plaintiff has not presented evidence "from which the jury could infer that the delay was unreasonable[,]" and so, just as in *Talian*, Plaintiff cannot establish Defendant City's negligence. *See id.* at 289, 390 S.E.2d at 742. Accordingly, because the Intersection was MUTCD compliant at the time of the accident, and Defendant City did not delay in installing the LPI, much less unreasonably delay in doing so, Defendant City did not breach a duty towards Plaintiff. *See id.* at 287, 390 S.E.2d at 741.

2. Proximate Cause

[3] Even if Defendant City owed a duty to Plaintiff, neither the Intersection design, the resident's complaint, nor Defendant City's response to the resident's complaint were the proximate cause of Bosworth-Jones' injuries. To prove proximate cause, a plaintiff must show that the injury would not have occurred but for the defendant's negligence. *Liller v. Quick Stop Food Mart, Inc.*, 131 N.C. App. 619, 624, 507 S.E.2d 602, 606 (1998). "Foreseeable injury is a requisite of proximate cause, which is, in turn, a requisite for actionable negligence." *Thornton v. F.J. Cherry Hosp.*, 183 N.C. App. 177, 182, 644 S.E.2d 369, 373 (2007) (citation omitted). To prove foreseeability, a plaintiff must show "that consequences of a generally injurious nature might have been expected." *Id.* at 182, 644 S.E.2d at 373 (citation omitted).

Here, for ten years prior to the date of the accident, there had been only two left turn, motor-vehicle related accidents. There were no pedestrian accidents during that time, nor between the time the

---

safety device ahead of schedule and in response to an accident. *See, e.g.*, N.C. R. Evid. 407 advisory committee's note (discussing the policy of excluding "evidence of subsequent remedial measures as proof of an admission of fault[,]" explaining that "evidence of . . . installation of safety devices" should be excluded because of the "social policy of encouraging people to take, or at least not to discourage them from taking, steps in furtherance of added safety").

crosswalk was completed in mid-2020 and the accident in this case. Although Defendant City received a complaint about "walk timing" at the Intersection, this single complaint does not reasonably indicate "consequences of a generally injurious nature" were to be expected, meaning that Plaintiff failed to prove Bosworth-Jones' injuries were foreseeable. *See id.* at 182, 644 S.E.2d at 373. Defendant Barakzai nonetheless quickly addressed the complaint by installing a "no Turn on Red" sign within three days of receiving the complaint, and no further complaints or additional communications following up on the resident's complaint were received by Defendant City.[4] Moreover, Bosworth-Jones was injured when Defendant Milazzo failed to yield to the pedestrian in the crosswalk while making a left hand turn on a circular green light; therefore, Defendant Milazzo's negligence—not Defendant City's—was the proximate cause of Bosworth-Jones' injuries. *See Liller*, 131 N.C. App. at 624, 507 S.E.2d at 606.

Defendant City did not create an overly dangerous situation, as the Intersection design was contemplated by both MUTCD and under North Carolina law. *See* N.C. Gen. Stat. § 20-158(b)(2a) (2023). Thus, neither the Intersection design, the resident's complaint, nor Defendant City's response to the complaint was the proximate cause of Bosworth-Jones' injuries. *See Liller*, 131 N.C. App. at 624, 507 S.E.2d at 606.

Viewing the evidence in the light most favorable to Plaintiff, there is no genuine issue of material fact—Defendant City had no legal requirement to exercise a discretionary function in installing an LPI, it did not delay in installing the LPI, Defendant Barakzai did not delay in addressing the resident's complaint, and Bosworth-Jones was injured due to Defendant Milazzo's negligence in failing to yield. *See In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576. Defendant City is entitled to judgment as a matter of law because it breached no duty to Bosworth-Jones, and even if it had breached a duty, it did not proximately cause her injuries. *See id.* at 573, 669 S.E.2d at 576. Accordingly, because there is no genuine issue of material fact, and Defendant City is entitled to judgment as a matter of law, the trial court did not err in granting summary judgment in favor of Defendant City. *See id.* at 573, 669 S.E.2d at 576.

---

4. Defendant Barakzai's quick response in addressing the resident's complaint by installing a "no Turn on Red" sign, based on Defendant Barakzai's experience that installing the sign would address the resident's complaint, further demonstrates Defendant City did not delay in addressing a danger the Intersection might have posed to pedestrians. *See Talian*, 98 N.C. App. at 289, 390 S.E.2d at 742.

IV. Conclusion

The trial court erred in granting its judgment on the pleadings in favor of Defendants Sloop and Barakzai because Defendants Sloop and Barakzai are not public officials, and therefore not entitled to public official immunity. The trial court did not err, however, in granting summary judgment to Defendant City as, irrespective of its waiver of governmental immunity, there is no genuine issue of material fact, and Defendant City is entitled to a judgment as a matter of law. We therefore remand the trial court's order as to the judgment on the pleadings and affirm the trial court's order as to the granting of the motion for summary judgment.

AFFIRMED In Part; REVERSED AND REMANDED In Part.

Judge GRIFFIN concurs.

Judge THOMPSON dissents in separate opinion.

THOMPSON, Judge, dissenting.

Failure to comply with the Manual on Uniform Traffic Control Devices (MUTCD) is not the *only* way by which a city that has waived its governmental immunity in tort can be liable for negligence. The majority's conclusion that, "because the [i]ntersection was MUTCD compliant at the time of the accident, and [d]efendant [Charlotte] did not delay in installing the LPI, much less unreasonably delay in doing so, [d]efendant [Charlotte] did not breach a duty towards [p]laintiff[,]" is not an appropriate determination for this court at the summary judgment stage.

Because I would conclude that plaintiff has stated facts that, when viewed in the light most favorable to plaintiff, raise genuine issues of material fact—specifically, whether defendant City of Charlotte's (defendant Charlotte) delay in correcting the dangerous conditions posed by the crosswalk timing for approximately seven months *after* defendant Charlotte was notified of the danger the crosswalk posed was *reasonable*—I would conclude that the trial court erred in granting defendant Charlotte's motion for summary judgment, and I respectfully dissent.

In order to bring a prima facie claim for negligence, a plaintiff must show (1) defendant owed a duty to the plaintiff, (2) defendant breached the duty, (3) the breach constituted the actual and proximate cause of plaintiff's injury, and (4) plaintiff suffered damages as a result of the

breach. *Cucina v. Jacksonville*, 138 N.C. App. 99, 102, 530 S.E.2d 353, 355 (2000). Generally, "[a]bsent a statute imposing liability, cities acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit are not liable for the tortious acts of their officers or agents." *Lonon v. Talbert*, 103 N.C. App. 686, 691, 407 S.E.2d 276, 280 (1991) (internal quotation marks, ellipsis, and citation omitted). Simply because "a city has authority to make discretionary decisions does not mean the city is thereby under any obligation[;] [a]uthority or power to control traffic does not create a mandate of action." *Id.*

However, "[a] city may waive its immunity from civil liability in tort by purchasing liability insurance." *Id.* Similarly, "[a]s to traffic control devices, a governmental subdivision [that] has waived immunity from civil liability in tort may be liable for its negligent failure to conform to a published standard such as the Manual on Uniform Traffic Control Devices." *Id.* at 692, 407 S.E.2d at 280. "With respect to state roads within municipal corporate limits, traffic signs, signals, markings, islands, and all other traffic[ ]control devices must be installed or erected in substantial conformance with the specifications of the MUTCD." *Id.* "[A] municipality [that] is under a duty to conform its traffic control devices to the MUTCD and which has also waived immunity for civil liability in tort is subject to possible liability for designing or installing a traffic control device not in substantial conformity with MUTCD specifications." *Id.* at 692, 407 S.E.2d at 281.

Here, defendant Charlotte did not have a mandate or warrant in the MUTCD regarding Leading Pedestrian Intervals (LPIs). As the majority correctly identifies, plaintiff has not pled facts that demonstrate defendant Charlotte was not in "substantial conformity" with the MUTCD. In fact, defendants *were* in "substantial conformity with MUTCD specifications[,]" *id.*, and if non-compliance with the MUTCD was the only means by which defendant Charlotte could be found liable for negligence, our analysis would end here.

However, in *Talian v. City of Charlotte*, our Court's analysis of whether summary judgment was appropriate *did not end* with a determination of whether the defendant, ironically *also* the City of Charlotte, had been in "substantial conformity" with the MUTCD; the defendant was in conformity with the MUTCD. *Talian*, 98 N.C. App. 281, 288, 390 S.E.2d 737, 741 (1990). After determining that the defendant *was* in conformity with the MUTCD, our Court *then* considered whether the defendant was liable—not for their failure to comply with the MUTCD—but

whether their delay was unreasonable, and thereby, *negligent*. *See id.* at 288–89, 390 S.E.2d at 742 (addressing plaintiff's argument that the defendant "was negligent in failing to [fix the dangerous condition] within a reasonable time after the decision to do so was made").

Here, as in *Talian*, our analysis of whether summary judgment was appropriate *should not* end with a determination of whether defendant Charlotte was in conformity with the MUTCD, which it was, but whether defendant Charlotte's delay in installing an LPI—which again, was *not required by the MUTCD*—after being notified of the dangerous conditions that the crosswalk created was *reasonable*.

Again, simply because "a city has authority to make discretionary decisions does not mean the city is thereby under any obligation[;] [a]uthority or power to control traffic does not create a mandate of action." *Lonon*, 103 N.C. App. at 691, 407 S.E.2d at 280. Similarly, in the exercise of discretionary governmental functions, "[m]ere delay in meeting a recognized need does not, without more, establish that the delay was unreasonable or that the municipality abused its discretion." *Talian*, 98 N.C. App. at 289, 390 S.E.2d at 742. However, it is fundamental that, "[u]pon notice of defects and dangers in the streets, the city must remove them in a reasonable time, and *failure to do so is negligence*, and such negligence is the basis of an action by anyone injured by reason thereof." *Jones v. Greensboro*, 124 N.C. 310, 310, 32 S.E. 675, 676 (1899) (emphasis added).

In *Talian*, much like the present case, the majority concluded that, "[t]he undisputed evidence of record showed that the traffic signal in place at the time of the collision complied with all requirements of federal, state, and local law and was in proper working order" and therefore, "the trial court did not err in granting a directed verdict for defendant." *Talian*, 98 N.C. App. at 289, 390 S.E.2d at 742. However, Judge Phillips offered a dissenting opinion, wherein he argued that, "[t]he question properly posed by the record is whether between the determination that additional signals were necessary and the accident[,] *more than a reasonable time went by without the improvement being made*. In my opinion the question is one of fact that should have been submitted to the jury." *Id.* (emphasis added) (Phillips, J., dissenting). I concur with Judge Phillips and apply the same reasoning to the case at bar.

In his complaint, plaintiff alleged that defendant Charlotte, "by and through its agents and employees . . . had a duty to exercise ordinary care for the safety of the general public, including Ms. Bosworth-Jones, in the design of the crosswalk and signal timing . . . and *in its response to the*

resident's complaint that the intersection was unsafe for pedestrians." (Emphasis added). Moreover, the complaint also alleged, *inter alia*, that, "[d]efendants Sloop and Barakzai . . . *in their official capacities*, and as agents and employees of [defendant Charlotte], failed to implement an LPI *after being placed on notice of the danger to pedestrians that the signal timing caused*" and "failed to separate the pedestrian phase from the traffic phase of the signal timing *after being placed on notice that the intersection was dangerous for pedestrians* . . . ." (Emphases added).

Plaintiff alleged that, "[a]s a direct, proximate, and reasonably foreseeable result of the negligence of [defendant Charlotte], by and through its agents and employees . . . [Ms. Bosworth-Jones] suffered severe, lifelong, and debilitating injuries." Finally, in the complaint, plaintiff alleged that defendant Charlotte "has waived any and all such governmental and/or sovereign immunity . . . by the act of purchasing (or otherwise procuring, obtaining, or having in place) liability insurance . . . ."[1]

Indeed, on 31 October 2020, defendant Charlotte was warned by a local resident that "individuals and families are put in danger when crossing the street [at issue in the present case] while cars are turning into the same lane" and requested "the pedestrian [crosswalk] timing to be adjusted to run when cars are not driving through [the] intersection." As plaintiff notes in his appellate brief, defendant Charlotte "chose to leave the crossing unsafe" while "[t]he fix to correct the danger was simple and *could be quickly implemented with little to no cost*." (Emphasis added).

Plaintiff's theory of negligence in the present case was not that defendant Charlotte failed to comply with the MUTCD, but that defendant Charlotte had a duty to exercise ordinary care, and defendant Charlotte breached that duty by "fail[ing] to implement an LPI *after being placed on notice of the danger to pedestrians that the signal timing caused*" and by "fail[ing] to separate the pedestrian phase from the traffic phase of the signal timing *after being placed on notice that the intersection was dangerous for pedestrians* . . . ." (Emphases added).

The majority then asserts that "[e]ven if [d]efendant [Charlotte] owed a duty to [p]laintiff, neither the [i]ntersection design, the resident's complaint, nor [d]efendant [Charlotte]'s response to the resident's complaint were the proximate cause of [Ms. Bosworth-Jones]'s injuries." Moreover, the majority claims that "[a]lthough [d]efendant [Charlotte]

1. I also note that any reference to the MUTCD is entirely absent from plaintiff's complaint.

received a complaint about 'walk timing' at the [i]ntersection, this single complaint does not reasonably indicate 'consequences of a generally injurious nature' were to be expected, meaning that [p]laintiff failed to prove Bosworth-Jones'[s] injur[ies] were foreseeable." Finally, they assert that defendant Charlotte "did not delay in installing the LPI, *much less unreasonably delay in doing so*."

To support their contentions that there was no foreseeability (and in turn, no proximate cause), the majority claims that, "for ten years prior to the date of the accident, there had been only two left turn, motor-vehicle related accidents [at the intersection, and] [t]here were no pedestrian accidents during that time, nor between the time the crosswalk was completed in mid-2020 and the accident in this case." In reality, the crosswalk project did not begin until 2017, and the *design* for the crosswalk at the intersection, which plaintiff contends in his complaint, "created a trap for pedestrians using the crosswalk exactly as they were directed[,]" was not completed until March 2019. The crosswalk itself *was not completed until* "July 2020."

As the majority notes, for ten years prior to the accident "[t]here were no pedestrian accidents [at the intersection,]" and then, *less than a year after* the crosswalk was completed in mid-2020, Ms. Bosworth-Jones was struck by a vehicle while using the crosswalk. The difference between the timeframe where there *were no* pedestrian accidents at the intersection and when there *was* a pedestrian accident at the intersection: *the crosswalk at the intersection*. If anything, the fact that there were no pedestrian accidents at the intersection for *ten years*, and then *seven months* after the crosswalk was completed, Ms. Bosworth-Jones was struck by a vehicle—*is further evidence* of the foreseeability of the harm in this case—that a pedestrian, using the newly created crosswalk *as it was designed*, would be struck and seriously injured by a vehicle entering the intersection due to the crosswalk's timing mechanism.

For *seven* of the *ten* months after the crosswalk was completed, from 31 October 2020 until 9 May 2021 when the accident occurred, defendant Charlotte was on notice that "[i]ndividuals and families are put in danger when crossing the street while cars are turning into the same lane" and that a citizen had requested that the "*crosswalk timing be adjusted* to run when cars are not driving through [the] intersection[,]" (emphasis added). It was at this point, "[u]pon notice of defects and dangers in the streets[,]" *Jones*, 124 N.C. at 676, that defendant Charlotte's duty to correct the dangerous condition arose, but defendant Charlotte failed to correct the dangerous condition by adjusting the

crosswalk timing. Instead, they installed a no right turn on red sign that did not address the "crosswalk timing" noted in the complaint.[2]

Finally, the majority asserts on several occasions that defendant Charlotte's "[m]ere delay in meeting a recognized need does not, without more, establish that the delay was unreasonable[,]" that defendant Charlotte "did not delay in installing an LPI, much less unreasonably delay in doing so[,]" and that plaintiff "has not presented evidence 'from which the jury could infer that the delay was unreasonable.' " However, "[i]n this jurisdiction, questions of proximate cause and insulating negligence *are for the jury except in cases so clear* there can be no two opinions among men of fair minds whether the intervening act and the resultant injury were such that the author of *the original wrong* could reasonably have expected them to occur as a result of his own negligent act." *Lonon*, 103 N.C. App. at 695–96, 407 S.E.2d at 282 (internal quotation marks, ellipsis, and citation omitted) (emphases added).

This is not a case so clear, and determinations about the *reasonableness* of defendant Charlotte's actions are not appropriate for this Court at the *summary judgment stage* of a negligence action.[3] Plaintiff did not just assert that defendant had simply delayed in meeting a recognized need, he also asserted that defendant Charlotte's response to the complaint, by installing a no turn on red signal, did not address the harm identified by the complaint: *crosswalk timing*.

Upon my review, viewing the evidence "in [the] light most favorable to the non-moving party[,]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 575, 576, I would conclude that plaintiff's allegation that defendant Charlotte negligently "failed to separate the pedestrian phase from the traffic phase of the signal timing after being placed on notice that the intersection was dangerous for pedestrians[,]" raised a question of material fact: whether defendant Charlotte was *unreasonable* in its delay in correcting the dangerous conditions in the roadway that were

---

2. It should also be noted that "[n]ine days after the collision, [defendant Charlotte] installed a five-second LPI at the intersection."

3. Moreover, this "mere delay" of seven months resulted in "broken bones, fractured ribs, severe lacerations, a dislocated shoulder, and, most significantly, a permanent, traumatic, and debilitating brain injury[,]" to an individual who was utilizing the crosswalk, created just *seven months earlier*, *exactly how she was supposed to*. The delay in correcting the dangerous condition here was not *per se* reasonable simply because of the fact that it constituted less time than the delay in *Talian*. Reasonableness is a question of fact for the jury.

created by the crosswalk, after being notified *seven months earlier* that the crosswalk was dangerous to pedestrians.

"Summary judgment is an extreme remedy and should only be awarded where the truth is quite clear[;] . . . [it] is rarely appropriate in negligence cases[,]" *Nick v. Baker*, 125 N.C. App. 568, 570–71, 481 S.E.2d 412, 414 (1997), and I would posit that the question properly posed by the record is—between the determination that there were dangerous conditions in the roadway created by the crosswalk and the accident—whether more than a reasonable time went by without correcting the dangerous condition. "In my opinion[,] the question is one of fact that should have [survived summary judgment]." *Talian*, 98 N.C App. at 289, 390 S.E.2d at 742 (Phillips, J., dissenting). For these reasons, I would conclude that the trial court erred in granting summary judgment to defendant Charlotte, and I respectfully dissent.

LUIS ORTEZ AND THERESA BEDDARD ESTES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DARREN DRAKE ESTES, PLAINTIFFS
v.
PENN NATIONAL SECURITY INURANCE COMPANY, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY AND PAMELA A. TOKARZ, DEFENDANTS

No. COA24-169

Filed 17 December 2024

1. Insurance—breach of the duty to defend—foreclosed by policy exclusions—Pleasant claim—inapplicable to merely negligent acts

Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had failed to defend plaintiff in the wrongful death suit, the trial court erred in granting partial judgment on the pleadings in favor of plaintiff. A comparison of the allegations in plaintiff's pleading—asserting a claim under *Pleasant v. Johnson*, 312 N.C. 710 (1985)—with the provisions of the insurance policy—which covered as an "insured" "anyone . . . using with [employer's] permission a covered 'auto,' " but excluded

coverage for bodily injury to a "fellow employee" of an "insured"—negated any duty by defendant to defend plaintiff against liability arising from the wrongful death of plaintiff's co-worker, his "fellow employee." Moreover, the holding of *Pleasant* (that "the Workers' Compensation Act did not shield a co-employee from common law liability for willful, wanton and reckless acts") was inapplicable in a wrongful death action grounded in negligence.

2. Insurance—claim for breach of duty to settle—Financial Responsibility Act—only a right, not a duty, for an insurance carrier to settle claims

Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's widow and estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff, along with the co-worker's widow and estate, then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had breached its duty by failing to settle an intentional tort claim, the trial court erred in finding such a breach by defendant because the Financial Responsibility Act (N.C.G.S. § 20-279.21) provided an insurance carrier with the right to settle claims, but no duty to do so. Moreover, defendant exercised its right to seek a settlement, but the estate rejected defendant's offer.

3. Unfair Trade Practices—insurance—right to seek a settlement—no duty to settle—failure to act in good faith not shown

Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's widow and estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff, along with the co-worker's widow and estate, then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had breached its duty by failing to settle an intentional tort claim, the trial court erred in finding that defendant violated the Unfair Trade Practices Act (N.C.G.S. § 75-1.1 et seq.) because the Financial Responsibility Act (N.C.G.S. § 20-279.21) provided an insurance carrier with the right to settle claims, but no duty to do so. Moreover, defendant exercised its right to seek a settlement, but the co-worker's widow and estate rejected defendant's counteroffer requesting a one-day extension for delivery of

payment—a circumstance insufficient to demonstrate a failure to act in good faith on defendant's part.

Judge THOMPSON concurring in result only.

Appeal by defendant from judgment entered 19 July 2019 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 14 August 2024.

White & Stradley, PLLC, by J. David Stradley and Nicole D. McNamara, for the plaintiff-appellee Ortez.

Abrams & Abrams, PA, by Noah B. Abrams, for the plaintiff-appellee Estes.

Kellum Law Firm, by John T. Briggs, for the plaintiff-appellee Estes.

Goldberg Segalla, LLP, by David L. Brown and John I. Malone, Jr., for the defendant-appellant.

TYSON, Judge.

Penn National Security Insurance Company ("Penn National") appeals from the trial court's order granting Luis Ortez's ("Ortez") motion for Rule 12(c) judgment on the pleadings. We reverse.

I. Background

Penn National issued a commercial auto insurance policy ("policy"), No. AX9 0615893 to Kitchen and Lighting Designs Inc. ("employer") on 1 August 2017, for a policy period extending from 1 August 2017 to 1 August 2018. The policy provided, *inter alia*, coverage as an "insured" for "[a]nyone else while using with [employer's] permission a covered 'auto' you own, hire or borrow . . . ." The policy also contained an exclusion as an "insured", stating, "This insurance does not apply to any of the following . . . fellow employee." One week later, on 8 August 2017, Plaintiff Luis Ortez was driving the employer's insured vehicle, when due to Ortez's distracted driving, he was involved in an accident, which resulted in the death of fellow employee, Darren Drake Estes, a passenger in the employer's insured vehicle.

Penn National was notified of the accident by their employer, Kitchen & Lighting Designs, who informed Penn National it employed

both Ortez and Estes. Employer also notified Penn National it had submitted Ortez's and Estes' claims to its workers' compensation carrier.

On 5 March 2018, Estes' wife, Theresa Beddard Estes, individually and as Administratrix of the Estate of Darren Drake Estes, filed a wrongful death suit against Passport Transportations, Inc., their driver, Zemo Fissaha, and Luis Ortez, in Craven County Superior Court ("Wrongful Death Lawsuit"). The Estes and Estes Estate suit asserted five claims: (1) negligent, grossly negligent, willful, wanton and reckless conduct of Fissaha; (2) punitive damages against Fissaha; (3) vicarious liability of Passport Transportation; (4) independent negligent and wanton conduct of Passport Transportation; and (5) reckless, willful, and wanton conduct of Ortez.

The Wrongful Death Lawsuit did not explicitly allege Ortez and Estes were co-employees, but baldly asserted *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985) as the basis for the claim. Kitchen and Lighting Designs Inc. was not named as a party defendant. Ortez made no demands on his employer nor Penn National to defend or indemnify him against the Estes Estate's claims asserted against him.

On 4 March 2019, the Craven County Superior Court entered partial summary judgment on liability against Ortez. On 27 March 2019, the Estes Estate served a motion for summary judgment on damages from both Ortez and Penn National, along with a notice of hearing setting the motion hearing for 8 April 2019. The Estes Estate served an amended notice of hearing on 4 April 2019, noting its summary judgment motion would be heard on 9 April 2019 at 9:30 a.m. On 5 April 2019, the Estes Estate transmitted a settlement offer to Penn National, offering to execute a covenant not to enforce judgment in favor of Ortez in exchange for delivery of a check in the amount of $30,000 to the office of counsel for the Estate before 3:00 p.m. on 8 April 2019, the day before the amended summary judgment hearing. Penn National agreed to the settlement but asserted it could not deliver the check by the deadline. Counsel for the Estes Estate withdrew the settlement.

The Estes Estate's summary judgment motion was heard on 9 April 2019. Penn National engaged an attorney to enter a special appearance on behalf of Penn National, seeking to stay the Wrongful Death Lawsuit. The trial court denied the motion to stay. The court heard the motion for summary judgment and entered judgment against Ortez in the amount of $9,500,000 plus interest and costs.

Ortez and the Estes Estate filed a complaint alleging Penn National had breached its duty to defend by failing "to defend a wrongful death

claim against [Ortez], and as a result, a judgment of $9,500,000.00 was entered against [Ortez]." Ortez and the Estes Estate also alleged Penn National had breached its duty to settle, and that they had committed unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 58-63-15(11) and N.C. Gen. Stat. § 75-1.1 *et seq.* ("Unfair and Deceptive Trade Practices Act") (2023).

Ortez filed a motion for judgment on the pleadings as to his claims for breach of the duty to defend, breach of the duty to settle, and violation of the Unfair and Deceptive Trade Practices Act. The trial court granted Ortez's motion for judgment on the pleadings and entered a judgment entitling him "to recover the sum of $9,649,808.27 from [Penn National] as compensatory damages for breach of the duty to defend, breach of the duty to settle, and unfair and deceptive trade practices" by order entered 19 July 2019. The trial court then trebled the damages and entered judgment in the amount of $28,949,424.80 against Penn National for violating the North Carolina Unfair and Deceptive Trade Practices Act. Penn National appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Issues

Penn National contends the trial court erred in concluding: (1) it had a duty to defend; (2) it had breached its duty to defend; (3) it had breached its duty to settle; (4) Ortez was entitled to a judgment as a matter of law on his claim for unfair and deceptive trade practices; and (5) erred in entering a $28.9 million judgment against defendant.

IV. Judgment on the Pleadings

A. Standard of Review

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal citations and quotations omitted). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Id.* (citations omitted).

A trial court's grant of a motion for judgment on the pleadings is reviewed *de novo* by this Court. *Toomer v. Branch Banking & Tr. Co.*,

171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. rev. denied*, 360 N.C. 78, 623 S.E.2d 263 (2005).

B. Analysis

1. Duty to Defend

[1] Penn National contends the trial court erred in granting Ortez's partial Rule 12(c) motion for judgment on the pleadings and asserts a comparison of the policy language and exclusions with the allegations in the pleading negates any duty to defend. We agree.

"An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings . . . . [w]hen the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). Our Supreme Court held long ago an insurer's duty to defend "becomes absolute when the allegations of the complaint bring the claim within the coverage of the policy." *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E.2d 313, 318 (1968).

More recently, our Supreme Court re-affirmed: "In determining whether an insurer has a duty to defend, the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010). Referred to as the "comparison test," the plain language of the insurance policy is reviewed and compared with the plain language of the facts alleged and the pleadings before the court. *Id.*

The allegations in the complaint, as compared with the exclusions in the policy does not require Penn National to defend Ortez. The Penn National Policy states:

> SECTION II – LIABILITY COVERAGE
>
> A. Coverage We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto". * * * We will have the right and duty to defend any "insured" against a "suit" asking for such damages … *However, we will have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" … to which this*

> *insurance does not apply*. We may investigate and settle any claim or "suit" as we consider appropriate.

(emphasis supplied).

This policy provision clearly provides coverage, to an "insured", but also includes unambiguous exclusions:

> B. Exclusions
>
> This insurance does not apply to any of the following:
>
> . . .
>
> 5. Fellow Employee
>
> "Bodily injury" to:
>
> a. Any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business; or
>
> b. The spouse, child, parent, brother or sister of that fellow "employee" as a consequence of Paragraph a. above.

The complaint alleged "Defendant Luis J. Ortez is liable to the Plaintiff based on the legal precedent of *Pleasant v. Johnson*, and subsequent legal authority in North Carolina recognizing that legal duty and that legal right of recovery." The opinion of *Pleasant v. Johnson* provides, ". . . the North Carolina Workers' Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence. An injured worker in such situations may receive benefits under the Act and also maintain a common law action against the co-employee." *Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250.

After our Supreme Court's decision, similar claims asserted between co-workers, not based upon negligence, have been referred to as *Pleasant* claims in this Court's decisions. *See Est. of Baker v. Reinhardt*, 288 N.C. App. 529, 537, 887 S.E.2d 437, 444 (2023); *Blue v. Mountaire Farms, Inc.*, 247 N.C. App. 489, 505, 786 S.E.2d 393, 403 (2016); *Greene v. Barrick*, 198 N.C. App. 647, 650, 680 S.E.2d 727, 730 (2009).

Using the comparison test to compare and assess the plain language of the policy and the allegations in the complaint, it is clear Penn National had no duty to defend Ortez in the Complaint as written. The only claim Estes and the Estes Estate asserted against fellow employee Ortez in the Wrongful Death Lawsuit was the *Pleasant* claim, which

could only be asserted by one employee against another employee for injuries resulting from intentional acts. These acts fall squarely within *Pleasant*'s exception from the worker's compensation exclusivity of negligence claims and the express and unambiguous policy exclusions stated in Penn National's policy. *Id.*

Plaintiffs argue *Pleasant*, like many landmark cases, embodies more than a single legal proposition. However, *Pleasant* has one clear and distinct holding that has become well-recognized in North Carolina law. *Id.* In cases involving actions asserted between fellow or co-employees, "the Workers' Compensation Act does not shield *a co-employee* from common law liability for willful, wanton and reckless negligence." *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249 (emphasis supplied). A "*Pleasant* claim" addresses matters relating to the scope and limits of liability among co-workers, rather than to implicate their employer in the litigation involving international torts or "willful, wanton and reckless" acts. *Pleasant*'s central holding is unambiguous and occupies a limited, unique, and specific claim between fellow employees for alleged intentional torts. *Id.*

Employer's insurance carriers are allowed to exclude fellow or co-employee intentional torts from coverage in their policies. Worker's Compensation insurance generally covers an employer's liability in negligence actions by and/or between co-employees at work. "[T]he plain language of G.S. 20-279.21(e) . . . allows an exemption from policy coverage of an employee only insofar as there are benefits available to that employee pursuant to North Carolina's Workers' Compensation Act." *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 639, 313 S.E.2d 856, 861 (1984). The North Carolina Workers' Compensation Act provides the sole remedy against the employer for an employee who has been injured by the ordinary negligence of a co-employee. *Id.*; *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882-83 (2000) (The Workers' Compensation Act is "the exclusive remedy in the event of [an] employee's injury by accident in connection with [their] employment.").

The Estes Estate's allegations against Ortez allege "reckless, willful, and wanton conduct" between co-workers, not simple negligence. Employer is not a party to this litigation and no allegations implicate or suggest their employer's complicity or directing Ortez's alleged "reckless, willful, and wanton conduct" toward Estes.

Workers' compensation insurance is designed to cover an employer's liability for an employee's accidental or negligent acts arising out of acts in the course and scope of employment occurring in the workplace.

Any conduct outside of that scope—such as intentional or grossly reckless acts—is excluded from coverage under both the Workers' Compensation Act and Penn National's express Fellow Employee exclusion. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250. This statute and policy exclusion excludes coverage for employee behaviors arising outside of ordinary negligence, encompassing alleged intentional, reckless, or willful actions, which are beyond those reasonably covered in a typical workplace negligence incident. *Id.*

Under North Carolina law, particularly as clarified in *Pleasant v. Johnson*, workers' compensation indemnity protections do not extend to cases involving willful, wanton, or reckless conduct by a co-employee. *Id.* at 716, 325 S.E.2d at 249. This precedent leaves room for assertion of personal liability for intentional acts outside of the Workers' Compensation Act's exclusivity. Ortez can be held personally liable for any intentional harm and damage he allegedly caused to Estes and the Estes Estate. *Id.* Fellow or co-employee exclusions allow employer's insurers to exclude covering claims based upon an employee's gross misconduct or intentional harm, which acts are fundamentally different from the unintentional accidents or minor negligence actions workers' compensation policies address. *Id.*; *South Carolina Ins. Co.*, 67 N.C. App. at 639, 313 S.E.2d at 861.

Requiring the insurer to defend Ortez would defeat the purpose of the Fellow Employee exclusion, which exists to shield the employer and insurer from being required to cover claims rooted in extreme recklessness or willful misconduct, conduct which aligns more closely with intentional harm, than with accidental injury. Courts generally interpret these exclusions to protect employers and their carriers from liability for egregious conduct not arising within the scope of employment-related negligence risk coverage. *Id.*

The holding in *Pleasant* and the purpose behind the Fellow Employee policy exclusion together show the insurer has no duty to defend or indemnify Ortez, particularly where Ortez never demanded his employer or Penn National to provide him with defense counsel. This exclusion is intended to limit coverage strictly to accidental or negligent conduct and not to encompass allegations of extreme or intentional wrongdoing between co-employees. As such, the Estes Estate's assertions of Ortez's alleged reckless and willful conduct are plainly and unambiguously excluded from coverage under the Fellow Employee exclusion in Penn National policy and falls outside the insurer's duty to defend. *Id.*

2. Duty to Settle

[2] The Penn National policy and the statutes provides insurance carriers with the right to settle under indemnity coverage, not a duty to settle. This right is conferred by the Financial Responsibility Act in N.C. Gen. Stat. § 20-279.21(f)(3) (2023) ("The insurance carrier shall have the right to settle any claim covered by the policy …").

When exercising its right to settle, the insurer "owes a duty to its insured to act deligently [sic] and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Alford v. Textile Ins. Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 13 (1958).

When Penn National received an offer to settle from the Estes Estate on Friday afternoon, the terms of the settlement required a check for $30,000 to be delivered to its attorney's offices on the following Monday by 3:00 p.m. Penn National replied by agreeing to the settlement and to deliver full payment the following day on Tuesday, which Plaintiffs denied, and withdrew their offer. Asking for a one-day extension to deliver payment to a demanded less-than-one-business-day turnaround does not support a finding and conclusion Penn National had failed to act in good faith to settle. *Id.* N.C. Gen. Stat. § 20-279.21(f)(3).

The trial court erred in finding Penn National had breached its duty to settle the intentional tort claim Estes and the Estes Estate had asserted against Ortez. Penn National had no duty to settle, only the right to seek settlement, which Penn National chose to exercise when it offered to settle for a $30,000 payment within two business days to the Estes Estate. The trial court's ruling on this issue is erroneous, prejudicial, and reversed.

3. Finding Penn National Violated the Unfair and Deceptive Trade Practices Act

[3] As noted above, the express policy language and the statute allows insurance companies the right to seek a settlement, not a duty to settle. N.C. Gen. Stat. § 20-279.21(f)(3) ("The insurance carrier shall have the right to settle any claim covered by the policy …").

When exercising its right to settle, the insurer "owes a duty to its insured to act deligently [sic] and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Alford v. Textile Ins. Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 13 (1958). When Penn National received an offer to settle from Estes and the Estes Estate on Friday afternoon, the terms of the settlement

included a check for $30,000 to be delivered to its attorney's offices on the following Monday by 3:00 p.m. Penn National replied asking to deliver on Tuesday, which was denied, and Plaintiffs withdrew their offer. Requesting a one-day extension to a demanded one business day turnaround does not support the finding Penn National had failed to act in good faith to settle to trigger treble damages and attorney fees liability under the Unfair and Deceptive Trade Practices Act. N.C. Gen. Stat. § 75-1.1.

The trial court erred in finding that Penn National had breached its duty to settle the claims. No duty to settle arose, only the right to seek settlement, which Penn National tried to exercise when it offered to settle for $30,000 with payment to be made within two business days thereafter in exchange for a covenant not to enforce judgment against Ortez.

The trial court erred in concluding Penn National had failed to act in good faith or committed unfair or deceptive trade practices to trigger treble damages and attorney fees liability under the Unfair and Deceptive Trade Practices Act. N.C. Gen. Stat. § 75-1.1 *et seq*. The trial court's ruling on this issue is erroneous, prejudicial, and reversed.

V. Conclusion

The trial court erred in granting Ortez's partial motion for a Rule 12(c) judgment on the pleadings. Under the comparison tests of the policy to the allegations and pleadings, Plaintiff failed to allege Penn National had breached its duty to defend or its duty to settle.

Plaintiff also failed to show the employer or Penn National had violated the Unfair and Deceptive Trade Practices Act. *Id*. The trial court erred in trebling the award of damages pursuant to N.C. Gen. Stat. § 75-1.1. The order of the trial court is reversed. *It is so ordered*.

REVERSED.

Judge STADING concurs.

Judge THOMPSON concurs in result only by separate opinion.

THOMPSON, Judge, concurring in result only.

Because I disagree with the majority's determination that "it is clear that [defendant] Penn National had no duty to defend [plaintiff] Ortez in the complaint as written[,]" I concur in result only.

A. Duty to defend

"An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings . . . . [w]hen the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). As our Supreme Court held long ago, an insurer's duty to defend "becomes absolute *when the allegations of the complaint* bring the claim within the coverage of the policy." *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E.2d 313, 318 (1968) (emphasis added).

"In determining whether an insurer has a duty to defend, the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010). "If the insurance policy provides coverage for the facts *as alleged*, then the insurer has a duty to defend." *Id.* (emphasis added). "An insurer is excused from its duty to defend only if the facts are *not even arguably* covered by the policy." *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 277–78, 708 S.E.2d 138, 144 (2011) (internal quotation marks and citation omitted) (emphasis added).

Defendant argues that the "fellow employee" provision of the policy nullified its duty to defend plaintiff Ortez in the underlying wrongful death action, and the majority contends that

> [t]he only claim Estes and the Estes Estate asserted against fellow employee [plaintiff] Ortez in the Wrongful Death Lawsuit was the *Pleasant* claim, [under *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985)] which could only be asserted by one employee against another for employee injuries resulting from intentional acts. These acts fall squarely within Pleasant's exception from the worker's compensation exclusivity of negligence claims and the express and unambiguous policy exclusions stated in [defendant] Penn National's policy.

After my review of the *allegations of the complaint*—the guidepost for determining whether an insurer has a duty to defend, per our Supreme Court's longstanding precedent—I would conclude that the trial court did err in determining that defendant had a duty to defend plaintiff Ortez in the underlying wrongful death action. Although there were no allegations *in the complaint* that plaintiff Ortez was a "fellow employee" of decedent Drake Estes at the time of the accident, as the

majority notes, the initial complaint alleged that plaintiff "Ortez is liable . . . based on the legal precedent of *Pleasant v. Johnson*, and subsequent legal authority in North Carolina recognizing that legal duty and that legal right of recovery." Although "[a]n insurer is excused from its duty to defend only if the facts are *not even arguably* covered by the policy[,]" *Kubit*, 210 N.C. App. at 277–78, 708 S.E.2d at 144 (internal quotation marks and citation omitted) (emphasis added), I would conclude that this reference to *Pleasant v. Johnson*[1] did suffice to bring the allegations of the complaint outside of the coverage of the policy, thereby absolving defendant Penn National of their duty to defend. I do not agree that this lone reference in the complaint, made it "*clear* that [defendant] Penn National had no duty to defend [plaintiff] Ortez in the complaint as written[,]" (emphasis added), and seek further clarity from our Supreme Court on whether this allegation in the complaint sufficed to absolve defendant Penn National of their duty to defend for purposes of the "comparison test" established in *Strickland*.

B. Duty to settle

Finally, the majority contends that "the statutes provide[ ] insurance carriers with the right to settle under indemnity coverage, not a duty to settle." This is not correct, as our courts have *consistently held* that insurance companies owe a duty to their insured to act diligently and in good faith in reaching settlements.

"The law imposes on the insurer the duty of carrying out in good faith its contract of insurance." *Alford v. Textile Ins. Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 12 (1958). "It is a matter of common knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims." *Id.* "It is for this reason that courts have *consistently* held that an insurer *owes a duty* to its insured to act diligently and in good faith in *effecting settlements* within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Id.* (emphasis added). "Liability has been repeatedly imposed upon insurance companies because of their failure to act diligently and in good faith in effectuating settlements with claimants." *Id.*

Indeed, our Legislature has enacted N.C. Gen. Stat. § 58-63-15, which defines "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance" as a matter of law, and provides, in

---

1. In *Pleasant*, our Supreme Court held that "the Worker's Compensation Act does not shield *a co-employee* from common law liability for . . . negligence." *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249 (emphasis added).

pertinent part, that one commits an "Unfair Claim Settlement Practice[ ]" by "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear . . . ." N.C. Gen. Stat. § 58-63-15(11)(f) (2023).

I agree with the majority that defendant Penn National did not have a duty to defend, nor a duty to settle, but write separately to note that insurance companies in North Carolina *do* "*owe*[ ] *a duty* to their insured to act diligently and in good faith in *effecting settlements* within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Id.* (emphasis added). For the aforementioned reasons, I concur in result only.

ADAM SAAD, PLAINTIFF
v.
TOWN OF SURF CITY, DEFENDANT

No. COA24-10

Filed 17 December 2024

1. Negligence—gross negligence—wanton conduct—sufficiency of evidence—summary judgment

In a negligence action filed against a town after an accident on a public roadway, where plaintiff was launched to the ground from his electric scooter after driving over a depressed, back-filled portion of the bicycle lane, which had been left unpaved and unmarked following excavation work performed by town employees when installing a sewer line, the trial court properly granted summary judgment to the town on plaintiff's gross negligence claim. A showing of gross negligence requires proof of wanton conduct; here, even assuming that the town had not provided sufficient warnings to cyclists of the backfilled area, plaintiff failed to forecast any evidence indicating that the town had acted with a bad purpose or reckless indifference to plaintiff's rights.

2. Negligence—ordinary—per se—summary judgment—genuine issues of material fact

In a negligence action filed against a town after an accident on a public roadway, where plaintiff was launched to the ground from his electric scooter after driving over a depressed, back-filled portion of the bicycle lane, which had been left unpaved and unmarked

following excavation work performed by town employees when installing a sewer line, the trial court erred in granting summary judgment in the town's favor on plaintiff's claims of: (1) ordinary negligence, where there was a genuine issue of material fact regarding whether the town breached its duty of care given that it knew about the backfilled area but still left it unmarked and unlit; and (2) negligence per se, where there was a genuine issue of material fact regarding whether the town violated a public safety ordinance requiring warnings for excavation sites. Further, the town's arguments on appeal—that plaintiff was contributorily negligent, that the trial court lacked jurisdiction over plaintiffs' claims, and that the town was protected by governmental immunity—lacked merit.

Appeal by plaintiff from order entered 3 July 2023 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 25 September 2024.

Everett Gaskins Hancock Tuttle Hash LLP, by Jason N. Tuttle and Michael J. Byrne, for plaintiff-appellant.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Norwood P. Blanchard, III, and Clay A. Collier for defendant-appellee.

DILLON, Chief Judge.

Plaintiff Adam Saad brought this action alleging he suffered damages when he wrecked his electric scooter while traveling over an area of the bicycle lane of a public roadway, said area being temporarily unpaved due to recent work performed by Defendant Town of Surf City. Mr. Saad appeals the trial court's grant of the Town's summary judgment motion on his claims for negligence and gross negligence.

I. 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.' " *Cullen v. Logan Devs., Inc.*, 386 N.C. 373, 377 (2024) (quoting N.C.G.S. § 1A-1, Rule 56(c)). We review an appeal from summary judgment *de novo*. *Value Health Sols., Inc., v. Pharm. Rsch. Assocs., Inc.*, 385 N.C. 250, 267 (2023). "In review of the motion for summary judgment, [we] must view the evidence in the light most favorable to the non-moving

party." *Id.* Accordingly, we review the forecasted evidence in the light most favorable to Mr. Saad, as the non-moving party.

II. Background

The forecasted evidence in the record at the summary judgment hearing, when viewed in the light most favorable to Mr. Saad, shows as follows:

In July 2019, a utilities company (hired by the Town) excavated a section of pavement, including the bicycle lane, on State Highway 210 to install sewer access for a house under construction in the Town. A few days later, Town employees excavated the same area to install a water line for the house under construction. When they completed their installation, the Town employees backfilled the excavation site with dirt and stone.

At approximately 10:45 pm on 27 July 2019, Mr. Saad was riding an electric scooter in the bicycle lane when his scooter struck the backfilled site, launching him forward into the ground and causing serious injuries. He was riding at "full throttle," where the specifications for that vehicle show a maximum speed of fifteen-and-a-half miles per hour.

It is undisputed that the backfilled site had not yet been repaved at the time of Mr. Saad's accident.

According to Mr. Saad's complaint, the backfilled site was entirely unmarked and uncovered. That is, there were no cones, barricades, signs or lights to warn cyclists of the unpaved backfilled site at the time of Mr. Saad's accident.

The backfilled site was, at most, "a couple of" inches below the surrounding asphalt surface.[1]

Mr. Saad filed his complaint against the Town, alleging (1) negligence *per se* and (2) negligence and gross negligence.[2] The Town moved

---

1. We note that, in his verified complaint, Mr. Saad alleged that "upon information and belief" the backfilled area was six to twelve inches below the surrounding asphalt. Our Court, though, has consistently held that it is inappropriate for a trial court at summary judgment to give weight to any allegation made upon information and belief. *See, e.g.*, *Asheville Sports Props., LLC v. City of Asheville*, 199 N.C. App. 341, 345 (2009) (noting that statements made "upon information and belief" in an affidavit or verified complaint "do not comply with the 'personal knowledge' requirement" required for affidavits at summary judgment). Therefore, in recounting the facts, we do not give weight to any allegation in Mr. Saad's complaint made "upon information and belief."

2. Mr. Saad also brought claims against the construction company building the house. However, Mr. Saad has voluntarily dismissed those claims without prejudice.

for summary judgment. Following a hearing, the trial court found there was no genuine issue of material fact and granted summary judgment in favor of the Town. Mr. Saad appeals.

III. Analysis

Mr. Saad has sued the Town for negligence (under theories of ordinary negligence and negligence *per se*) and gross negligence.

[1] We first address Mr. Saad's gross negligence claim. "[O]rdinary negligence involves inadvertence or carelessness," whereas gross negligence involves wanton conduct where a defendant "acted with a bad purpose or with reckless indifference to [a] plaintiff's rights." *Cullen*, 386 N.C. at 382.

Based on our review of the record, we conclude that Mr. Saad has not forecasted evidence to put at issue whether the Town was *grossly* negligent. Assuming the Town failed to provide a warning of a two-inch depression in the bicycle lane caused by the backfilled area, Mr. Saad has not forecasted evidence from which a jury could conclude that the Town acted with a bad purpose or with reckless indifference. We, therefore, affirm the trial court's grant of summary judgment to the Town on Mr. Saad's gross negligence claim.

[2] We now turn to Mr. Saad's claims for negligence.

"The common law claim of negligence has three elements: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach." *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450 (2022).

We have recognized that municipalities may be subject to negligence claims for defects in a travel way, as follows:

> Municipalities are responsible only for negligent breach of duty, which is made out by showing that (1) a defect existed, (2) an injury was caused thereby, (3) the [municipality] officers knew, or should have known from ordinary supervision, the existence of the defect, and (4) that the character of the defect was such that injury to travelers therefrom might reasonably be anticipated.

Desmond v. City of Charlotte, 142 N.C. App. 590, 592–93 (2001) (citation and internal marks omitted). "It is not every defect in a street or sidewalk which will render a city liable to a person who falls as a result thereof. Trivial defects, which are not naturally dangerous, will not

make the city liable for injuries occasioned thereby." *Mosseller v. City of Asheville*, 267 N.C. 104, 109 (1966).

As pointed out by the Town in its brief, it has been held that a change in sidewalk elevation is a trivial defect if the difference is only a couple of inches. *See*, *e.g.*, *Desmond*, 142 N.C. App. at 593 (at least one-half inch sidewalk depression); *Joyce v. City of High Point*, 30 N.C. App. 346, 348 (1976) (one-to-two-inch sidewalk irregularity); *Bagwell v. Town of Brevard*, 256 N.C. 465, 466 (1962) (approximately one-inch change in sidewalk elevation).

Our Supreme Court has explained that an inconsistency in a walkway may, but does not typically, arise to the level of negligence on the part of the municipality:

> The existence of a hole or depression, or a material inequality or unevenness, or a gap in a sidewalk or crosswalk may constitute such negligence on the part of a municipality as will render it liable to pedestrians for injuries caused thereby.
>
> But a municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to mere convenient travel, and slight inequalities or depressions or differences in grade, or a slight deviation from the original level of a walk due to the action of frost in the winter or spring, and other immaterial obstructions, or trivial defects which are not naturally dangerous, will not make a municipality liable for injuries occasioned thereby.
>
> The fact that the surface of a walk may have become uneven from use, or that bricks therein may have become loose or displaced by the action of the elements, so that persons are liable to stumble or be otherwise inconvenienced in passing, does not necessarily involve the municipality in liability, so long as the defect can be readily discovered and easily avoided by persons exercising due care, or provided the defect be of such a nature as not of itself to be dangerous to persons so using the walk.

Houston v. City of Monroe, 213 N.C. 788, 790–91 (1938) (concluding demurrer was proper where crosswalk depression was up to two-and-a-half inches).

However, our Supreme Court has also held that *it was a jury question* whether a city was liable for a pedestrian's injury from falling due to a defect in a sidewalk where the city knew of the defect and the injured pedestrian had no notice of the defect. *Bell v. City of Raleigh*, 212 N.C. 518, 519–20 (1937).

The forecasted evidence here, taken in the light most favorable to Mr. Saad, shows that the Town knew of the "backfilled" condition of the section of the bicycle lane where Mr. Saad had his accident. It is uncontested that the Town's own employees performed the work to backfill that section.

Further, there is forecasted evidence from Mr. Saad's verified complaint that on the night of Mr. Saad's accident there was nothing in front of the section warning oncoming cyclists of the backfilled area. Indeed, the facts here involve a lane of travel for bicyclists, rather than a lane of travel for pedestrians, as was at issue in the cases cited above. Because a cyclist travels faster than a pedestrian, it is reasonable that a cyclist, especially one riding at night, would have less opportunity to discern an inconsistency in the lane of travel than a pedestrian.

Mr. Saad argues the Town was negligent based on a "negligence *per se*" theory, contending the Town violated one of its safety ordinances, specifically Section 16-47, which requires that one who has excavated a lane of travel place sufficient warnings to put travelers on notice, as follows:

> It shall be unlawful for any person to make or cause to be made any excavation of any kind in the town in or along or near any street without placing and maintaining proper guardrails and signal lights or other warnings at, in or around the same, *sufficient to warn the public* of such excavations and to protect all persons using reasonable care from accidents on account of the same.

Surf City, N.C., Code, § 16-47 (2023) (emphasis added).

Our Supreme Court has instructed as follows:

> The general rule in North Carolina is that the violation of a public safety statute constitutes negligence *per se*. A public safety statute is one imposing upon the defendant a specific duty for the protection of others. Significantly, even when a defendant violates a public safety statute, the plaintiff is not entitled to damages unless the plaintiff belongs to the class of persons intended to be protected

> by the statute and the statute violation is a proximate cause of the injury.

Stein v. Asheville City Bd. of Educ., 360 N.C. 321, 326 (2006) (cleaned up).

We conclude that the ordinance is a public safety statute and Mr. Saad belongs to the class of persons intended to be protected by the ordinance. It is undisputed that the Town caused the excavation to take place. And based on Mr. Saad's allegation in his verified complaint, there is an issue of fact whether the Town placed something in front of the backfilled site "sufficient to warn the public" of the danger.

The Town makes several arguments as to why it was entitled to summary judgment, which we address in turn.

First, the Town contends that the forecasted evidence shows that Mr. Saad was contributorily negligent as a matter of law. We disagree.

Our Supreme Court has explained contributory negligence as follows:

> Every person having the capacity to exercise care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant, contributes to the injury complained of, he is guilty of contributory negligence.

Clark v. Roberts, 263 N.C. 336, 343 (1965). Further, it "is not necessary that [a] plaintiff be actually aware of the unreasonable danger of injury to which his conduct exposes him. [A] [p]laintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673 (1980).

Here, the Town contends that Mr. Saad was contributorily negligent by failing to operate his electric scooter with reasonable care while riding in a bicycle lane, at a high speed, at night, and with limited visibility. *See Clark*, 263 N.C. at 343 ("Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury."). "Only where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774 (1997).

There was evidence that the scooter was traveling approximately fifteen miles per hour. We conclude this forecasted evidence is such as

that a jury must determine whether Mr. Saad acted with reasonable care in operating his electric scooter.

The Town also argues that Mr. Saad was contributorily negligent *per se*, contending that Mr. Saad violated both a Surf City town ordinance and a North Carolina statute by operating an electric scooter in a bicycle lane.

A Town ordinance prohibits motorized vehicles on all bikeways. Surf City, N.C., Code, § 17-162 (2023). And the North Carolina statute requires that "[t]he headlamps of motor vehicles shall be so constructed, arranged, and adjusted that . . . they will at all times mentioned in G.S. 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead . . ." N.C.G.S. § 20-131 (2023).

However, for a plaintiff's violation of the law to constitute contributory negligence *per se*, the violation must be a proximate cause of the plaintiff's injuries—akin to how a defendant's violation of law must be a proximate cause of a plaintiff's injuries to constitute negligence *per se*. *See Short v. Chapman*, 261 N.C. 674, 680 (1964) ("It is a fundamental principle that the only contributory negligence of legal importance is contributory negligence which proximately causes or contributes to the injury under judicial investigation."). Here, even if we were to determine that the ordinance and/or statute cited by the Town applied to Mr. Saad and that he violated the ordinance and/or statute, we cannot conclude on this record whether such a violation was a proximate cause of Mr. Saad's injuries as a matter of law. As our Supreme Court has instructed,

> [w]hat is the proximate cause of an injury is ordinarily a question to be determined by the jury as a fact in view of the attendant circumstances. When more than one legitimate inference can be drawn from the evidence, the question of proximate cause is to be determined by the jury. It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case.

Oxendine v. Lowry, 260 N.C. 709, 713 (1963) (citations and quotation marks omitted).

For instance, it may be that a jury would determine that Mr. Saad would have suffered the same fate had he been on a bicycle traveling fifteen miles per hour rather than an electric scooter traveling that same

speed. In sum, viewed in the light most favorable to Mr. Saad, the forecasted evidence fails to show whether Mr. Saad's injury was proximately caused by the scooter's headlamps or by riding an electric scooter in a bicycle lane, rather than a bicycle. *See Nicholson*, 346 N.C. at 774 ("Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment").

Next, the Town argues the trial court lacked subject matter jurisdiction over this matter because the bicycle lane where the injury occurred is owned and controlled by the Department of Transportation (an agency of the State of North Carolina) and that, therefore, a claim should have been brought under the North Carolina Tort Claims Act, N.C.G.S. § 143-291 (2023).

The Town's contention, however, fails because Mr. Saad has sued the Town, a municipality; he has not brought a claim against the State. We conclude that the trial court has jurisdiction over the tort claims brought by Mr. Saad against the Town.

Finally, the Town contends it is protected by governmental immunity as a matter of law. We, however, have stated that

> the doctrine of governmental immunity will not act as a shield to a municipality from liability for torts committed by its agencies and organizations when the activity of the municipality is proprietary in nature. The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines.

Harrison v. City of Sanford, 177 N.C. App. 116, 121 (2006) (citations and quotation marks omitted). Here, the Town has admitted that it sets rates and charges fees for the maintenance of sewer lines. *See Vill. of Pinehurst v. Reg'l Invs. of Moore, Inc.*, 330 N.C. 725, 729 (1992) ("[O]wnership and operation of a water and sewer service is a proprietary function operated for a profit."). And there is forecasted evidence that the Town caused the excavation in the bicycle lane to provide access to its sewer line to a new customer.

IV. Conclusion

The trial court improperly granted summary judgment in favor of the Town on the issue of negligence (under theories of ordinary negligence

and negligence *per se*) but properly granted summary judgment in favor of the Town on the issue of gross negligence.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges MURPHY and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
MACK VERNON BRACEY, DEFENDANT

No. COA23-875

Filed 17 December 2024

Firearms and Other Weapons—possession of a stolen firearm—knowledge that firearm was stolen—substantial evidence

In a prosecution on charges including possession of a stolen firearm (discovered in a hidden compartment in defendant's car), the trial court did not err in denying defendant's motion to dismiss the firearms change for insufficiency of the evidence that he knew or had reasonable grounds to believe the firearm was stolen where such knowledge could be reasonably inferred from incriminating circumstances, including defendant's flight from law enforcement officers—first, in a high-speed car chase, and, after defendant crashed his vehicle into trees, on foot—as well as his concealment of the gun in an open space behind a panel near the steering column and his denial of possessing any firearm when apprehended.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 31 January 2023 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 19 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adrina G. Bass, for the State.

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

FLOOD, Judge.

Defendant Mack Vernon Bracey appeals from the trial court's denial of Defendant's motion to dismiss his charge of possession of a stolen firearm for insufficient evidence. On appeal, Defendant argues the State failed to present sufficient evidence that Defendant knew or had reasonable grounds to know the gun he possessed was stolen. Upon review, we conclude the State presented sufficient evidence that Defendant knew or had reasonable grounds to know the gun was stolen property, based on incriminating circumstances, and the trial court did not err in denying Defendant's motion to dismiss this charge for insufficient evidence.

I. Factual and Procedural Background

On 31 January 2022, Officer Hannah Jackson was parked outside the Day's Inn hotel in Shallotte, North Carolina, which is known by law enforcement as a "hub for illegal activity," when an empty stationary vehicle caught her attention as it was parked in front of the hotel. Officer Jackson ran the vehicle's license plate and ascertained the vehicle belonged to Defendant, who had two felony warrants from Columbus County and two felony warrants from Brunswick County.

For the next six hours, Officer Jackson observed the vehicle from her police car until Defendant approached the vehicle and entered it via the driver's side door, leaving the door open. Officer Jackson called her partner[1] to the scene. Once her partner arrived, Officer Jackson then approached Defendant's vehicle from the passenger's side, made contact with Defendant, and ordered Defendant to exit the vehicle. Defendant refused to exit, stating "I'm not getting out of the car"; began "reaching around for some things"; and appeared to be "trying to hide things." As Defendant was reaching around in his vehicle, Officer Jackson's partner walked around to the vehicle's driver's side. Defendant immediately "shut [the driver's side door,] put the car in drive, and took off." Officers quickly began their pursuit of Defendant.

As Defendant fled from the officers' pursuit, he drove at sixty-five miles per hour ("mph") in a thirty-five mph zone, running red lights and driving "into the opposite lane of travel[.]" At some point during the pursuit, Defendant was driving "95 to 100" mph in a sixty mph zone; thereafter, having slowed down at some point, he crashed his vehicle between two trees, exited it, and continued to flee on foot, into a swampy area.

The officers pursued Defendant on foot and eventually apprehended him. Upon apprehension, the officers proclaimed to Defendant that they

1. A review of the Record did not indicate Officer Jackson's partner's name.

had found a gun, after having seen an empty gun holster on the driver's side in Defendant's vehicle when looking in after the crash. Defendant asked, "[w]here?" and the officers replied, "[i]n the woods . . . where you tossed it." Defendant then replied: "Oh. There ain't no gun." From this exchange, Officer Jackson determined "there was a gun somewhere" on the premises. Officer Jackson then asked Defendant why he ran, and Defendant claimed Officer Jackson was interrupting his "hit" of cocaine.

After further questioning Defendant about what may be back at the Day's Inn hotel he had left, Defendant denied having anything in his hotel room, but officers later found .38 caliber ammunition, as well as illegal narcotics, inside the room. Defendant was arrested, and his car was towed to an impound lot.

The next day, Officer Jackson searched Defendant's vehicle and found a loaded .38 caliber revolver in a hidden compartment in the steering wheel area of the vehicle. As to the hidden compartment, Officer Jackson later testified:

> I noticed that on the left side of the steering wheel where you would normally turn your headlights on and off, it was a little loose looking, so I used that pry bar to pop it open. It popped open very easily. And it was a [] natural void is what it's called in your vehicle where there's places that you can hide things. Just open space. So there's an open space behind there. A few wires for the headlights. And I noticed the butt of a revolver.

Further, upon investigation, officers later discovered the gun had been previously reported stolen.

Defendant was indicted on several charges, including (1) fleeing to elude arrest with two aggravating factors, exceeding the speed limit by fifteen mph and driving recklessly; (2) possession of a stolen firearm; and (3) possession of a firearm by felon.

On 30 January 2023, this matter came on for trial. At the close of the State's evidence, Defendant moved to dismiss the charge of possession of a stolen firearm, arguing the State had not met its burden of proving Defendant knew that the gun was in the car, or that he knew the gun was stolen. The trial court denied this motion. At the close of all evidence, Defendant renewed his motion to dismiss, which was also denied. The jury found Defendant guilty of possession of a stolen firearm and guilty as to the other charges not relevant to this appeal, and Defendant was sentenced accordingly.

Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review the appeal of the final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Standard of Review

"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. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (citation omitted). Under North Carolina law, "[w]hen a trial court is considering a defendant's motion to dismiss based upon an insufficiency of the evidence presented, the trial court 'is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight.' " *State v. Brown*, 182 N.C. App. 277, 281, 641 S.E.2d 850, 853 (2007) (citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate or would consider necessary to support a particular conclusion." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (internal citations omitted) (cleaned up). "A substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight." *Id.* at 412, 597 S.E.2d at 746 (citation and internal quotation marks omitted). "It is the function of the jury to determine the facts in the case from the evidence and to determine what the evidence proves or fails to prove." *State v. Taylor*, 64 N.C. App 165, 169, 307 S.E.2d 173, 176, (1983).

Further, "the evidence must be 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." *Golder*, 374 N.C. at 250, 839 S.E.2d at 790 (citation and internal quotation marks omitted). It is not the job of this Court, nor that of the trial court, to weigh the evidence; we must determine only whether the State presented substantial evidence such that a reasonable juror might accept the evidence as adequate to support a particular conclusion. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746; *see also Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790.

IV. Analysis

Defendant argues the trial court erred in denying his motion to dismiss the charge for possession of a stolen firearm for insufficient evidence. Specifically, Defendant contends the State failed to present

sufficient evidence that Defendant "knew or had reasonable grounds to believe the [gun] was stolen." We disagree.

For a defendant to be properly found guilty of possession of a stolen firearm, "the State must present substantial evidence that (1) the defendant was in possession of a firearm; (2) which had been stolen; (3) the defendant knew or had reasonable grounds to believe the property was stolen; and (4) the defendant possessed the pistol with a dishonest purpose." *State v. Brown*, 182 N.C. App. 277, 281, 641 S.E.2d 850, 853 (2007). "Knowledge that property was stolen may be inferred from incriminating circumstances[,]" *Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176, and our Supreme Court has provided that "an accused's flight is evidence of consciousness of guilt and therefore of guilt itself." *State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986).

This Court has previously considered appeals concerning a defendant's knowledge of property being stolen, and for which we concluded such knowledge may be evinced by incriminating circumstances. For instance, in *Taylor*, where, after being yelled at by a passerby, the "defendant removed the firearm from his coat, stooped near a car and attempted to surreptitiously hide or dispose of it by throwing it into nearby bushes[,]" we concluded this evidence was "sufficiently incriminating to permit a reasonable inference that [the] defendant knew or must have known that the firearm was stolen[.]" *Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176.[2] Additionally, in *State v. Wilson*, where the defendant fled by car from police officers and had his companion throw a gun that the defendant and his companion used in a robbery out of the car window, we concluded this evidence was "sufficiently incriminating to permit a reasonable inference that [the] defendant knew the firearm was stolen, and [was] therefore sufficient to go to the jury on that issue." 106 N.C. App. 342, 348, 416 S.E.2d 603, 606 (1992).

Here, like the defendant in *Wilson*, Defendant fled by car from the officers, running red lights and exceeding the speed limit, all while the gun was inside his vehicle. *See* 106 N.C. App. at 348, 416 S.E.2d at 606; *see also Parker*, 316 N.C. at 304, 341 S.E.2d at 560. Further, like the defendant in *Taylor*, who hid the gun in a bush, Defendant "surreptitiously hid[]" the gun in his vehicle behind a loose panel in the steering wheel. *See Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176. Moreover, during his exchange with the officers upon his apprehension, Defendant

2. Black Law's Dictionary defines "surreptitious" as "done by stealth[.]" *Surreptitious*, Black's Law Dictionary (12th ed. 2024).

denied possessing a gun and further denied having anything in his hotel room, but officers later found the gun in the hidden compartment of Defendant's vehicle, and found .38 caliber ammunition inside the room, which is the type of ammunition for which the gun is chambered.

Per our standard of review, when considering the sufficiency of the evidence and viewing the evidence in the light most favorable to the State, these facts indicate the State presented substantial evidence that a reasonable juror may find that Defendant knew or had reasonable grounds to believe that the gun discovered in his vehicle was stolen. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746; *see also Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790; *Wilson*, 106 N.C. App. at 348, 416 S.E.2d at 606; *Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176.

Defendant further argues, however, that the facts of this case are more akin to those in *State v. Wilson*, which this Court decided in 2010. In *Wilson*, the sole issue on appeal was "whether [the d]efendant's guilty knowledge can be inferred from his *placement* of the stolen property." 203 N.C. App. 547, 555, 691 S.E.2d 734, 740 (2010) (emphasis added). There, the defendant stored a stolen gun in his mother's closet after committing a robbery. *Id.* at 549, 691 S.E.2d at 736–37. At trial, the State presented evidence of those facts, and the defendant moved to dismiss for insufficient evidence that he knew or should have known the gun was stolen. *Id.* at 549–50, 691 S.E.2d at 736–37. On appeal, we agreed and held "the mere fact of depositing [evidence in one's residence] does not by itself constitute incriminating behavior." *Id.* at 555, 691 S.E.2d. at 740.

Here, however, Defendant's gun was not simply placed in his vehicle, as one might simply place a firearm in a closet. *See id.* at 549, 691 S.E.2d at 736–37. Rather, the gun was stealthily hidden in a compartment of the steering wheel of Defendant's vehicle, requiring removal of a loose panel for the gun to be accessed. Further, although a gun holster was found in Defendant's vehicle by the driver's side door, the gun was found not in or with the holster, but rather in this hidden compartment of the steering wheel, indicating that Defendant "surreptitiously" hid the gun. *See Taylor*, 64 N.C. App at 169, 307 S.E.2d at 176. Finally, unlike *Wilson*, and as discussed above, there is other incriminating evidence, such as Defendant's flight from the officers and the .38 caliber ammunition found in his hotel room, from which a reasonable juror may conclude that Defendant knew or had reasonable grounds to believe that the gun discovered in his vehicle was stolen. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746; *see also Golder*, 374 N.C. at 249, 839 S.E.2d at 790.

As the State presented evidence from which a reasonable juror may find Defendant guilty, we conclude the State met its evidentiary

burden of presenting substantial evidence. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746; *see also Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790. Accordingly, it was not error for the trial court to deny Defendant's motion to dismiss for insufficient evidence, and we affirm the trial court's denial.

V. Conclusion

Upon review, viewing the evidence in the light most favorable to the State, we conclude the State presented substantial evidence based on incriminating circumstances that Defendant knew or had reasonable grounds to believe the gun was stolen. We therefore affirm the trial court's denial of Defendant's motion to dismiss his charge of possession of a stolen firearm for insufficient evidence.

AFFIRMED.

Judge STROUD concurs.

Judge MURPHY dissents in separate opinion.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority's holding that the State presented substantial evidence that Defendant knew or had reasonable grounds to believe that the .38 revolver discovered in his vehicle was stolen. I would hold that the State did not present sufficient evidence to persuade a rational juror of Defendant's guilty knowledge as, even in the light most favorable to the State, no evidence or reasonable intendment drawn therefrom indicates a connection between Defendant's actions and knowledge or reasonable grounds to believe that the firearm was stolen. Instead, I find the factual circumstances to be similar to those in *State v. Wilson*, 203 N.C. App. 547 (2010), wherein we held that, "[w]hile it is certainly possible to hide stolen property in one's residence, the mere fact of depositing it there does not by itself constitute incriminating behavior." *Id.* at 555 (citation omitted).

In *Wilson* (2010), the State's evidence tended to show that the defendant and his accomplice robbed a convenience store using a firearm that had been stolen from its owner's home around or about one month earlier. *Id.* at 548-550. After the robbery, the defendant and his accomplice visited the accomplice's mother's home and deposited the firearm in her

bedroom closet. *Id.* at 549. The defendant was charged, *inter alia*, with possession of a stolen firearm and moved at trial to dismiss the charge for lack of sufficient evidence that he knew or had reasonable grounds to believe that the firearm was stolen. *Id.* at 550. The trial court denied the defendant's motion to dismiss, reasoning that the defendant's behavior in bringing the firearm to his accomplice's mother's home "for the purpose of hiding it[] . . . in and of itself would raise an inference that [he] knew the weapon was [']hot['] and didn't want to be seen with it out in public." *Id.* We reversed, holding that, unlike in *Taylor*, *Parker*, and *Wilson* (1992), we could not infer the defendant's "guilty knowledge" that the firearm had been stolen from his mere storage of that firearm in his accomplice's mother's home. *Id.* at 555.

Here, the State's evidence tended to show that, on 31 January 2022, Defendant—who was already a convicted felon and had four active felony warrants for his arrest—was confronted in a hotel parking lot by law enforcement officers while inside of his vehicle as he was "trying to get a hit in[]" of the cocaine in his possession. Defendant fled from the officers in a high-speed motor vehicle pursuit until he crashed into a wooded, swampy area. Defendant exited the vehicle and fled from the officers in a foot chase until he was apprehended and questioned. In a preliminary search of Defendant's vehicle, law enforcement officers located an empty gun holster but were unable to locate any firearm on the scene. When questioned about a firearm found outside the vehicle, Defendant denied its existence. The next day, Officer Jackson located a firearm tucked into a natural void of Defendant's vehicle during a search at the impound lot and determined from its serial number that it had been reported stolen. Defendant argues, and I agree, that the factual circumstances underlying the revolver here more closely align with those in *Wilson* (2010), where mere storage of a stolen firearm in the accomplice's mother's residence was not substantial evidence of guilty knowledge of the gun's stolen status.

In *Taylor*, the State presented evidence that, after the defendant was confronted by a passerby, he was witnessed pulling the stolen firearm from his jacket and disposing of it in the bushes. *State v. Taylor*, 64 N.C. App. 165, 169 (1983). In *Parker*, the State presented evidence of circumstances surrounding the defendant's acquisition of the stolen vehicle—the defendant's role as a go-between for two individuals located a short distance from one another, the purchase price of $800.00 for a vehicle worth substantially more, and the lack of vehicle title—*and* of the defendant's flight. *State v. Parker*, 316 N.C. 295, 304 (1986). In *Wilson* (1992), the State presented evidence that the defendant disposed of the

stolen firearm during the police pursuit. *State v. Wilson*, 106 N.C. App. 342, 347-48 (1992).

Here, unlike in the aforementioned cases, the State presented no evidence of the circumstances surrounding Defendant's acquisition of the firearm; no evidence of when the firearm was stored in the natural void of Defendant's vehicle, including whether this storage took place during the flight; and no evidence tending to relate Defendant's flight to the stolen firearm as opposed to his outstanding warrants, his possession of any firearm itself being a felony, and additional flight after committing felony fleeing/eluding arrest.

While "an accused's flight is evidence of consciousness of guilt and therefore of guilt itself[,]" *id.* at 348, substantial evidence that Defendant is guilty of *some* crime is *not* substantial evidence that he committed this particular crime, no more specifically that he knew or had reasonable grounds to believe that the firearm in his possession was stolen. In the light most favorable to the State, substantial evidence of Defendant's flight on 31 January 2022 is not, by inference and without more, substantial evidence of every knowing element of every crime which he could plausibly be charged with committing that day. The facts and circumstances warranted by the State's evidence here do no more than raise a suspicion or conjecture as to Defendant's guilty knowledge of the gun's stolen status, "since there would still remain a reasonable doubt as to [D]efendant's guilt." *State v. Turnage*, 362 N.C. 491, 494 (2008). I would hold that the trial court erred in denying Defendant's motion to dismiss the charge of possession of a stolen firearm because the State failed to present substantial evidence that Defendant knew or had reasonable grounds to believe that the .38 revolver discovered in his vehicle was stolen. I respectfully dissent.

STATE v. CARWILE

[297 N.C. App. 145 (2024)]

STATE OF NORTH CAROLINA
v.
JASON JOHN CARWILE

No. COA23-885

Filed 17 December 2024

1. Criminal Law—defenses—castle doctrine—inapplicable where intruder has ceased efforts to enter a home—plain error and ineffective assistance of counsel not shown

In a prosecution that resulted in a conviction for second-degree murder—arising from an incident where the (masked) victim entered defendant's residence in the early morning hours and struck defendant with multiple objects before defendant pushed him out of the house; the two continued to fight away from the house and into a used car lot; after the victim raised his hands, defendant and two other occupants of the home each kicked and beat the victim even after he became motionless—the trial court did not plainly err by failing to instruct the jury on the castle doctrine in the absence of defendant's timely objection to the instruction's omission. The presumptive fear of imminent death or serious bodily harm essential to the defense of habitation, as codified in N.C.G.S. § 14-51.2(b), was unavailable because the victim had discontinued his efforts to forcefully and unlawfully enter—and had clearly exited—defendant's home, as shown by video surveillance footage from the used car lot and testimony from defendant and two eyewitnesses. Accordingly, defendant's related claim for ineffective assistance based on counsel's failure to raise the issue at trial was also unavailing.

2. Criminal Law—defenses—self-defense—special instruction not given—jury instructions accurate as given—no error

In a prosecution that resulted in a conviction for second-degree murder—arising from an incident where the (masked) victim entered defendant's residence in the early morning hours and struck defendant with multiple objects before defendant pushed him out of the house; the two continued to fight away from the house and into a used car lot; after the victim raised his hands, defendant and two other occupants of the home each kicked and beat the victim even after he became motionless—the trial court did not err by failing to give a special instruction to the jury extending the holding of *State v. McLymore*, 380 N.C. 185 (2022) (which addressed the ability of a criminal defendant to assert self-defense where that defendant had

been in the process of committing a felony) to the conduct of the victim, because the victim was not a criminal defendant and was not asserting self-defense. Moreover, the jury instructions as given provided an accurate statement of the law regarding self-defense as it could potentially apply to defendant.

Appeal by Defendant from Judgments entered 22 February 2023 by Judge Todd W. Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 27 August 2024.

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

Christopher J. Heaney for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jason John Carwile (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Second-Degree Murder, Misdemeanor Assault with a Deadly Weapon, and Misdemeanor Communicating Threats. The Record before us, including evidence presented at trial, tends to reflect the following:

Around 5:00 a.m. on 4 September 2018, the decedent in this case—Christopher Easter—approached Defendant's residence wearing a mask. Defendant, his wife, and Joshua Chinault were all present at the house. Easter grabbed a chainsaw that was on the porch, entered the house, and struck Defendant with the chainsaw. Easter also hit Defendant in the head with a rock-stuffed sock. Defendant pushed Easter out of the house through the front door, and an altercation between the two ensued. Defendant and Easter continued to fight while moving away from the house and towards a used car dealership lot approximately five hundred yards away. As they entered the neighbor's yard, Easter slipped and dropped the chainsaw. Defendant also fell around this point, but Easter continued "backing" away from the house.

Surveillance footage from the auto dealership—admitted into evidence—showed Easter, with his hands raised, backing into the car lot. Approximately five seconds later, Defendant approached Easter as he backed into one of the cars and yelled, " 'Where are you going, boy?' and 'I'm going to kill you[.]' " Easter was still backing away when Defendant's wife entered the scene carrying a white trash can. Defendant's wife hit

Easter with the trash can as Easter kept backing up. Defendant and his wife continued to approach Easter until he backed into another car. Defendant and his wife both hit Easter, causing him to fall to the ground. As Easter tried to get back up, Defendant began to repeatedly hit him in the head with a rock-filled sock. During the beating, a wrench fell from Easter's clothes; Defendant picked up the wrench and hit Easter in the head with it. Easter wrapped around Defendant's knees, causing him to fall to the ground.

Around this time, Chinault arrived. Defendant continued to strike Easter with the wrench while both were on the ground. While Defendant was hitting Easter with the wrench, Defendant's wife and Chinault started kicking and striking Easter as well. Defendant also began slamming Easter's head into the concrete. All three kept attacking Easter while he lay on the ground unmoving for over a minute. Defendant, while slamming Easter's head into the ground, dragged and pulled him over to a parked car. While Easter lay motionless in the road, Defendant continued to beat him. At this point, both Defendant's wife and Chinault attempted to "get [Defendant] to stop." But he did not. Defendant's wife pulled Easter's shoes and pants off of him and left them in the road. Eventually, Defendant's wife pulled him off of Easter. Defendant, his wife, and Chinault then went back to the house, leaving Easter on the ground. Easter died as a result of his injuries.

On 5 November 2018, Defendant was indicted for First-Degree Murder. On 13 July 2020, the State obtained a superseding indictment for First-Degree Murder. On 10 August 2020, Defendant was additionally indicted for Felony Assault with a Deadly Weapon and Felony Communicating Threats. This case came on for trial on 13 February 2023. In his defense, Defendant asserted self-defense and defense of others. During the preliminary charge conference, the trial court expressly asked Defendant's counsel about the self-defense issue in the following exchange:

> [Trial Court]: [A]re you looking at self-defense and then the motive, the stand your ground, like defense of habitation or . . .
>
> [Defense Counsel]: No, because that clearly says it does not apply.
>
> [Trial Court]: Right.
>
> [Defense Counsel]: This is more of a — It's a hybrid, but I think it's accurate under the law, Your Honor. This is one

> [of] those strange cases where I think it's pretty clear, just like [the prosecutor] said, that if he'd shot him dead in the house, everything would have been fine.
>
> [Trial Court]: Right.
>
> [Defense Counsel]: Unfortunately, he managed to run away. But that's the reason you don't get to use physical force while doing that. There is no home base here.

After the defense rested, Defendant proposed a special instruction stating that "the State must prove that but for the alleged victim escaping after the commission of the felony of felonious breaking or entering, the confrontation resulting in the death of the victim would not have occurred." The trial court rejected this instruction.

On 22 February 2023, the jury returned verdicts finding Defendant guilty of Second-Degree Murder, Misdemeanor Assault with a Deadly Weapon, and Misdemeanor Communicating Threats. The trial court sentenced Defendant to 300 to 372 months of imprisonment for Second-Degree Murder. The trial court consolidated the convictions for Assault with a Deadly Weapon and Communicating Threats, and sentenced Defendant to 30 days of imprisonment to run concurrently with the sentence for Second-Degree Murder. Defendant orally gave Notice of Appeal on 22 February 2023.

Issues

The dispositive issues on appeal are whether the trial court: (I) plainly erred in failing to give the jury an instruction on the defense of habitation—known as the Castle Doctrine—where Defendant used deadly force against Easter in a parking lot after Easter retreated from Defendant's residence; and (II) erred by refusing to give Defendant's requested special jury instruction.

Analysis

I. Applicability of the Castle Doctrine

[1] On appeal, Defendant contends the trial court plainly erred by failing to instruct the jury on the Castle Doctrine. Specifically, Defendant argues the trial court should have instructed the jury: (a) his fear for his life was presumptively reasonable; (b) an aggressor instruction clarifying that a person is "not the aggressor while defending their home"; and (c) he was allowed to threaten Easter with lawful force. He also argues his trial counsel's failure to request these instructions constituted ineffective assistance of counsel.

For each of the jury instructions at issue here, Defendant failed to object at trial to their omission. He is, therefore, limited to arguing their omission constituted plain error. N.C. R. App. P. 10(a)(4) (2023) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original). In other words, plain error requires a defendant to meet a three-factor test:

> First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Reber, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (citations and quotation marks omitted).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Kuhns*, 260 N.C. App. 281, 284, 817 S.E.2d 828, 830 (2018) (quoting *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973)). "Accordingly, 'it is the duty of the trial court to instruct the jury on all substantial features of a

case raised by the evidence.' " *Kuhns*, 260 N.C. App. at 284, 817 S.E.2d at 830 (quoting *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988)). Conversely, a trial court does not err by omitting an instruction where there is not substantial evidence presented at trial that the defendant is entitled to such an instruction. *See, e.g.*, *State v. Dilworth*, 274 N.C. App. 57, 64, 851 S.E.2d 406, 411 (2020) (trial court did not err in omitting defense of habitation instruction where there was no evidence victim was attempting to unlawfully enter home); *State v. Copley*, 386 N.C. 111, 125, 900 S.E.2d 904, 915 (2024) (no prejudicial error in jury instructions where "jurors concluded that the castle doctrine did not shield" the defendant from criminal liability).

A. *Castle Doctrine and Presumption of Reasonable Fear*

"North Carolina has long recognized that '[a] man's house, however humble, is his castle, and his castle he is entitled to protect against invasion.' " *Kuhns*, 260 N.C. App. at 284, 817 S.E.2d at 830 (quoting *State v. Gray*, 162 N.C. 608, 613, 77 S.E. 833, 835 (1913)). As our Supreme Court has recently affirmed, "an attack on the house or its inmates may be resisted by taking life." *State v. Phillips*, 386 N.C. 513, 517, 905 S.E.2d 23, 27 (2024) (quoting *Gray*, 162 N.C. at 613, 77 S.E. at 834). "This fundamental principle of defense of habitation is known as the castle doctrine." *Id.* The defense of habitation is codified in our statutes as follows:

> The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> > (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
> >
> > (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2023).

Here, Defendant contends the trial court plainly erred by failing to instruct the jury that Defendant's fear for his life was presumptively

reasonable under the circumstances. When the Castle Doctrine applies, a person has a presumptively reasonable fear of imminent death or serious bodily harm when another seeks to unlawfully and forcefully enter that person's home while he is present. This presumption, however, does not apply in any of the statutory conditions listed in subsection (c) of N.C. Gen. Stat. § 14-51.2. *Phillips*, 386 N.C. at 524, 905 S.E.2d at 31. Relevant to the present case, our statutes provide the Castle Doctrine presumption does not apply where "[t]he person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace, and (ii) has exited the home, motor vehicle, or workplace." N.C. Gen. Stat. § 14-51.2(c)(5) (2023). In determining whether a defendant is entitled to an instruction on the Castle Doctrine, a court must view the evidence "in the light most favorable to the defendant, and the determination shall be based on evidence offered by the defendant and the State." *State v. Cook*, 254 N.C. App. 150, 152, 802 S.E.2d 575, 577 (2017) (citations omitted).

There is no dispute that at the time Defendant used deadly force against Easter, Easter had exited Defendant's home. Video surveillance footage shows Defendant used deadly force against Easter in a used car parking lot five hundred yards away from Defendant's home. The question, then, is whether Easter had "discontinued all efforts to unlawfully and forcefully enter the home[.]" N.C. Gen. Stat. § 14-51.2(c)(5) (2023). Viewing the evidence in the light most favorable to Defendant, we conclude that he had and, consequently, that the Castle Doctrine does not apply to the present case.

While much of the caselaw addressing whether an intruder had discontinued their efforts to forcefully enter a home is unpublished and, thus, not controlling legal authority,[1] we find *State v. Willoughby* persuasive in our assessment of the facts at bar. In *State v. Willoughby*, the defendant was convicted of second-degree murder after shooting a woman standing in his yard who was in the midst of a dispute with another occupant through a window. 292 N.C. App. 220, 896 S.E.2d 317 (2024) (unpublished). There, viewing the evidence in the light most favorable to the defendant, this Court concluded the Castle Doctrine did not apply and thus, the trial court did not err by declining to instruct the jury on the Castle Doctrine. *Id.* at *2. In support of its conclusion,

1. Our Rules of Appellate Procedure provide: "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored[.]" N.C. R. App. P. 30(e)(3) (2024).

this Court noted several facts. First, an eyewitness to the shooting testified at trial that the victim "was standing in the front yard and was not coming toward [d]efendant before [d]efendant shot at her from his front porch." *Id.* Further, the defendant acknowledged to law enforcement officers that the victim "was not acting in a threatening manner." *Id.* Indeed, "the evidence showed that [the victim] stood approximately 38 feet away and exclaimed, 'Oh, well, you're going to . . . shoot me,' a sentiment she reiterated, in shock, after [d]efendant then shot her." *Id.* Additionally, the Court pointed to evidence the defendant was calm when officers arrived at the scene and that the defendant repeatedly told law enforcement he had not intended to shoot the victim, but rather he was aiming at a brick pile in the front yard. *Id.*

Viewing the evidence in the light most favorable to Defendant in the present case, like the victim in *Willoughby*, Easter was not moving toward Defendant or Defendant's home at the time Defendant used deadly force. Indeed, eyewitnesses—notably Defendant's wife and his friend Chinault—testified Easter was moving away from Defendant's home and was backed up against a car in a used car dealership lot hundreds of yards away. Further, the video surveillance footage shows a period of time when there was distance between Easter and Defendant. Similarly to the victim in Willoughby, in that time, Easter did not move toward Defendant or Defendant's home; rather, he stood still, backed against a car some five hundred yards from Defendant's home.

Although Defendant testified that the altercation with Easter "continued from [his] residence" to the auto dealership lot and claimed Easter did not "turn and run away," Defendant also testified that he fell just before reaching the parking lot and thus may not have seen Easter run. Further, Defendant conceded on cross-examination that Easter "back[ed] away" at various points, consistent with Defendant's wife's and neighbor's testimony. Indeed, Chinault testified that as Easter backed against one of the cars, Defendant yelled "Where are you going, boy?" and "I'm going to kill you[.]" Additionally, the video surveillance footage clearly shows at least a full minute where Easter lay motionless on the ground while Defendant repeatedly slams his head against the concrete and Defendant's wife and Chinault kick and strike him. Based on this evidence, even viewed in the light most favorable to Defendant, we conclude Easter had "discontinued all efforts to unlawfully and forcefully enter the home" and thus, the Castle Doctrine did not apply. N.C. Gen. Stat. § 14-51.2(c)(5) (2023). Therefore, Defendant was not entitled to a jury instruction that his fear was presumptively reasonable.

B. *Aggressor Instruction*

Defendant next contends the trial court plainly erred in failing to provide a jury instruction clarifying that a person is "not the aggressor while defending their home." Because Defendant was not entitled to an instruction on the Castle Doctrine, we conclude he was therefore not entitled to this aggressor instruction.

The defenses available to defendants pursuant to N.C. Gen. Stat. §§ 14-51.2 and 14-51.3 "[are] not available to" someone who "[i]nitially provokes the use of force against himself or herself." N.C. Gen. Stat. § 14-51.4(2) (2023). This is commonly known as the aggressor doctrine. "Someone may be considered the aggressor if they 'aggressively and willingly enter into a fight without legal excuse or provocation.' " *State v. Hicks*, 385 N.C. 52, 60, 891 S.E.2d 235, 241 (2023) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)). "Additionally, someone who did not instigate a fight may still be the aggressor if they continue to pursue a fight that the other person is trying to leave." *Id.* (citation omitted). "When the evidence is conflicting, it is for the jury to determine whether the defendant was the aggressor." *Id.* (citations omitted).

Here, the evidence shows Defendant became the aggressor when Defendant continued to pursue Easter after Easter discontinued his efforts to unlawfully and forcefully enter the home and tried to leave. Indeed, Chinault testified Defendant followed Easter yelling, "Where are you going, boy? I'm going to kill you[.]" Easter was also moving away from Defendant's home while Defendant, Defendant's wife, and Chinault followed. When Defendant reached Easter, he beat Easter with a sock filled with rocks and a wrench, taking turns with his wife and Chinault in delivering the blows. Defendant did not stop beating Easter when he was lying motionless on the ground; the assault continued well after Easter ceased resistance. Thus, we conclude Defendant "continue[d] to pursue a fight" that Easter was "trying to leave." *Hicks*, 385 N.C. at 60, 891 S.E.2d at 241. Therefore, Defendant was not entitled to a clarification regarding when he could not be deemed the aggressor. Consequently, we conclude the trial court did not plainly err in omitting this instruction.

C. *Communicating Threats*

Defendant additionally contends the trial court plainly erred in failing to instruct the jury that Defendant had lawful authority to communicate threats to an intruder while he was defending his home. Again, Defendant did not request any such instruction at trial.

The offense of communicating threats is defined as follows:

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

N.C. Gen. Stat. § 14-277.1(a) (2023). Defendant concedes the four enumerated elements for communicating threats are met. However, Defendant argues that when he communicated threats to Easter, he had the lawful authority to do so because he was acting in self-defense or defense of habitation pursuant to the Castle Doctrine. In other words, Defendant contends "[t]he trial court should have told the jurors that if [Defendant] was threatening to use lawful force, then he could not communicate threats." We disagree.

As discussed above, Defendant was not entitled to use deadly force pursuant to the Castle Doctrine because Easter had exited Defendant's home and "discontinued all efforts to unlawfully and forcefully enter the home." N.C. Gen. Stat. § 14-51.2(c)(5) (2023). Thus, Defendant's contention that if deadly force is justified, so too is communicating threats fails because Defendant's use of deadly force was *not* justified.

Further, even if the Castle Doctrine applied, the trial court substantively provided the instruction Defendant now argues for at trial. "The trial court is not required to follow any strict format when instructing the jury 'as long as the instruction adequately explains each essential element of the offense.' " *State v. Guice*, 286 N.C. App. 106, 113, 879 S.E.2d 350, 355 (2022) (citing *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014)). Where a defendant requests additional language be added to a jury instruction that is redundant, the trial court does not err in failing to add the requested language, even if it is a correct statement of law. *See id.* (where a trial court instructed the jury the

phrase "willfully threaten" means "intentionally or knowingly expressing an intent or a determination to physically injure another person," a requested instruction as to the subjective intent of the defendant was redundant and thus it was not error for the trial court to refuse to give the instruction).

Regarding the charge of Communicating Threats, the jury was instructed as follows:

> For you to find the defendant guilty of this offense, the State must prove six things beyond a reasonable doubt: First, that the defendant willfully threatened to physically injure the victim. A threat is any expression of an intent or determination to physically injure another. A threat is made willfully if it is made intentionally or knowingly. Second, that the threat was communicated to the victim orally. Third, that the threat was made in a manner and under circumstances which would cause a reasonable person to believe that it was likely to be carried out. Fourth, that the victim believed the threat would be carried out. *Fifth, that the threat was made without lawful authority*. Sixth, that the offense was committed because of the victim's race or color. . . . If you do not so find or have a reasonable doubt as to one or more of these things, you would then determine if the defendant is guilty of misdemeanor communicating threats. Misdemeanor communicating threats differs in that the offense need not be committed because of the victim's race or color.

(Emphasis added). Thus, the jury was in fact instructed that the State had to prove Defendant had communicated threats without lawful authority. We, therefore, conclude there was no error in the trial court's instruction on communicating threats.

D. *Ineffective Assistance of Counsel*

Defendant also argues his trial counsel's failure to request the above jury instructions constituted ineffective assistance of counsel (IAC). Because the Castle Doctrine does not apply in this case, we conclude Defendant's counsel was not ineffective in failing to request said instructions.

Defendant raises his IAC claim for the first time on appeal. "In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Warren*,

244 N.C. App. 134, 144, 780 S.E.2d 835, 841 (2015) (citation and quotation marks omitted). IAC claims brought on direct review will be decided on the merits, however, "when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). On direct appeal, this Court "ordinarily limits its review to material included in the record on appeal and the verbatim transcript of the proceedings[.]" *Id.* at 166, 557 S.E.2d at 525 (citation omitted).

Under *Strickland v. Washington*, a defendant must satisfy a two-part test to show ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To demonstrate 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.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. "A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge." *State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003) (citing *State v. Swann*, 322 N.C. 666, 688, 370 S.E.2d 533, 545 (1988)).

The evidence presented at trial shows the Castle Doctrine does not apply in this case because Easter had exited Defendant's home and discontinued his efforts to enter the home. Thus, the trial court did not err in failing to give jury instructions on the Castle Doctrine. As such, defense counsel's failure to request these jury instructions does not amount to error. Therefore, Defendant's claim of ineffective assistance of counsel fails. *Pratt*, 161 N.C. App. at 165, 587 S.E.2d at 440.

II. Defendant's Special Instruction

[2] Defendant contends the trial court's refusal to give a special instruction was in error. At trial, Defendant requested the following instruction:

> The alleged victim would not be justified, and is therefore not entitled to the benefit of using defensive force, if he was escaping after the commission of the felony of felonious breaking or entering, and that felony offense was immediately causally connected to the circumstances giving rise to the defensive force used by the alleged victim. As such, for the alleged victim to be allowed the benefit of using defensive force, the State must prove beyond a reasonable doubt, among other things, that the alleged victim, while using defensive force, was not escaping after the commission of the felony of felonious breaking or entering, and there was not an immediate causal connection between the alleged victim's use of such defensive force and his felonious conduct. In other words, the State must prove that but for the alleged victim escaping after the commission of the felony of felonious breaking or entering, the confrontation resulting in . . . the death of the victim would not have occurred.

The trial court declined to give this instruction, finding it unsupported by legal authority. We agree.

"It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citation omitted). "A specific jury instruction should be given when (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation and quotations marks omitted). Additionally, "[i]t is well established in this jurisdiction that the trial court is not required to give a requested instruction in the exact language of the request." *State v. Green*, 305 N.C. 463, 476-77, 290 S.E.2d 625, 633 (1982). A trial court need not give an instruction verbatim so long as it gives the instruction in substance. *State v. Godwin*, 369 N.C. 604, 613, 800 S.E.2d 47, 53 (2017).

"A request for a special instruction which deviates from the pattern jury instruction qualifies as a special instruction." *State v. Young*, 294 N.C. App. 518, 524, 903 S.E.2d 460, 465 (2024) (citing *State v. Brichikov*, 281 N.C. App. 408, 414, 869 S.E.2d 339, 344 (2022)). "[I]f a request be made for a special instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance."

State v. Lamb, 321 N.C. 633, 644, 365 S.E.2d 600, 605-06 (1988) (quoting *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956)). "A trial court's erroneous refusal to instruct the jury in accordance with a criminal defendant's request will not result in a reversal of the trial court's judgment unless the error in question has prejudiced the defendant," such that "there is a 'reasonable possibility that, had the trial court given the [requested instruction], a different result would have been reached at trial." *State v. Benner*, 380 N.C. 621, 628-29, 869 S.E.2d 199, 204-05 (2022) (quoting *State v. Lee*, 370 N.C. 671, 672, 811 S.E.2d 563, 564 (2018)).

Defendant contends *State v. McLymore* provides the legal basis for his requested special instruction. 380 N.C. 185, 868 S.E.2d 67 (2022). In *McLymore*, the defendant was charged with first-degree murder, among other charges, after he got into an altercation with the decedent and shot him. *Id.* at 187-88, 868 S.E.2d at 70-71. At the time of the shooting, the defendant was a felon in possession of a firearm. *Id.* at 188, 868 S.E.2d at 71. At trial, the defendant sought to assert the affirmative defense of self-defense. *Id.* In its review, our Supreme Court considered N.C. Gen. Stat. § 14-51.4(1), which provides that self-defense is not available to a person who used defensive force and who was attempting to commit, committing, or escaping after the commission of a felony. *Id.* at 186-87, 868 S.E.2d at 70. The Court concluded that because the defendant was committing the felony of being a felon in possession of a firearm at the time he shot the decedent, and the two activities shared a "causal nexus," he could not assert the defense of self-defense under N.C. Gen. Stat. § 14-51.4(1). *Id.* at 200, 868 S.E.2d at 78.

McLymore's holding is narrower than Defendant contends. *McLymore* addressed whether a criminal defendant could assert the defense of self-defense where the defendant had been in the process of committing a felony. Defendant wishes to extend this principle to the conduct of Easter, arguing that Easter used impermissible force against Defendant because he was in the process of fleeing a felony when he fled Defendant's home. Easter, however, is not a criminal defendant and is not asserting self-defense as an affirmative defense for his conduct. Thus, *McLymore* does not apply to Easter's conduct. Because the Defendant's requested instruction, as written, is not supported by legal authority, the trial court did not err in declining to provide it to the jury.

Moreover, to the extent the requested jury instruction pertains to Defendant, the instruction was substantively given. Defendant's requested instruction informs the jury that Easter's use of force was unlawful, thus entitling Defendant to defend himself. The requested instruction, in substance, thus asks the jury to be instructed on

self-defense. The jury received such an instruction. Indeed, at trial, the following instruction was provided to the jury regarding Defendant's right to defend himself:

> If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from imminent death or great bodily harm and the circumstances did create sufficient belief in the defendant's mind at the time the defendant acted, such assault would be justified by self-defense. You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at that time.

The provided instruction is an accurate statement of the law regarding self-defense. Thus, even were Defendant entitled to the requested instruction, it was substantively given. Therefore, the trial court did not err in declining to give Defendant's requested instruction. Consequently, the trial court did not err in its jury instructions. In turn, the trial court did not err in entering judgment upon the jury verdicts.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the trial court's Judgments.

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JEFFREY LEE JOHNSON

No. COA24-336

Filed 17 December 2024

Search and Seizure—warrantless search—curtilage—seizure of neglected animals—exigent circumstances—plain view doctrine—probable cause to search house

In a prosecution for felony cruelty to animals, officers' warrantless search of the curtilage of defendant's home and seizure of twenty-one dogs was not unconstitutional where the officers, in response to a call regarding a strong smell indicating a dead animal, had discovered that defendant was on probation from a prior conviction of animal cruelty and, as they walked up defendant's driveway, they could see and hear multiple animals exhibiting signs of poor health and living conditions and could smell ammonia and feces. The condition of the animals created exigent circumstances justifying their removal for emergency veterinary treatment. Further, based on the plain view discoveries of the animals on the front of the property, there was probable cause to search the backyard and inside the house (for which officers obtained a warrant). The trial court did not err, much less plainly err, by denying defendant's motion to suppress.

Appeal by Defendant from judgments entered 12 October 2023 by Judge Phyllis M. Gorham in Carteret County Superior Court. Heard in the Court of Appeals 9 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State-Appellee.

W. Michael Spivey for Defendant-Appellant.

COLLINS, Judge.

Defendant Jeffrey Lee Johnson appeals from judgments entered upon guilty verdicts of one count of felony cruelty to animals and two counts of misdemeanor cruelty to animals. Defendant argues that the trial court plainly erred by concluding that a warrantless search of his home's curtilage was reasonable due to exigent circumstances and by

denying his motion to suppress the evidence seized as a result of that search and the search of his home. We find no error, much less plain error.

I. Background

Defendant was indicted for two counts of felony animal cruelty and three counts of misdemeanor animal cruelty. Defendant moved to suppress all evidence seized during the search of his property. The evidence presented at the suppression hearing tended to show the following:

Carteret County Animal Control Officer Tyler Harvill received a phone call reporting a strong smell coming from Defendant's property and concern that there might be a deceased dog on the property. Harvill discovered that Defendant was on probation as a result of being found guilty of cruelty to animals. As conditions of Defendant's probation, he was required to allow reasonable searches of his home and yard concerning animals on his property and was prohibited from abusing animals by withholding food or water.

Harvill immediately attempted to reach Defendant by phone but received no response; he left a voicemail. Harvill contacted Carteret County Deputy Sheriff Jessica Newman and requested her assistance with checking on several dogs at Defendant's property. He told Newman of Defendant's conviction for animal cruelty and his probation conditions.

Harvill and Newman drove to Defendant's home. Harvill parked his car just past Defendant's driveway. "[E]ven from next to the road" he could smell ammonia and feces coming from Defendant's property. Newman drove separately to Defendant's property. She testified, "As soon as I got out of my patrol car, I could smell a very, very strong odor of ammonia and feces and what I associate with, my experience being, just the smell of rot." The property had overgrown brush and "a lot of trash and building construction materials piled up." Newman could see animals throughout the front of the property and was concerned about them being dirty.

Because Harvill and Newman had been unable to reach Defendant and were concerned about a potentially dead animal on the property, the officers walked up the driveway toward Defendant's home to attempt to make contact with Defendant. When they reached the end of the driveway, they encountered Chubby, a Pitbull attached to a heavy chain that was driven into the ground.

Chubby's neck was "very irritated"; he had "a lot of missing fur"; his teeth "were worn down to the gumline"; he had overgrown toenails, one of which was "enlarged, red, and appeared to be infected"; and "[h]e had

scabs on his body [in] various stages of healing." Chubby did not have any food or water nearby.

The officers could see other dogs on the property. "[T]hey all had similar . . . hair loss and overgrown nails, and their teeth were worn down severely. They all pretty much had the same setup." The officers could also hear dogs barking from various points on the property. Newman walked toward the sound of barking puppies. She found puppies in a box filled with fresh and dried feces. The water buckets inside the box were too tall for the puppies to reach over.

One of the officers knocked on Defendant's front door but got no response. They could hear a dog barking inside. Newman stood on a pile of trash and a freezer next to the door to look inside Defendant's window for the dog. As she did this, "the smell of ammonia and feces increased significantly to the point [she] felt physically sick." "[T]he residence was very dirty. The floor was coated in dirt. There were piles of feces. It was just very dirty, and there was a lot of trash." The barking dog was positioned to the side of the window.

The officers headed into the backyard to check on the other dogs, because they were concerned for the dogs' safety. The dogs in the backyard "did not appear to be in good condition." One of the dogs had a large tumor above its tail. Several dogs had "their teeth worn down to the gumline, some of them, including their canine teeth; missing fur on the majority of the dogs; scabs on the majority of the dogs; overgrown toenails on the majority of the dogs." Some of the dogs had water, others did not, and others had dirty water. Some of the water bowls were placed on top of the dogs' shelters and the dogs were not in good enough condition to get on top of the shelters to reach the bowls.

As she was looking around, Newman noticed a chain leading into a dog shelter created out of a barrel. She walked over to it and saw a dog inside. She initially thought the dog was deceased. She called out to it, but there was no reaction. Newman testified:

> I got closer to the dog. Her name is Emmie. I bent down and I watched. I could see her breathing very shallow. Continued trying to get her attention. She didn't react. I ended up putting my hand on the chain and kind of rustling the chain, and she slowly started to react.
>
> . . . .
>
> She picked her head up, looked at me. She began to try to get up to step out of the crate, the barrel. She was very

> uneasy on her feet. She actually stumbled and fell a couple of times as she was walking out.
>
> . . . .
>
> She looked terrible. Again, her teeth were very worn down to the gums. Her ears had both been -- they're very short-cropped ears. The ears were both bleeding. Both ears had open wounds that were bleeding. She had the most missing fur. You could see her skin and several patches throughout her entire body. She had a large mass on her left thigh that was oozing blood and -- and fluid, and her toenails were so overgrown that it actually changed -- it contorted her toes. Her paw didn't just sit flat on the ground.

Newman called the magistrate and sent over some photographs of the dogs. The magistrate found probable cause to charge Defendant with animal cruelty and probable cause to take the dogs at that time for their safety. Newman also spoke with Animal Control and explained her intention to get the animals to the Humane Society for safekeeping and veterinary care.

At that point, Defendant arrived home. He was "not receptive to having a conversation," and Newman placed him under arrest. After taking Defendant to the Carteret County Detention Center, Newman applied for, and received, a warrant to search Defendant's home. Inside the home, Newman found two dogs, Weezy and Peezy, both of whom were in horrible physical condition. No food or water was available to the dogs.

Ultimately, twenty-one dogs were seized from Defendant's property. The vast majority of the dogs needed immediate veterinary assistance. Emmie was immediately euthanized based on veterinary recommendation. Weezy was also euthanized after the removal of her bladder stones did not sufficiently treat her poor health.

The trial court denied Defendant's motion to suppress, finding facts consistent with those recited above and concluding that the search was not unreasonable based on exigent circumstances. The case proceeded to trial. The jury found Defendant guilty as charged. Defendant was sentenced to 8-to-19 months of imprisonment for the felony cruelty to animals conviction and to two 120-day sentences for the two misdemeanor cruelty to animals convictions, all to run consecutively. The trial court suspended the sentences with an active sentence of 90 days, and Defendant was placed on special supervised probation for 48 months. Defendant appealed in open court.

II. Discussion

Defendant contends that the trial court plainly erred by denying his motion to suppress evidence seized as a result of the warrantless search of the curtilage of his home and of his home. Defendant's arguments are wholly meritless.

A. Standard of Review

When a defendant fails to preserve an issue relating to a motion to suppress but "specifically and distinctly" contends plain error, this Court reviews the issue for plain error. *State v. Powell*, 253 N.C. App. 590, 594 (2017); N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted).

"In reviewing a motion to suppress evidence, this Court examines whether the trial court's findings of fact are supported by competent evidence and whether those findings support the conclusions of law." *State v. Alvarez*, 385 N.C. 431, 433 (2023) (citation omitted). "Conclusions of law are reviewed de novo." *Id.*

B. Applicable Search and Seizure Law

The Fourth Amendment protects individuals "against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. No unreasonable search occurs when "an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well-established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper." *State v. Lupek*, 214 N.C. App. 146, 151 (2011) (quotation marks, brackets, and citation omitted). "When law enforcement observes contraband in plain view, no reasonable expectation of privacy exists, and thus, the Fourth Amendment's prohibition against unreasonable warrantless searches is not violated." *State v. Grice*, 367 N.C. 753, 756 (2015) (citation omitted). Moreover, an officer may seize evidence under the plain view doctrine when "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed; . . . the evidence's incriminating character . . . was immediately apparent; . . . the officer had a lawful right of access to the object itself; . . . [and] the discovery of evidence in plain view [was] inadvertent." *Id.* at 756-57 (quotation marks and citations omitted).

When an officer is not in a place where the public is allowed to be, "[t]he governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135 (1982) (citations omitted). "Exigent circumstances exist when there is a situation that demands unusual or immediate action and that may allow people to circumvent usual procedures." *State v. Nance*, 149 N.C. App. 734, 743 (2002) (quotation marks, brackets, and citations omitted). "If the circumstances of a particular case render impracticable a delay to obtain a warrant, a warrantless search on probable cause is permissible . . . ." *State v. Allison*, 298 N.C. 135, 141 (1979) (citations omitted). Exigent circumstances exist where an officer reasonably believes that an animal on the property needs immediate aid. *Cf. Nance*, 149 N.C. App. at 743-44 (analyzing whether exigent circumstances existed for animal control officers to enter defendant's property and seize horses located thereon and ultimately concluding they did not because the "animal control officers had ample time during the three days after [first] viewing the horses in which to secure a warrant, but neglected to do so because they mistakenly believed it to be unnecessary"). *See Morgan v. State*, 645 S.E.2d 745, 749 (Ga. Ct. App. 2007) (holding that the Fourth Amendment does not bar a police officer from making a warrantless entry and search when they reasonably believe an animal on the property needs immediate aid).

1. Search of Defendant's Curtilage

Here, Harvill received a phone call reporting a strong smell and the potential for a dead animal on Defendant's property. He discovered that Defendant had been convicted of cruelty to animals and was on probation. Harvill called Defendant but Defendant did not answer. Harvill called Newman, and upon their arrival at Defendant's property, they immediately smelled ammonia and feces; Newman smelled rot. The property was overgrown with brush, and a lot of trash and building construction materials were piled up. They could see animals "throughout the front of the property."

The officers walked up Defendant's driveway toward his home. At the end of the driveway, they encountered Chubby, who was chained up and in poor physical condition with no food or water. They could see other dogs on the property in similar condition with "pretty much . . . the same setup." They could hear puppies barking in a nearby box, dogs barking from various points on the property, and a dog barking

inside the home. When the officers knocked on the door, they got no response. Next to the door, "the smell of ammonia and feces increased significantly to the point [Newman] felt physically sick."

At this point, no unreasonable search had occurred as Newman was "in a place where the public is allowed to be" when she walked up Defendant's driveway and onto the porch. *Lupek*, 214 N.C. App. at 151. Furthermore, the seizure of Chubby and the other dogs visible on the property was justified under the plain view doctrine: Newman did not violate the Fourth Amendment in arriving where Chubby was chained to the ground and the other dogs were visible; it was immediately apparent from Chubby's and the other dogs' conditions that Chubby and the other dogs were evidence of animal cruelty; Newman had a lawful right of access to Chubby and the other dogs; and the discovery of Chubby and the other dogs in plain view was inadvertent. *See Grice*, 367 N.C. at 756-57. Additionally, the circumstances abundantly supported a reasonable belief that the dogs on the property needed immediate aid to prevent further serious injury or death such that exigent circumstances justified Newman's warrantless entry into the areas of Defendant's property where the dogs were located.

Likewise, once Newman observed the seriously deprived condition of the dogs, she was entitled to respond to the dire emergency situation by having the dogs immediately seized so that they could be transported for emergency medical treatment. Accordingly, under these circumstances, the prevention of the continued needless suffering and death of the dogs on Defendant's property created exigent circumstances justifying the warrantless search and seizure of the dogs. *See*, *e.g.*, *Morgan v. State*, 656 S.E.2d 857, 860 (Ga. Ct. App. 2008) (affirming exigent circumstances existed where malnourished and mistreated animals were observed on the property, a neighbor had reported mistreated animals on the property, and harsh weather conditions existed, giving the deputy "a reasonable belief that the dogs heard barking in the backyard were in need of immediate aid to prevent their serious injury or death").

We further note that, given the plain view discoveries of Chubby and the other dogs on the front of the property, there was a substantial basis for probable cause to search the backyard and inside the house. Indeed, Newman applied for and received a search warrant to search the residence, storage units, barns, sheds, outbuildings, and person(s) at Defendant's property. Thus, even if exigent circumstances had not justified the search of the backyard and seizure of the dogs therein, the dogs would have been seized inevitably upon Newman securing and executing the search warrant for the premises; the inevitable discovery rule

therefore applies. *See State v. Wells*, 225 N.C. App. 487, 490 (2013) ("Under the inevitable discovery doctrine, evidence which is illegally obtained can still be admitted into evidence as an exception to the exclusionary rule when the [evidence] ultimately or inevitably would have been discovered by lawful means." (quotation marks and citations omitted)).

For these reasons, the trial court did not err, much less plainly err, by denying Defendant's motion to suppress evidence seized as a result of the warrantless search of the curtilage of Defendant's home.

2. Search of Defendant's Home

Defendant also asserts that the trial court plainly erred by denying his motion to suppress evidence seized as a result of the search of his home because the warrant was based on evidence seized from an unconstitutional search of the curtilage of his home. However, because the search of Defendant's curtilage was not unconstitutional, the warrant obtained to search Defendant's home was not based on evidence obtained by an unconstitutional search. Accordingly, the trial court did not err, much less plainly err, by denying his motion to suppress.

III. Conclusion

No unreasonable search occurred when Newman walked up Defendant's driveway and onto the porch, and the seizure of Chubby and the other dogs visible on the front property was justified under the plain view doctrine. Furthermore, exigent circumstances justified the warrantless search of Defendant's backyard and the seizure of the dogs found there. Finally, given the plain view discoveries of Chubby and the other dogs on the front property, even if exigent circumstances had not justified the backyard search and seizure of the dogs therein, the inevitable discovery rule applies. Accordingly, the trial court did not err, much less plainly err, by denying Defendant's motion to suppress.

NO ERROR.

Chief Judge DILLON and Judge CARPENTER concur.

STATE OF NORTH CAROLINA
v.
WILLIAM DAVID LINGERFELT, DEFENDANT

No. COA23-1158

Filed 17 December 2024

Sexual Offenders—sex offender registration—petition to terminate—tier level—categorical approach—comparability of state and federal offenses

The trial court properly denied defendant's petition to terminate his sex offender registration after determining that he was not a Tier I sex offender, since the state offense he was convicted of—sexual activity by a substitute parent—was comparable to the generic federal offense of abusive sexual contact, thereby placing him in Tier II or III. To be sure, the statute defining the federal offense required that a defendant act "knowingly" while the statute for the state offense lacked any mens rea requirement, thus prohibiting a wider range of conduct than the federal statute. Nevertheless, in affirming the denial of defendant's petition, the Court of Appeals concluded that the two offenses were still a categorical match because there was no realistic probability that the State of North Carolina could or would enforce its statute in a way that would sweep in conduct outside of what the generic federal crime encompassed (specifically, unintentional sexual activity by a substitute parent).

Judge MURPHY dissenting.

Appeal by defendant from order entered 22 May 2023 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 8 October 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

THOMPSON, Judge.

When determining whether a defendant may be afforded relief pursuant to a petition for termination of sex offender registration, a trial court must first determine, by comparison between the defendant's state offense and federal law, where the severity of Defendant's conduct falls within a three-tier system. Defendants whose offenses under state law do not meet any of the enumerated bases for categorization under Tier II or Tier III of this federal system automatically default to Tier I. After careful review, we affirm the order of the trial court denying defendant's petition for termination of sex offender registration.

I. Factual Background and Procedural History

On 4 February 2003, defendant was convicted of two counts of sexual activity by a substitute parent under the then-applicable provisions of N.C. Gen. Stat. § 14-27.7. Pursuant to these convictions, defendant was placed on probation and first registered as a sex offender on 14 February 2004; however, after a violation of conditions of his probation, defendant had his probation revoked and his sentence activated on 19 May 2004.

On 26 June 2019, defendant filed a petition for termination of his sex offender registration, and the petition was denied. Defendant filed another petition for termination of his sex offender registration on 1 March 2023—the petition at issue in this case—and the trial court again denied the petition. In denying the 2023 petition, the trial court made the following findings of fact from a form checklist on the order:

> 1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above. [Defendant's February 2003 convictions were identified above on the form.]
>
> 2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above. [14 February 2003 was the registration date identified.]
>
> 3. Since the Date Of Conviction above, the petitioner has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.
>
> 4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.

> 5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.
>
> 6. The petitioner is not a current or potential threat to public safety.

However, the trial court left blank the box indicating that

> [t]he relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State[,]

leaving a note beside the unchecked box that read "Tier II or Tier III[.]"[1]

The trial court concluded the petition should be denied, and from this order, defendant filed timely written notice of appeal.

II. Discussion

A. Standard of review

While the determination of whether to terminate a defendant's registration requirement is technically discretionary and subject to review for abuse of that discretion, in cases where, as here, the classification of the offense is the sole issue on appeal, we review the matter de novo as an alleged error of law and not as a discretionary determination by the trial court. *State v. Moir*, 369 N.C. 370, 374, 389 (2016); *In re Hamilton*, 220 N.C. App. 350, 359 (2012).

B. Defendant's tier status

Defendant argues that the underlying offense for which he had to register—sexual activity by a substitute parent—was a Tier I offense for purposes of comparison with federal statutes, specifically in that his offense was not comparable to the allegedly analogous federal Tier II crime. We do not agree.

---

1. The trial court also left unchecked a box indicating that, "[i]f the petitioner filed a previous petition for termination under N.C. Gen. Stat. § 14-208.12A that was denied, one year or more has passed since the date of the denial." However, as noted above, it had been more than one year since the denial of defendant's next-most-recent petition for termination, and no other information on the record indicates that defendant had had a petition for termination denied within one year of the 2023 petition.

Under N.C. Gen. Stat. § 14-208.12A, "[t]en years from the date of initial county registration, a person required to register [as a sex offender] may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article." N.C. Gen. Stat. § 14-208.12A(a) (2023). A trial court may terminate the defendant's registration requirement if the defendant shows the following in the petition:

> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A(a1).

For purposes of N.C. Gen. Stat. § 14-208.12A(a)(2), although the form language on the trial court's order indicates that any termination of defendant's registration requirement must comply with the Jacob Wetterling Act, the current legislation setting minimum standards for the state receipt of federal funds with respect to release from sex offender registries is the Sex Offender Registration and Notification Act (SORNA). *See Moir*, 369 N.C. at 375, 794 S.E.2d at 690 (holding that "the currently effective federal statutory provisions governing the extent to which an individual is required to register as a sex offender is . . . found in the Sex Offender Registration and Notification Act (SORNA)"). Under SORNA, "sex offenders subject to a registration requirement are classified on the basis of three tier levels . . . with sex offenders being treated differently based upon the exact tier to which they are assigned . . . ." *Moir*, 369 N.C. at 376, 794 S.E.2d at 690. The three tiers are statutorily defined by analogy to federal offenses.

First, "[t]he term '[T]ier I sex offender' means a sex offender other than a [T]ier II or [T]ier III sex offender." 34 U.S.C.A. § 20911(2) (2023). Second, "[t]he term '[T]ier II sex offender' means a sex offender other than a [T]ier III sex offender whose offense is punishable by imprisonment for more than 1 year" and

> (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
>
> (i) sex trafficking (as described in section 1591 of Title 18);
>
> (ii) coercion and enticement (as described in section 2422(b) of Title 18);
>
> (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;
>
> (iv) abusive sexual contact (as described in section 2244 of Title 18);
>
> (B) involves--
>
> (i) use of a minor in a sexual performance;
>
> (ii) solicitation of a minor to practice prostitution; or
>
> (iii) production or distribution of child pornography; or
>
> (C) occurs after the offender becomes a [T]ier I sex offender.

34 U.S.C. § 20911(3).

Finally, "[t]he term '[T]ier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year" and

> (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
>
> (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
>
> (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;
>
> (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
>
> (C) occurs after the offender becomes a tier II sex offender.

34 U.S.C.A. § 20911(4).

In *State v. Moir*, our Supreme Court observed that "[t]he federal courts have described three approaches for making determinations like

ascertaining the tier to which a defendant should be assigned for the purpose of determining whether he is eligible to have his sex offender registration obligation reduced[,]" including, "(1) the 'categorical approach,' (2) the 'circumstance-specific approach,' and (3) 'the modified categorical approach.' " *Moir*, 369 N.C. at 379, 794 S.E.2d at 692. "The applicability of each approach depends upon whether the statute under which a defendant was convicted refers to a 'generic crime' or to a 'defendant's specific conduct.' " *Id.* at 379–80, 794 S.E.2d at 692.

However, "[i]n the event that the court is required to address issues arising under a divisible [state] statute, which exists when the relevant provision sets out multiple offenses rather than a single offense, a pure categorical approach cannot be utilized in any meaningful way." *Id.* at 381, 794 S.E.2d at 693. "In order to resolve cases involving divisible statutes, courts have developed the 'modified categorical approach.' " *Id.* The modified categorical approach "only permits a finding of comparability in the event that the elements of at least one of the alternative offenses set out in the statute defining the offense of which the defendant was previously convicted categorically match the generic federal offense." *Id.*

"In using the 'modified categorical approach,' the court is permitted to examine a limited number of contemporaneously generated documents . . . such as the indictment, the plea agreement, and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.* (internal quotation marks and citation omitted). "[T]he only reason that a court is allowed to consider certain extra-statutory information in the 'modified categorical approach' is to assess whether the plea was to the version of the crime' in the state statute 'that correspond[s] to the generic [federal] offense.' " *Id.* at 382, 794 S.E.2d at 693 (internal quotation marks, brackets, and citation omitted).

N.C. Gen. Stat. § 14-27.7(a) provides that

> [i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.7(a) (2002).

Here, applying the framework set forth by our Supreme Court in *Moir*, we observe that N.C. Gen. Stat. § 14-27.7(a) is a divisible statute in that it "sets out multiple offenses rather than a single offense[,]" *id.* at 381, 794 S.E.2d at 693, with the elements being either:

- (1) Defendant assumes the position of a parent in the home of a minor and (2) Defendant engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home; or
- (2) Defendant has custody of a victim of any age or a person who is an agent or employee of any person or institution and (2) Defendant engages in vaginal intercourse or a sexual act with the victim while the victim is in Defendant's custody.

N.C. Gen. Stat. § 14-27.7(a).[2]

Furthermore, when making limited judicial observance of the indictment, *Moir*, 369 N.C. at 381, it appears that both of defendant's counts were of the first formulation, with the indictment specifically referring to intercourse with a victim residing in his home.[3] Accordingly, our comparison will inquire as to whether the federal statute, abusive sexual contact, is *a categorical* match with the state offense of sexual activity by a substitute parent.

C. Categorical approach

This case ultimately turns on, as noted above, whether defendant's "state conviction is comparable to the relevant federal offense for purposes of the 'categorical approach[,]' " that is, whether "the elements

---

2. The current codification of sexual activity by a substitute parent substantially reflects this division, with the offense currently being formulated as follows:

> (a) If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, the defendant is guilty of a Class E felony.
>
> (b) If a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony.
>
> (c) Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.31.

3. The second count, for which the indictment is absent, is stipulated by the parties to have occurred in a substitute parental, rather than custodial, arrangement.

composing the statute of conviction are the same as, or narrower than, those of the generic offense." *Moir*, 369 N.C. at 380, 794 S.E.2d at 692 (internal quotation marks and citation omitted).

As the dissent correctly notes, "if a state statute 'sweeps more broadly than the generic crime,' there is no categorical match." *Id.* "In other words, if there is a *realistic probability* that the State would apply its statute [sexual activity by a substitute parent pursuant to N.C. Gen. Stat. § 14-27.2] to conduct that falls outside the generic definition of a crime [abusive sexual contact pursuant to 18 U.S.C. § 2244(a)(3)] there is no categorical match . . . ." *Id.* (internal quotation marks, ellipsis, and citation omitted) (emphases added). Therefore, in applying the categorical approach—we consider the elements of the state offense: sexual activity by a substitute parent; with the elements of the generic federal offense: abusive sexual contact—to determine whether there is a categorical match between the two offenses.

18 U.S.C. § 2244(a)(3) defines abusive sexual contact as

> [w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate- -
>
> . . . .
>
> (3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both . . . .

18 U.S.C. § 2244(a)(3) (2023).

In turn, 18 U.S.C. § 2243(a) defines sexual abuse *of a minor*:

> [w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—
>
> (1) has attained the age of 12 years but has not attained the age of 16 years; and

> (2) is at least four years younger than the person so engaging[.]

18 U.S.C.A. § 2243(a).

On the other hand, the offense for which defendant was convicted was sexual activity by a substitute parent under N.C. Gen. Stat. § 14-27.7, which provided:

> [i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.7(a).

Applying the categorical approach to the two offenses at issue in the present case, we observe that the state offense is not *fully* coterminous with the pertinent federal state offense. While the federal prohibition on abusive sexual contact in 18 U.S.C. § 2244(a)(3) includes the requirement that the defendant act "knowingly[,]" N.C. Gen. Stat. § 14-27.7(a) contains no such mens rea requirement.[4] Therefore, the range of conduct prohibited by N.C. Gen. Stat. § 14-27.7(a) is wider than the range prohibited by 18 U.S.C. § 2244(a)(3), because it does not require a mental state.

---

4. For comparison, the first prong of North Carolina's currently effective statute prohibiting indecent liberties with children includes both a purpose requirement and a mens rea requirement:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . *[w]illfully* takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years *for the purpose of arousing or gratifying sexual desire*[.]

N.C. Gen. Stat. § 14-202.1(a)(1) (emphases added). From this, we can infer that, had our General Assembly intended to include such mens rea requirements in N.C. Gen. Stat. § 14-27.7(a), it could have done so, making their omission intentional.

I agree with the dissent that "the North Carolina formulation [of the elements of sexual activity by a substitute parent] prescribes no intent requirement, [while] the federal formulation [of the offense] does." However, the dissent argues that a "mismatch between the mens rea of the federal generic crime" and the North Carolina statute "leads inevitably to the conclusion that they are not a categorical match." *See Cabeda v. Attorney General of United States*, 971 F.3d 165, 176 (3d Cir. 2020) (holding that "the mismatch between the mens rea of the federal generic crime and the [state crime] leads inevitably to the conclusion that they are not a categorical match").

In *Cabeda v. Attorney General of United States*, the Third Circuit Court of Appeals acknowledged the oddity of the ensuing result due to the categorical mismatch between the mens rea of the state and federal offenses at issue in that case, observing that:

> one might be forgiven for thinking that, as a matter of common sense, it is scarcely conceivable that one could, as a factual matter, recklessly commit the crime that Pennsylvania calls involuntary deviate sexual intercourse. That improbability, one might further think, should mean that the Pennsylvania statute is a categorical match for the generic crime of sexual abuse of a minor, *because there is no realistic probability* that Pennsylvania could or would enforce its statute in a way that would sweep in reckless conduct. *Following that reasoning would allow for a more sensible result here*, the semantic strictures of the categorical approach notwithstanding. Unfortunately, that analytical route is also barred by binding precedent.

971 F.3d 165, 175 (3d Cir. 2020) (emphases added).

Ultimately, the Third Circuit observed that the Third Circuit's "precedent, however, takes an alternative approach[,]" and "where the elements of the crime of conviction are not the same as the elements of the generic federal offense[,] the realistic probability inquiry *is simply not meant to apply*." *Id.* at 176 (ellipses omitted) (emphasis added). Again, in reaching this result, the majority acknowledged that, "the mismatch between the mens rea of the federal generic crime and the Pennsylvania involuntary deviate sexual intercourse statute leads inevitably to the conclusion that they are not a categorical match." *Id.* "We are left with no option, then, but to conclude that Cabeda's multiple statutory rapes of a 15-year-old boy do not qualify as sexual abuse of a minor within the meaning of the [federal statute]. *What a world*." *Id.* (emphasis added).

We propose reaching the "more sensible result[,]" *id.* at 175, lamented by the majority in *Cabeda*, that—despite the mens rea mismatch between the statutes at issue, there is no *realistic probability* that North Carolina could or would enforce its statute in a way that would sweep in *unintentional* sexual activity by a substitute parent—therefore, there *is* a categorical match between the North Carolina offense, sexual activity by a substitute parent, and the generic federal offense, abusive sexual contact.[5]

Because we conclude there is a categorical match between the two offenses, we conclude that the trial court did not err in denying defendant's petition for termination of his sex offender registration. Consequently, we conclude that the trial court did not abuse its discretion in denying defendant's petition for termination of his sex offender status.

III. Conclusion

Because there is not a realistic possibility that the State of North Carolina would apply its statute to conduct that falls outside of the generic definition of the crime, there is a categorical match between the two offenses. Therefore, we conclude that the trial court did not err in denying defendant's petition for termination of his sex offender registration.

AFFIRMED.

Judge GRIFFIN concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

The Majority's holding, even if framed as the "more sensible result," *Majority* at 14, is an incorrect application of the framework mandated by our Supreme Court in *Moir*, 369 N.C. at 380, as—by the Majority's own

5. I take judicial notice of the reality that the Third Circuit Court of Appeals of the United States has explicitly (but reluctantly) rejected my proffered approach, holding that, "where the elements of the crime of conviction are not the same as the elements of the generic federal offense . . . the realistic probability inquiry . . . is simply not meant to apply." *Cabeda*, 971 F.3d at 176. However, our Supreme Court *has not offered further guidance* on what constitutes a "realistic probability" under *Moir*, and whether that inquiry is an appropriate one to undertake in light of the mens rea mismatch between the two offenses in the present case.

admission—"the range of conduct prohibited by [N.C.G.S.] § 14-27.7(a) is *wider* than the range prohibited by 18 U.S.C. § 2244(a)(3), because it does not require a mental state." *Majority* at 12-13 (emphasis added). For the reasons explained below, I would hold that the offense of sexual activity by a substitute parent for which Defendant was convicted includes a broader range of conduct than the allegedly analogous federal offense, such that Defendant was not a Tier II offender, but a Tier I offender, and therefore entitled as a matter of law to a new determination as a Tier I offender.

Under *Moir*, once the modified categorical approach resolves into the categorical approach, we must examine the elements of the divided state offense to see if they refer to a range of conduct narrower than that described by the comparable federal offense for tiering purposes:

> A defendant's state conviction is comparable to the relevant federal offense for purposes of the "categorical approach" when the elements composing the statute of conviction are the same as, or narrower than, those of the generic offense. Accordingly, if a state statute "sweeps more broadly than the generic crime," there is no categorical match. *Descamps* [*v. United States*, 570 U.S. 254, 261 (2013)] (stating that "[t]he key, we emphasize[], is elements, not facts.") In other words, if there is a realistic probability that the State would apply its statute to conduct that falls outside the generic definition of a crime, there is no categorical match and the prior conviction cannot be for an offense under the federal statute.

Moir, 369 N.C. at 380.

Here, the allegedly analogous federal statute is abusive sexual contact under 18 U.S.C. § 2244(a)(3):

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—
>
> . . . .
>
> (3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both[.]

18 U.S.C. § 2244(a)(3) (2023). In turn, 18 U.S.C. § 2244(a)(3) provides that

> [w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—
>
> (1) has attained the age of 12 years but has not attained the age of 16 years; and
>
> (2) is at least four years younger than the person so engaging[.]

18 U.S.C. § 2243(a) (2023). A "sexual act," under these statutes, is

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
>
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

18 U.S.C. § 2246(2) (2023). Overall, then, abusive sexual contact occurs when a person "knowingly engages in or causes" "a sexual act with another person who[] (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging[,]" with "sexual act" being defined in 18 U.S.C. § 2246(2). *See* 18 U.S.C. § 2243(a) (2023).

The offense for which Defendant was convicted was sexual activity by a substitute parent under N.C.G.S. § 14-27.7 (2002). The language of the statute is as follows:

> If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C.G.S. § 14-27.7(a) (2002). A "sexual act," for purposes of N.C.G.S. § 14-27.7(a) (2002), "means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." N.C.G.S. § 14-27.1(4) (2002).

Here, where it is undisputed that Defendant was at least four years older than the victim and the victim was between 12 and 16 at the time of the offense, the question becomes whether, when a defendant assumes the position of a parent in the home of the minor and engages in vaginal intercourse or a sexual act with her, he necessarily *knowingly* engages in or causes a sexual act with the victim. *See* 18 U.S.C. § 2244(a)(3) (2023); 18 U.S.C. § 2243(a) (2023); *Moir*, 369 N.C. at 384 n.9 (determining that issues of age are resolved by the facts of the offense, not the elements in the statutes); *see also State v. Williams*, 226 N.C. App. 393, 406 (2013) (cleaned up) ("The word 'knowingly' means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged.").

For purposes of detailing the comparison, both vaginal intercourse and the N.C.G.S. § 14-27.7(a) (2002) definition of "sexual act" are *almost* completely subsumed by the federal statute. Vaginal intercourse necessarily includes "contact between the penis and the vulva"; "cunnilingus" entails "contact between . . . the mouth and the vulva"; "fellatio" entails "contact between the mouth and the penis"; "analingus" entails "contact between . . . the mouth and the anus"; and "anal intercourse" entails "contact between . . . the penis and the anus[.]" *Compare* N.C.G.S. § 14-27.1(4) (2002) *with* 18 U.S.C. § 2246(2) (2023). However, "the penetration, however slight, by any object into the genital or anal opening of another person's body" is not *fully* coterminous with "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, *with an intent to abuse*, *humiliate*,

harass, degrade, or arouse or gratify the sexual desire of any person[.]" *Compare* N.C.G.S. § 14-27.1(4) (2002) *with* 18 U.S.C. § 2246(2)(C) (2023). While the North Carolina formulation prescribes no intent requirement, the federal formulation does. The same could also be said of the offenses more broadly: while the federal prohibition on abusive sexual contact in 18 U.S.C. § 2244(a)(3) includes the requirement that the defendant act "knowingly[,]" the relevant portion of N.C.G.S. § 14-27.7(a) (2002) contains no such mens rea requirement. Therefore, the range of conduct prohibited by N.C.G.S. § 14-27.7(a) (2002) is wider than the range prohibited by 18 U.S.C. § 2244(a)(3).

Based on this mismatched mens rea element, I would hold that Defendant was not a Tier II offender by comparison with abusive sexual contact, as N.C.G.S. § 14-27.7(a) (2002) prohibited a wider range of conduct. Moreover, there is no serious contention on appeal that Defendant was a Tier III offender; that his offense was comparable to sex trafficking, coercion and enticement, or transportation with intent to engage in criminal sexual activity; that his offense involved a minor in sexual performance, the practice of prostitution, or child pornography; or that his offense occurred after he had already previously become a Tier I offender. *See* 34 U.S.C. §20911(3)(A)(i)-(iii), (B), (C) (2023). This necessarily leads to the conclusion that Defendant was a Tier I offender. *See* 34 U.S.C. § 20911(2) (2023) ("The term 'tier I sex offender' means a sex offender other than a tier II or tier III sex offender."); *see also Cabeda*, 971 F.3d at 176 ("[T]he mismatch between the mens rea of the federal generic crime and the [state crime] leads inevitably to the conclusion that they are not a categorical match . . . ."). Given that the trial court's order denying Defendant's petition for termination of sex offender registration was predicated solely on the belief that Defendant was a Tier II or Tier III offender, this misapprehension of law suffices to show abuse of discretion. *See Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104 (2022) (marks omitted) ("[W]hatever the standard of review, an error of law is an abuse of discretion.").

In light of this abuse of discretion, I would vacate the order of the trial court denying Defendant's petition for termination of sex offender registration and remand to the trial court. On remand, Defendant would be entitled to a new determination as a Tier I offender; however, "the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion." *In re Hamilton*, 220 N.C. App. 350, 359 (2012). "Thus, after making findings of fact supported by competent evidence on each issue raised in the petition, the trial court [would be] then free to employ its discretion in reaching its conclusion of law whether Petitioner is entitled to the relief he requests." *Id.*

STATE OF NORTH CAROLINA
v.
FERNANDO RODRIQUEZ McCULLOUGH

No. COA24-361

Filed 17 December 2024

1. Probation and Parole—revocation of probation—new criminal offense—sufficiency of evidence—driving while impaired

The trial court did not abuse its discretion by revoking defendant's probation for committing a new criminal offense while on probation—driving while impaired (DWI)—where the State presented the charging officer's affidavit, defendant's arrest warrant for DWI, an intoxilyzer report showing that defendant had a blood alcohol level of 0.12, and testimony from defendant's probation officer regarding defendant's phone call to her notifying her of his arrest. The affidavit and intoxilyzer report, in particular, were sufficient to allow the trial court to independently determine that it was more probable than not that defendant had violated the terms of his probation.

2. Probation and Parole—revocation of probation—statutory right to confront adverse witnesses—affidavit in lieu of testimony—other evidence sufficient

The trial court did not commit prejudicial error in defendant's probation revocation hearing—based on defendant's commission of a new criminal offense while on probation (driving while impaired)— by failing to make an explicit finding that good cause existed for denying defendant the right to confront the charging officer, whose affidavit was submitted by the State. Where the State presented sufficient other evidence to support revocation, including an intoxilyzer report and testimony from defendant's probation officer (regarding defendant's phone call to her notifying her about his DWI and admitting that he had been driving), the arresting officer's testimony would have been extraneous.

3. Judgments—revocation of probation—clerical error—basis for revocation—incorrect box checked

The judgment revoking defendant's probation was remanded to the trial court for correction of a clerical error where, although the trial court's findings in open court clearly indicated that the basis for revocation was the commission of a new criminal offense (driving while impaired), the court checked an additional box on the

judgment and commitment form erroneously linking revocation to defendant's failure to pay court and supervision fees (as alleged in his probation officer's violation report).

4. Attorney Fees—criminal case—attorney appointment fee—duplicate fees erroneously assessed

Where the trial court erroneously assessed defendant two appointment fees for court-appointed counsel in a criminal matter—once after defendant's sentencing when he pleaded guilty and a second time after his probation was revoked—in violation of N.C.G.S. § 7A-455.1, the duplicate appointment fee was vacated and the matter was remanded to the trial court for recalculation of the judgment.

Appeal by Defendant from an order entered 16 November 2023 by Judge Lori I. Hamilton in Cabarrus County Superior Court. Heard in the Court of Appeals 8 October 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Helms, for the State.

Jason Christopher Yoder for Defendant-appellant.

WOOD, Judge.

Fernando Rodriquez McCullough ("Defendant") appeals from a final judgment following the revocation of his probation.

I. Factual and Procedural Background

On 18 May 2022, Defendant pleaded guilty to assault by strangulation, assault on a female, and injury to real property. He was sentenced to 11 to 23 months of imprisonment, suspended for 18 months of supervised probation, and was ordered to pay court appointed attorney fees plus a $75.00 attorney appointment fee.

On 7 May 2023, Defendant was charged for the criminal offenses of DWI and driving while license revoked for an impaired revocation in Cabarrus County. On 17 May 2023, Defendant's probation officer filed a violation report in Cabarrus County Superior Court alleging Defendant had violated the conditions of his probation by failing to pay court and supervision fees as ordered by the court and for committing the new criminal offenses of DWI and driving while license revoked for an impaired revocation.

Defendant's probation expired on 14 November 2023, and his violation hearing was held on 16 November 2023. The trial court found good cause to retain jurisdiction because the hearing was conducted during the same session of court in which Defendant's probation expired. Defendant admitted the violations related to owing money but denied committing a new criminal offense.

At the hearing, Defendant's probation officer testified she filed a violation report alleging new criminal offenses after a magistrate issued a warrant charging Defendant with five offenses: driving while impaired, driving while license revoked for an impaired revocation, no liability insurance, "giving, lending, or borrowing a license plate" and "expired/no inspection." The State introduced the warrant into evidence as State's Exhibit 1. The State also introduced an officer's affidavit, consent form, and intoxilyzer result form from the 7 May 2023 arrest. Defense counsel objected to the probation officer testifying to the content of those items rather than the arresting officer. The trial court noted Defendant had the right to confront witnesses at the hearing but overruled the objection concluding that the officer's testimony would be extraneous under this Court's decision in *Singletary. State v. Singletary*, 290 N.C. App. 540, 893 S.E.2d 215 (2023). The probation officer also testified that Defendant had called her to report his arrest for the new offenses.

The trial court found the evidence sufficient to support revocation of Defendant's probation for committing a new criminal offense based on the officer's affidavit, the consent form, the test results, and the Defendant's admission to his probation officer. After revoking Defendant's probation, the trial court ordered the clerk to enter a civil judgment for $325.00 in attorney fees, as well as another $75.00 attorney appointment fee.

II. Analysis

Defendant argues the trial court erred in finding Defendant had committed a new criminal offense based on the magistrate's warrant and violated Defendant's due process and statutory right to confrontation by failing to make a finding of good cause for denying his right to confront and cross-examine the arresting officer. Additionally, Defendant argues the trial court erred in ordering Defendant to pay a second $75.00 appointment of counsel fee and erred in finding that "[e]ach violation is, in and of itself a sufficient basis upon which this Court should revoke probation and activate the suspended sentence."

A. Jurisdiction

On 16 November 2023, after the trial court revoked Defendant's probation, Defendant gave oral notice of appeal in open court. Because it is

a final judgment from the superior court, jurisdiction lies in this Court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

The North Carolina Rules of Appellate Procedure permit appeals from a criminal action to be made in two ways: entering oral notice at trial or filing written notice with the clerk of superior court within fourteen days. N.C. R. App. P. 4(a). This Court has held attorney fees are civil penalties subject to the rules of civil procedure governing appeals. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 697 (2008). Therefore, defendants are required to follow the civil rules of procedure when appealing attorney fees. A party must file and serve written notice of appeal with the clerk of superior court within thirty days after entry of judgment. N.C. R. App. P. 3(a),(c)(1). Defendant gave oral notice of appeal after entry of the judgment but failed to enter written notice of appeal within the time proscribed.

On 25 June 2024, Defendant filed a Petition for Writ of Certiorari pursuant to N.C. Gen. Stat. § 7A-32(c), Rule 21 of the North Carolina Rules of Appellate Procedure, and *State v. Ledbetter*, 371 N.C. 192, 194, 814 S.E.2d 39, 41 (2018) requesting this Court cure the defective notice of appeal. Under Appellate Rule 21(a)(1), this Court may issue a writ of certiorari to permit review "when the right to prosecute an appeal has been lost by the failure to take timely action[.]" N.C. R. App. P. 21(a)(1)(2023). Our Supreme Court has stated the writ of certiorari should issue upon "a reasonable show of me its and that the ends of justice will be thereby promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924).

The State concedes the trial court erred by duplicating the attorney appointment fee. Under N.C. Gen. Stat. § 7A-455, a trial court may impose attorney's fees against a convicted, indigent defendant for the cost incurred by a defendant's appointed counsel. *State v. Webb*, 358 N.C. 92, 100, 591 S.E.2d 505, 512 (2004). The statute permits a $75.00 fee for the appointment of a court-appointed attorney in every criminal case. The fee applies once, "regardless of the number of cases which the attorney was assigned. An additional appointment fee shall not be assessed if the charges for which an attorney was appointed were reassigned to a different attorney." N.C. Gen. Stat. § 7A-455.1(e) (2023).

As this issue clearly has merit, we grant certiorari to reach the merits of Defendant's appeal.

B. Standard of Review

A trial court's decision to revoke probation is reviewed for "manifest abuse of discretion." *Singletary* at 545, 893 S.E.2d at 220.

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

When the trial court's revocation of probation relies on statutory interpretation, it is a question of law and is reviewed *de novo*. *State v. Krider*, 258 N.C. App. 111, 113, 810 S.E.2d 828, 829 (2018), *aff'd but criticized*, 371 N.C. 466, 818 S.E.2d 102 (2018). Claims alleging violations of statutory guidelines and constitutional rights are also reviewed *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation omitted).

C. New Criminal Offense

[1] The trial court may revoke probation when a defendant commits a criminal offense while on probation. N.C. Gen. Stat. §§ 15A-1343(b)(1) (2022), 15A-1344(a) (2022). That a defendant is charged with a criminal offense is "insufficient to support a finding that he committed them." *Singletary* at 546, 893 S.E.2d at 220 (quoting *State v. Hancock*, 248 N.C. App. 744, 749, 789 S.E.2d 522, 526 (2016)). To revoke probation for committing a criminal offense, there must be "some form of evidence that a crime was committed." *State v. Graham*, 282 N.C. App. 158, 160, 869 S.E.2d 776, 778 (2022). However, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* at 159, 869 S.E.2d at 778. The trial court only need find that a defendant "willfully violated a valid condition of probation" to revoke probation. *Singletary* at 545, 893 S.E.2d at 220 (quoting *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008)). The evidence must "reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation . . . ." *Id.*

The evidence is sufficient when "the trial court can independently find that the defendant committed a new offense." *Id.* at 546, 893 S.E.2d at 221 (quoting *Hancock*, 248 N.C. App. at 749, 789 S.E.2d at 526).

At the hearing, the trial court cited *Singletary* to support its decision. In *Singletary*, the trial court relied upon the violation report, arrest warrants, the defendant's admission to her probation officer of the crimes, and images of the defendant committing the alleged crimes to make an independent determination that it was "more probable than not Defendant committed the new criminal offense." *Id.* at 547, 893 S.E.2d at 221.

Defendant contends the trial court erred in its comparison to *Singletary* as there was no independent evidence to establish that he committed a new crime. We disagree.

The trial court was presented with the driving while impaired arrest warrant containing Defendant's photograph, the charging officer's affidavit, the intoxilyzer report showing a blood alcohol level of 0.12, and the probation officer's testimony regarding the telephone conversation she had with Defendant shortly after the incident. Although the arrest warrant is not sufficient to allow the trial court to independently determine Defendant probably committed a new offense, the charging officer's affidavit and the intoxilyzer report were sufficient to allow the trial court to independently determine Defendant probably had committed the offenses of driving while impaired. Thus, the evidence allowed the trial court to independently determine that it was "more probable than not Defendant committed the new criminal offense" and thereby violated the terms of his probation. *Id.*

D. Due Process and Right to Confrontation

[2] A probation revocation hearing is not a criminal proceeding and therefore the "Sixth Amendment right to confrontation in a probation revocation hearing does not exist." *Singletary* at 548, 893 S.E.2d at 222 (quoting *State v. Hemingway*, 278 N.C. App. 538, 548, 863 S.E.2d 279, 286 (2021)). N.C. Gen. Stat. § 15A-1345(e) "controls the probationer's right to confrontation" during a hearing. *Id.* Therefore, no constitutional argument exists; there is only a statutory argument for Defendant's violation of due process. *Id.*

Under N.C. Gen. Stat. § 15A-1345(e), during a revocation hearing, the probationer "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2022). The court may use its discretion to determine if good cause exists for denying confrontation. *Singletary*, 290 N.C. App.

at 548, 893 S.E.2d at 222 (citing *State v. Jones*, 269 N.C. App. 440, 444, 838 S.E.2d at 686, 689 (2020)). Accordingly, the issue is whether the trial court made a prejudicial error by not making a finding of good cause for denying Defendant the ability to confront the arresting officer.

While enumerating its findings in open court, the trial court cited *Singletary* explaining "failure to require an adverse witness to testify is not error if the adverse witness' testimony would have been merely extraneous evidence in light of other competent evidence presented . . . ." *Singletary* at 548, 893 S.E.2d at 222.

In *Singletary*, this Court found that when the trial court had arrest warrants, video footage, and the parole officer's testimony about the defendant's admissions, there was sufficient evidence to support the trial court's finding that the defendant had committed new crimes without any testimony from the witness at issue. *Id.* at 549, 893 S.E.2d at 223.

As in *Singletary*, here, the trial court received into evidence documents filed with the court, specifically the arrest warrant containing Defendant's picture and the intoxilyzer results indicating a breath alcohol level above the legal limit. In addition, Defendant's probation officer testified that Defendant contacted her about his arrest and admitted he had been driving. Even without the arresting officer's affidavit or testimony, the trial court had sufficient evidence to independently determine a new offense of driving while impaired had been committed. Because the arresting officer's testimony would have been merely extraneous when sufficient evidence had been admitted, the trial court did not err by omitting a finding of good cause for denying the confrontation of the arresting officer.

E. Clerical Errors

[3] Defendant's probation officer filed a violation report alleging Defendant was in violation of his probation for failing to pay court and supervision fees and committing new criminal offenses. When completing the Judgment and Commitment Upon Revocation of Probation form, the trial court checked both box four, indicating "each violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence," as well as box five (a) which acknowledged Defendant's probation could only be revoked "for the willful violation of the condition(s) that he/she not commit any criminal offense . . . ." Probation can only be revoked if the probationer:

> (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3)

> violates any condition of probation after serving two prior periods of CRV [confinement in response to violations] under N.C. Gen. Stat. § 15A-1344(d2).

N.C. Gen. Stat. § 15A-1344(a)(2023); *State v. Krider*, 258 N.C. App. 111, 113, affirmed in part, 371 N.C. 466 (2018). Thus, Defendant's failure to pay the fees alleged in the violation report is not a sufficient basis for revoking probation and the trial court's selection of box four indicating that each violation was a sufficient basis upon which the court could revoke probation was error.

Thorough review of the trial court's findings made in open court clearly indicate Defendant's probation was revoked on the basis of new criminal conduct. The trial court stated,

> The State has presented sufficient evidence to indicate that the defendant has committed new criminal conduct while he was on probation. That is [a] revocable offense. The recommendation from the probation officer is that his probation be revoked. I am going to accept the recommendation. I'm going to revoke his probation . . . .

Notwithstanding the trial court's statements, the trial court checked the wrong box. "When the trial court incorrectly checks a box on a judgment form that contradicts its findings and the mistake is supported by the evidence in the record, we may remand for correction of this clerical error in the judgment." *State v. Newsome*, 264 N.C. App. 659, 665, 828 S.E.2d 495, 500 (2019). Accordingly, we remand to the trial court for correction of the clerical error.

F. Appointment Fee for Court-Appointed Attorney

[4] Defendant next argues the trial court incorrectly assessed two appointment fees for his court-appointed attorney, and the State concedes the error. Pursuant to N.C. Gen. Stat. § 7A-455.1, a trial court may impose attorney's fees against a convicted, indigent defendant for the cost incurred by a defendant's appointed counsel. *Webb* at 100, 591 S.E.2d at 512. The statute allows for a $75.00 appointment fee for court-appointed attorney fees in every criminal case provided the fee shall be applied "only once, regardless of the number of cases to which the attorney was assigned. An additional appointment fee shall not be assessed if the charges for which an attorney was appointed were reassigned to a different attorney." N.C. Gen. Stat. § 7A-455.1(e) (2023). The plain reading of this statute shows the attorney appointment fee should only be charged once for each case and our Supreme Court has stated that "[c]osts are imposed only at sentencing . . . . " *State v. Webb* at 101,

591 S.E.2d at 513. However, here it was charged both during sentencing after Defendant pleaded guilty and at the probation revocation hearing.

Further, the attorney appointment fee statute specifically states it can only be assessed if the "person is convicted." N.C. Gen. Stat. § 7A-455.1(a) (2023). Here, Defendant had already been assessed a $75.00 fee during sentencing when he pleaded guilty in this case. Probation violation proceedings occur in the same case for which a defendant is placed on probation following a conviction but are not in themselves new convictions. Our Supreme Court has clarified, "[w]hen a defendant's probation is revoked, the sentence the defendant may be required to serve is the punishment for the crime of which he had *previously* been found guilty." *State v. Murchison*, 367 N.C. 461, 463, 758 S.E.2d 356, 358 (2014) (cleaned up) (emphasis added).

Therefore, the second $75.00 appointment fee charged after Defendant's probation revocation must be removed from the calculation of civil penalties charged to Defendant. We vacate the duplicate attorney fee and remand to correct the judgment amount.

III. Conclusion

For the foregoing reasons, the trial court did not err in its determination Defendant had committed a new criminal offense warranting, in its discretion, revocation of Defendant's probation, nor did the trial court err in denying Defendant's confrontation of the arresting officer. However, the trial court erred when it charged Defendant the $75.00 attorney appointment fee twice. We vacate the duplicate attorney appointment fee and remand to the trial court for recalculation of the judgment.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Judges ARROWOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
CINQUANA LAZIAH DAYREIONA MOODY, DEFENDANT

No. COA23-1020

Filed 17 December 2024

1. Motor Vehicles—felony death by vehicle—motion to dismiss—impaired driving—proximate cause of death—substantial evidence

In a prosecution on multiple charges arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the trial court did not err in denying defendant's motion to dismiss the charge of felony death by vehicle where the State produced substantial evidence of the two contested elements of that offense: (1) that defendant was engaged in the offense of impaired driving, as shown by the level of delta-9-tetrahydrocannabinal (THC) in her blood, data from defendant's vehicle showing that she was driving 70 miles per hour (MPH) in a 45 MPH zone and never reduced her speed before the collision, and witness testimony that he saw defendant's vehicle "fly past" him on the wrong side of the road immediately before the crash; and (2) that defendant's impaired driving was the proximate cause of the victim's death, as shown by expert testimony regarding the potential effects of THC on driving—including decreased motor coordination, slowed reaction time, impaired time and distance estimation, and a tendency to weave side to side—along with the above-described vehicle data and witness testimony indicating the defendant's driving was consistent with appreciably impaired driving.

2. Evidence—felony death by vehicle—testimony regarding notification to be on the lookout for an impaired driver—limiting instruction

In a prosecution on charges including felony death by vehicle arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the trial court did not err by admitting testimony from a law enforcement officer that he had been notified to be on the lookout (BOLO) for a "possibly impaired driver" shortly before seeing smoke coming from the scene of the collision. Upon defendant's objection on Evidence Rule

403 grounds, the trial court gave a limiting instruction to the jury that the BOLO testimony was only to be considered to provide context to the officer's investigation, thus ensuring that any prejudice to defendant from the reference to a "possibly impaired driver" did not substantially outweigh the testimony's probative value. Further, even assuming that admission of the BOLO testimony was error on hearsay grounds (a basis not raised by defendant at trial), defendant could not show prejudice in light of the other evidence of defendant's impaired driving and thus could not establish plain error.

3. Criminal Law—prosecutor's closing argument—failure to intervene ex mero motu—no gross impropriety

In a prosecution on charges including felony death by vehicle arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the prosecutor's statement during closing argument—to which defendant did not object—noting that the victim, her child, and her family had no opportunity to realize the finality of their last interactions before the deadly collision occurred, even if improper, did not require the trial court's ex mero motu intervention because it did not rise to the level of gross impropriety.

Appeal by Defendant from judgment entered 23 January 2023 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

William D. Spence, for the defendant-appellant.

STADING, Judge.

Cinquana Laziah Dayreiona Moody ("Defendant") appeals the trial court's judgment after a jury found her guilty of felony death by vehicle, among other charges not at issue. For the reasons below, we hold that the trial court did not err in denying Defendant's motion to dismiss the felony death by vehicle charge, did not plainly err or abuse its discretion in admitting Officer Jacob Huneycutt's testimony, and did not abuse its discretion by not intervening *ex mero motu* in the State's closing argument.

I. Background

On the morning of 10 September 2020, Defendant crashed her vehicle head-on into another vehicle driven by Ms. Brianna Simpson. The collision occurred when Defendant crossed from her lane into the oncoming lane occupied by Ms. Simpson. Defendant survived but Ms. Simpson was pronounced dead at the hospital afterward. The first witness on the scene of the accident, Joshua Whitley, saw Defendant's black SUV "flying" past him at over seventy miles per hour immediately prior to the collision. The posted speed limit was forty-five miles per hour. Mr. Whitley also observed that Defendant had crossed into the furthest lane of oncoming traffic.

Around the same time, Officer Huneycutt of the Kannapolis Police Department, received a "be on the lookout" ("BOLO") notification from police dispatch about a "possibly [ ] impaired driver." Shortly after receiving the notification, Officer Huneycutt "saw smoke up in the distance." Upon approaching the smoke's location, he observed two totaled vehicles—a white sport utility vehicle ("SUV") and a black SUV. Sergeant Matthew Hoehman of the Kannapolis Police Department also arrived at the scene to secure it for further investigation. Sergeant Hoehman obtained a search warrant to draw Defendant's blood for testing and to recover the SUVs' respective event data recorders ("EDR"). Defendant's EDR confirmed that, immediately prior to impact, she failed to remove her foot from the gas pedal or press the brake, and thus failed to decelerate below seventy miles per hour. Ms. Simpson's EDR, on the other hand, confirmed that she sharply decelerated to forty-one miles per hour and attempted to swerve away from Defendant.

Defendant's blood test showed the presence of delta-9-tetrahydro cannabinal ("THC"), the primary psychoactive substance in marijuana. More precisely, the results confirmed a THC concentration of 1.4 nanograms per milliliter of blood ("ng/ml") with a margin-of-error of ± 0.3 ng/ml. One of the State's expert witnesses testified that the test registers any THC amount above 1.0 ng/ml but cannot "connect a particular concentration of THC to a level of impairment." The witness also testified:

> THC can cause euphoria, reduced inhabitations, drowsiness, sedation, disorientation and confusion. And specifically with respect to driving, it can cause . . . decreased motor coordination, subjective sleepiness. It can cause lateral travel, meaning you're weaving from left to right. It can cause slowed reaction time, and it can cause impaired time and distance estimation, meaning it can cause you to

> misjudge how close you are to another vehicle. It can also cause reduced ability to maintain headway, meaning keeping track of your surroundings and . . . what all is around you as you're driving down a roadway.

Another expert witness testified "a potentially impairing side effect of marijuana" is "a lack of awareness of where you are as far as lane position, whose lane you're in, and lack of awareness of the vehicle you're headed toward."

Both in pretrial proceedings and at trial, the court denied Defendant's motion to dismiss the felony death by vehicle charge for lack of substantial evidence. Additionally, during the trial, the court admitted, over Defendant's objection, Officer Huneycutt's testimony about the BOLO. Furthermore, during closing arguments, a portion of the prosecutor's closing referenced Ms. Simpson's family. After the trial court entered judgment, Defendant entered her notice of appeal.

II. Jurisdiction

Under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023), this Court has jurisdiction to consider Defendant's appeal of the trial court's judgment.

III. Analysis

Defendant raises three issues on appeal: Whether the trial court (1) erred in denying Defendant's motions to dismiss her felony death by vehicle charge and instead allow the State's case to go to the jury; (2) plainly erred or abused its discretion in admitting Officer Huneycutt's testimony concerning a BOLO for a "possibly [ ] impaired driver;" and (3) abused its discretion by not intervening *ex mero motu* during the State's closing arguments.

A. Motion to Dismiss

[1] First, Defendant argues that the trial court erred by denying her motion to dismiss her felony death by vehicle charges in favor of allowing the State's case to go to the jury.

We review this question of law *de novo*. *See State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). When considering a motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299

N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). Evidence is judicially substantive if it would "persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (citation omitted). A trial court must consider all evidence "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom [.] . . ." *Powell*, 299 N.C. at 99, 261 S.E.2d at 118.

In relevant part, a person commits felony death by vehicle if they: (1) unintentionally cause the death of another person (2) were engaged in the offense of impaired driving, and (3) the commission of the offense of impaired driving is the proximate cause of the death. N.C. Gen. Stat. § 20-141.4(a1)(1)–(3) (2023). Since Defendant stipulated to unintentionally causing the victim's death in the crash, we address only the latter two felony death by vehicle elements. *Id.* § 20-141.4(a1)(2)–(3). For the reasons below, this Court holds that the State produced substantial evidence of these two elements necessary to survive Defendant's motion to dismiss.

1. Impaired Driving

Defendant asserts that the State did not provide substantial evidence of her impairment because it could not pinpoint when or how much THC she consumed before the collision. More specifically, Defendant argues that there was insufficient evidence that she had consumed a sufficient quantity of marijuana as to cause her to lose control of her bodily or mental faculties to any extent. After reviewing the record, we disagree.

"A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance." *Id.* § 20-138.1(a)(1) (2023). Under our statutory scheme, an "Impairing Substance" is defined as: "Alcohol, *controlled substance under Chapter 90 of the General Statutes*, *any drug or psychoactive substance capable of impairing a person's physical or mental faculties*, or any combination of these substances." *Id.* § 20-4.01(14a) (emphasis added). "Under the Influence of an Impairing Substance" is statutorily defined as "[t]he state of a person having his physical or mental faculties, or both, *appreciably impaired by an impairing substance*." *Id.* § 20-4.01(48b) (emphasis added).

Both statutory and case law contemplate legal impairment arising under the influence of substances other than alcohol. *E.g.*, *id.* § 20-138.1(a)(1) ("while under the influence of an impairing substance"); *State v. Norton*, 213 N.C. App. 75, 81–82, 712 S.E.2d 387, 392 (2011)

(upholding an impaired driving conviction based in part on cocaine metabolites found in a post-hospitalization blood test). The mere consumption or use of an impairing substance does not necessarily render someone impaired. *See State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985) ("An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired."). Indeed, "[t]he effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired." *Id.* However, "evidence that a defendant consumed an impairing substance and then drove in a faulty manner is sufficient *prima facie* to show appreciable impairment." *Norton*, 213 N.C. App. at 80, 712 S.E.2d at 391.

When addressing impaired driving in the context of alcohol, our Supreme Court held that evidence of consumption of that impairing substance, "*standing alone*, is no evidence that [a driver] is under the influence of an intoxicant." *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000) (quoting *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970) (brackets in original). However, "the fact that a motorist has been drinking, when considered in *connection with faulty driving* . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [the impaired driving statute]." *Rich*, 351 N.C. at 398, 527 S.E.2d at 306 (citations and internal quotation marks omitted, emphasis added). Although the present matter does not involve alcohol, the text of our impaired driving statute applies to "impairing substance[s]," thereby logically extending the holding of *State v. Rich* to marijuana consumption. *See id.*; *see also Norton*, 213 N.C. App. 75, 712 S.E.2d 387.

With respect to the impaired driving element, Defendant argues that the amount of THC shown in her system, without more evidence, is insufficient to survive a motion to dismiss. However, this view disregards that the State offered additional circumstantial evidence to meet its burden. The State did not only offer direct evidence of THC in Defendant's blood at the time of the crash. It also provided evidence of "faulty driving . . . indicating an impairment of physical or mental faculties." *Id.* (citation omitted). For example, the EDR from Defendant's SUV showed that she did not decelerate below seventy miles per hour at any point before impact in the far-left opposite lane, while the victim's own recorder showed both a sharp deceleration and an attempt to swerve at the same time. Also, Mr. Whitley witnessed Defendant's SUV "fly past" him "completely on the wrong side" of the road immediately before the crash. Based on the results of Defendant's blood test and the additional supporting circumstantial evidence, we hold that the

State adduced substantial evidence of impaired driving to withstand Defendant's motion to dismiss.

2. Proximate Cause

Defendant also asserts that the State did not provide substantial evidence that her impaired driving proximately caused Ms. Simpson's death. After careful consideration, we disagree.

A proximate cause is one:

> (1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

State v. Smith, 289 N.C. App. 707, 716, 891 S.E.2d 459, 465 (2023) (quoting *State v. Hall*, 60 N.C. App. 450, 454–55, 299 S.E.2d 680, 683 (1983)). To establish proximate cause, "the act of the accused need not be the immediate cause of the death[;] [the accused] is legally accountable if the direct cause is the natural result of his criminal act." *Id.* at 716, 891 S.E.2d at 466 (citation omitted and brackets in original). If a person "of ordinary prudence could have foreseen an accident resulting from [impaired] driving," then there is substantial evidence to support a finding that the defendant's impaired state was a proximate cause of the victim's death. *State v. Leonard*, 213 N.C. App. 526, 530-31, 711 S.E.2d 867, 871 (2011). The evidence is considered "in the light most favorable to the State, with all reasonable inferences drawn in the State's favor[.]" *Id.* at 530, 711 S.E.2d at 871 (citation omitted).

Proximate cause is also satisfied if there is more than one cause of the victim's death or injury and the defendant's impaired driving is *one of those causes*. *See id.* ("Defendant's violation [of the impaired driving statute] . . . need not be the *only* proximate cause of a victim's injury in order for defendant to be found criminally liable; a showing that defendant's action of driving while under the influence was *one* of the proximate causes is sufficient."); *see also State v. Cummings*, 301 N.C. 374, 377, 271 S.E.2d 277, 279 (1980) ("There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death."); *see also State v. Bethea*, 167 N.C. App. 215, 221, 605 S.E.2d 173, 178–79 (2004) ("The defendant's acts need not have been the last or nearest cause. It is sufficient if they concurred

with some other cause, acting at the same time, which in combination with it proximately caused the victim's death.").

Again, addressing proximate cause, the State met its burden of production to survive Defendant's motion to dismiss. The crucial question here is whether, pursuant to the evidence, a reasonable juror could be persuaded to accept the conclusion that—under the unbroken, natural, and continuous sequence—Defendant's impaired driving was the proximate cause of Ms. Simpson's death. *See* N.C. Gen. Stat. § 20-141.4(a1)(2)–(3); *see also Smith*, 289 N.C. App. at 716, 891 S.E.2d at 466; *see also Leonard*, 213 N.C. App. at 531, 711 S.E.2d at 871 (holding that a reasonably prudent person could foresee that driving under the influence of an impairing substance could lead to the injury of another.). At trial, expert testimony provided THC is an impairing substance that "can cause . . . decreased motor coordination, . . . lateral travel, meaning you're weaving from left to right[,] . . . slowed reaction time, . . . [and] impaired time and distance estimation, meaning it can cause you to misjudge how close you are to another vehicle." All of these factors are present: The evidence from the EDRs and testimony of other witnesses showed that Defendant's driving was consistent with such impairment—she left her lane of travel crossing "completely on the wrong side" of the road, was "flying" seventy-three miles per hour in a forty-five mile-per-hour zone, failed to decelerate, failed to initiate her SUV's brakes, and collided head-on with Ms. Simpson's SUV, which in turn caused Ms. Simpson's death. Considering the evidence in the light most favorable to the State, we hold that the State presented substantial evidence of proximate causation to withstand Defendant's motion to dismiss. *Leonard*, 213 N.C. App. at 531, 711 S.E.2d at 871.

B. BOLO Testimony

[2] Second, Defendant argues that the trial court abused its discretion or plainly erred by admitting Officer Huneycutt's testimony concerning the BOLO notification. Defendant first asserts that the probative value of the testimony is substantially outweighed by the danger of unfair prejudice under N.C. Gen. Stat. § 8C-1, R. 403 (2023). Defendant further argues that this evidence amounted to inadmissible hearsay. *Id.* § 8C-1, R. 801–02. For the reasons below, we are unable to discern reversible error by the trial court's admission of the testimony.

1. Rule 403 Balancing

Defendant asserts that Officer Huneycutt's BOLO testimony prejudiced her to the extent that it violated Rule 403. After careful consideration, we disagree.

During Defendant's pretrial motion, she argued that the admission of the BOLO testimony into evidence would violate Rule 403's balancing test—challenging the introduction of Officer Huneycutt's testimony on this topic. The trial court heard arguments and subsequently denied Defendant's motion. Thereafter, at trial, Officer Huneycutt testified that he received a BOLO for a "possibly [ ] impaired driver." Defendant's counsel objected but failed to state the specific grounds; however, the grounds are apparent upon review of the record. *State v. McLymore*, 380 N.C. 185, 192, 868 S.E.2d 67, 73 (2022) (quoting 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."). The following colloquy took place during Officer Huneycutt's testimony:

> [STATE'S ATTORNEY]: How do you remember that day?
>
> [OFFICER HUNEYCUTT]: It was one of the worst days I've had, quite honestly, in law enforcement. I was traveling on the way home. And as I was travelling down Lane Street, we got a BOLO over the radio just saying that there was possibly an impaired driver on 85.
>
> [DEFENDANT'S ATTORNEY]: Objection, Alford.
>
> THE COURT: Overruled. Thank you.

Although Defendant did not clearly state the basis for her objection, we gather from the context of the record that the objection was rooted in Rule 403. *See* N.C. R. App. P. 10(a)(1). Accordingly, we review the trial court's ruling for an abuse of discretion. *See State v. Lail*, 294 N.C. App. 206, 903 S.E.2d 204, 208 (2024) ("We review Rule 403 rulings for abuse of discretion, which '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.' ") (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Under Rule 403, a trial court may exclude otherwise relevant evidence "if its probative value is *substantially* outweighed by the danger of unfair prejudice . . . ." *Id.* § 8C-1, R. 403 (emphasis added). "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. France*, 94 N.C. App. 72, 76, 379 S.E.2d 701, 703 (1989) (citations and internal quotation marks omitted). "Rule 403 calls for a balancing of the proffered evidence's probative value against its

prejudicial effect. Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree." *State v. Mercer*, 317 N.C. 87, 93–94, 343 S.E.2d 885, 889 (1986). The rule does not forbid a trial court from admitting relevant evidence even if "it may tend to prejudice the accused or . . . excite sympathy for the cause of the party who offers it." *State v. Mayhand*, 298 N.C. 418, 422, 259 S.E.2d 231, 235 (1979).

Here, Defendant maintains that the admission of the BOLO testimony prejudiced her because it impermissibly could persuade the jury to infer that she was driving impaired prior to the crash. However, the record demonstrates that the trial court adequately considered the possibility of prejudice, limited the scope in which the State could offer the evidence, and additionally offered to give a limiting instruction to that effect upon request:

> THE COURT: All right. We are out of the presence of the jury and the jury pool. From yesterday, we had, I believe, one outstanding issue left for me to address. And that is an objection to the information about the 911 call with regard to a possible impaired driver. After considering all of the arguments, in my discretion I'm going to overrule the objection with a limitation. I will allow the information be presented for the matter . . . other than for the truth of the matter asserted, I will allow it to provide context to . . . the officer's investigation. I will, however, consider offering a limiting instruction if you all think that would be helpful. And I'll allow you all to consider that in responding at a later time if you all would like for me to give a limiting instruction to the jury that it's not being offered for the truth of the matter asserted but for the purpose of the investigation, what the officer did next.

Thus, the record clarifies that the trial court recognized the possibility of prejudice and limited the purpose for which the State could offer it "to provide context to . . . the officer's investigation."

Turning next to Officer Huneycutt's testimony, the record supports the purported use of this testimony—that it demonstrated "what he did next." Indeed, after he testified to receiving the BOLO, Officer Huneycutt stated: "I heard it. Just a few moments later I was travelling down the road, and I saw smoke up in the distance. As I approached the smoke, it was apparent there had been a motor vehicle crash." After providing this testimony, Officer Huneycutt did not mention the BOLO again. We

discern no merit to Defendant's contention that the prejudicial value of the BOLO testimony outweighed its probative value.

2. Hearsay

Defendant next asserts that the trial court committed plain error because Officer Huneycutt's BOLO testimony was inadmissible hearsay. We disagree.

" '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, R. 801(c) (emphasis added). "However, out of court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Thomas*, 350 N.C. 315, 339, 514 S.E.2d 486, 501 (1999).

Since Defendant did not raise any hearsay arguments or objections at the trial, we review this issue for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) ("Unpreserved error in criminal cases . . . is reviewed only for plain error."). To demonstrate plain error, a defendant must show "that a fundamental error occurred at trial. A fundamental error requires a defendant to establish prejudice, *i.e.*, that the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Carter*, 255 N.C. App. 104, 106, 803 S.E.2d 464, 466 (2017) (internal citations and quotations omitted).

Assuming, for purposes of our analysis, that it was error to admit the testimony because it was hearsay, Defendant, still, is unable to establish prejudice. *Id.* As discussed at-length above, other pieces of evidence sufficiently support that Defendant was driving while impaired. Thus, this BOLO statement of "possibly [ ] impaired driver" did not amount to such a fundamental error as to have a probable impact on the jury's verdict. *Id.*

C. Intervention *Ex Mero Motu*

[3] Third, Defendant argues that the trial court abused its discretion by not intervening *ex mero motu* in the State's closing argument to correct its allegedly emotional and improper appeals to the jurors' passions. In making this challenge, Defendant points to the State's references at closing "to the victim, her child, and her family were clearly improper appeals to sympathy and pity, and clearly calculated to prejudice the jury."

During a closing argument, an attorney "may not become abusive, inject her personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of

the defendant, or make arguments on the basis of matters outside the record . . . ." N.C. Gen. Stat. § 15A-1230(a) (2023). This Court subjects a trial court's supervision of closing arguments to an abuse of discretion standard. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). Our courts analyze the contextual discretion here through a two-step inquiry: (1) whether the prosecutor made an improper argument in fact and, if so, (2) whether the impropriety so grossly prejudiced the jury as to deny the defendant due process. *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 468 (2017). We reverse a conviction on the basis of a prosecutor's closing argument only if a defendant can show "both an improper argument and [resulting] prejudice . . . ." *Id.*

The following portion of the State's closing argument is challenged:

> We've heard a lot of science and a lot of numbers. You've heard a lot of People testify about a lot of things, and most of it has been about the Defendant. But what you don't hear about nearly enough and really what this case comes down to is that empty sear. It comes down to [Ms. Simpson].
>
> On September 10, 2020, [Ms. Simpson] didn't know it was the last time that her brother and sister would try to wake her up in the morning. [S]he didn't know it was the last time she would hug her daughter [ ] goodbye. She didn't know it was the last time she'd kiss her mother before she left or that she wouldn't see her dad when he got home from work.
>
> . . . .
>
> On that day, [Ms. Simpson's] final moments were spent on the side of Lane Street in a mass of mangled metal and smoke. [Defendant] had a choice and she chose marijuana. [Defendant] had a choice and she cho[se] to drive. [Ms. Simpson] had no choices. But you do. You really have the last choice and the only one that matters.
>
> You have the choice to find [Defendant] responsible and guilty of exactly what she did. [Ms. Simpson] deserves it, and that's what justice requires. And that's what I'm asking you to do. Find [Defendant] guilty of felony death by motor vehicle."

After reviewing the record, for the reasons below, we hold that trial court did not abuse its discretion in failing to intervene *ex mero motu* in the State's closing arguments.

1. Gross Impropriety

Within the bounds of Section 15A-1230, "prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all *reasonable* inferences drawn therefrom." *Huey*, 370 N.C. at 180, 804 S.E.2d at 469 (emphasis added) (internal quotation marks and citation omitted). A prosecutor's argument is proper when "it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911 (1987).

In this case, even if we assume that the prosecutor's inferential comments are improper statements by the State in service of its closing argument—mere impropriety is not enough; the comments must be so grossly improper and prejudicial as to deny the defendant due process protections. *Huey*, 370 N.C. at 180, 804 S.E.2d at 469 (citations omitted). To determine gross impropriety, we consider the prosecutor's statements "in context and in light of the overall factual circumstances to which they refer." *Id.* at 180, 804 S.E.2d at 470 (citations omitted). "When this Court has found the existence of overwhelming evidence against a defendant, we have not found statements that are improper to amount to prejudice and reversible error." *Id.* at 181, 804 S.E.2d at 470 (citations omitted). The inquiry must ultimately focus on "whether the jury relied on the evidence or on prejudice enflamed by the prosecutor's statements." *Id.* at 185, 804 S.E.2d at 473.

Here, the prosecutor's closing argument "did not manipulate or misstate the evidence[;]" rather, it focused on a walkthrough of Section 20-138.1(a)'s elements that the State had to prove to the jury beyond a reasonable doubt. *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993). Regularly infusing her argument with references to "reason and common sense," the prosecutor explained appreciable impairment, the multiple ways Defendant's actions met the proximate cause requirement, and THC as falling within the definition of "an impairing substance." These strategic choices by the prosecutor sufficiently reduced the likelihood that any potentially inflammatory statements influenced the jury's ultimate verdict. Moreover, we consider the substantial weight of the evidence against Defendant as a factor. *Id.* We therefore hold that the prosecutor's comments about the victim's family, even if improper, did not amount to a denial of Defendant's due process right to a fair trial. *See Huey*, 370 N.C. at 180, 804 S.E.2d at 470; *see also McCollum*, 334 N.C. at 224–25, 433 S.E.2d at 152–53.

IV. Conclusion

For the reasons discussed above, we hold that the trial court did not err in denying Defendant's motion to dismiss the felony death by vehicle charge, neither plainly erred nor abused its discretion in admitting Officer Huneycutt's BOLO testimony, and did not abuse its discretion in not intervening *ex mero motu* in the State's closing argument.

NO ERROR.

Chief Judge DILLON and Judge COLLINS concur.

STATE OF NORTH CAROLINA
v.
QUASHAUN MELSUN REEL, DEFENDANT

No. COA23-711

Filed 17 December 2024

Search and Seizure—motion to suppress—knock and talk—warrantless search—probable cause—exigent circumstances

In a prosecution on drug and weapon charges arising from an officer's "knock and talk" at defendant's house, the trial court properly denied defendant's motion to suppress where competent evidence supported the court's factual findings regarding the "knock and talk," which in turn supported the court's conclusions of law. Specifically, the court properly concluded that the "knock and talk" did not rise to the level of a Fourth Amendment search where the officer approached the home in a manner consistent with societal expectations when he followed a visitor to the front door, wearing attire that clearly identified him as a police officer. The fact that he had parked adjacent to the home, entered defendant's property through the side yard, and stood behind the visitor at the front door did not transform the "knock and talk" into a search. Further, the subsequent warrantless search of the house: (1) was supported by probable cause where the officer detected the strong odor of marijuana emanating from the residence; and (2) fell under the exigent circumstances exception to the warrant requirement because the officer believed drugs could be destroyed if he left to obtain a warrant, since defendant tried to prevent the officer from entering after he identified himself.

Judge THOMPSON dissenting.

Appeal by defendant from judgment entered 3 February 2023 by Judge William A. Wood II in Superior Court, Guilford County. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for defendant-appellant.

STROUD, Judge.

This appeal arises from the trial court's denial of a motion filed by Defendant in which he sought to suppress evidence underlying several drug and weapon charges brought against him. Based on the applicable standard of review, we must overrule Defendant's arguments and affirm the trial court's order.

I. Factual Background and Procedural History

On 14 September 2020, Defendant was indicted for the following drug related charges at issue in this appeal: in case file 20 CRS 79581: trafficking a schedule I controlled substance (heroin), possession with intent to sell or deliver a schedule I controlled substance (heroin), possession with intent to sell or deliver a schedule I controlled substance (MDMA); in case file 20 CRS 79582: possession with intent to sell or deliver a schedule VI controlled substance (marijuana), possession of a schedule VI controlled substance (marijuana), and possession of drug paraphernalia; and in case file 20 CRS 79583: possession with intent to sell and deliver a schedule I controlled substance (heroin) within 1000 feet of a school.

On 10 May 2021, Defendant was indicted on several more charges: in case file 21 CRS 70148, possession of a firearm by a felon; in 21 CRS 70149, possession with intent to sell or deliver a schedule VI controlled substance (marijuana) and carrying a concealed firearm; and in case file 21 CRS 70150, maintaining a dwelling to keep and sell a controlled substance (heroin).[1]

1. On 10 October 2022, superseding indictments were filed in 20 CRS 79581, 20 CRS 79583, and 21 CRS 70150, changing the controlled substance from heroin to fentanyl. Also on 10 October 2022, an additional indictment was filed in 22 CRS 26050, charging Defendant with two counts of trafficking between four and thirteen grams of fentanyl.

On 14 September 2022, Defendant filed a motion to suppress statements he made and contraband discovered during a search of Defendant's residence on 6 August 2020. That motion and other pretrial matters came on for hearing on 6 December 2022 in Superior Court, Guilford County. On 12 December 2022, the trial court entered an order denying the motion to suppress; the order contained three dozen findings of fact.

The unchallenged portions of the trial court's findings indicate that on 24 July 2020, the High Point Police Department ("HPPD") received a complaint regarding "drugs[and]narcotics" at 1506-A Leonard Avenue. On 4 August 2020, an anonymous tip received through Crime Stoppers alleged that illegal drugs were being sold by an unnamed male at the same residence, with "people . . . in and out of the residence constantly, day and night." Both reports were passed along to HPPD Officer Brian Hilliard[2] with a directive to "check the address[.]"

Hilliard learned that Defendant was listed on the utility accounts for the address and decided to conduct a "knock and talk" at the residence on 6 August 2020. On that date, when Hilliard and two other officers arrived at Defendant's home in an unmarked police car, they saw no cars in the driveway and no apparent activity. The officers decided to drive around the block, eventually arriving on a road that runs along the side of the home, where they parked. When a grey Acura pulled into the driveway of the home, Hilliard got out of his car and walked toward the female visitor who got out of the car. Hilliard spoke to the visitor, although she did not respond to him. Hilliard then followed the visitor to the front door of the home.

Defendant answered the door after the visitor opened the storm door and knocked. Hilliard, who was standing "just behind" the visitor, two feet from the doorway, "detected the strong odor of marijuana emanating from the residence[.]" The visitor entered the home, and the door was closed. Hilliard perceived that the door was being braced to prevent entry, and the combination of these circumstances caused Hilliard to believe that "drugs could be destroyed if he did not immediately gain entry."

Hilliard then verbally identified himself as a law enforcement officer and gave a command for the door to be opened. When that command was not heeded, he attempted but failed to "shoulder" the door open.

---

2. The order indicates that at the time the suppression hearing, Hilliard held the rank of lieutenant. At the time of his encounter with Defendant, however, Hilliard was an officer with the HPPD street crimes unit.

Another officer was able to kick the door open, and officers entered the home. Defendant and the visitor were handcuffed and detained, and officers discovered "[a] bag of marijuana, a bag of pills[,] and a digital scale were in plain view inside the residence directly beside the front door."

Based on its factual findings, the trial court made twenty-three conclusions of law, including that the "knock and talk" by Hilliard did not rise to the level of a Fourth Amendment search and that probable cause and exigent circumstances justified the warrantless search of Defendant's home. Accordingly, the trial court held that Defendant's constitutional rights were not violated and denied his motion to suppress.

Defendant reserved his right to appeal the denial of his motion to suppress. On 26 January 2023, he pled guilty, under an agreement with the State, to five charges: two counts of trafficking fentanyl and one count each of possession with the intent to sell or deliver fentanyl, possession with intent to sell or deliver MDMA, and possession of a firearm by a felon. The remaining charges were dismissed, and the trial court consolidated the convictions for sentencing, imposing an active term of 225-282 months and a fine of $500,000.

II. Analysis

Defendant argues that the trial erred by denying his motion to suppress under the "knock and talk" exception to the Fourth Amendment and by concluding that the officers' warrantless entry into Defendant's home was justified by probable cause and exigent circumstances.

A. Standard of Review

"In reviewing a motion to suppress evidence, [the Court of Appeals] examines whether the trial court's findings of fact are supported by competent evidence and whether those findings support the conclusions of law. Conclusions of law are reviewed de novo." *State v. Alvarez*, 385 N.C. 431, 433, 894 S.E.2d 737, 738 (2023) (citations omitted). In conducting this review, "we examine the evidence introduced at trial in the light most favorable to the State." *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010) (citations omitted).

A reviewing court is "bound by the trial court's findings of fact if such findings are supported by competent evidence in the record," *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997), and "[c]onclusions of law that are correct in light of the findings are also binding on appeal[,]" *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996) (citation omitted). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard

all of the testimony and observed the demeanor of the witness." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

B. Challenged Findings of Fact

Defendant contends that all or portions of four findings of fact in the suppression order are not supported by competent evidence.

Finding of fact 11- Defendant first maintains no competent evidence indicated that Hilliard parked "in the same area" as the Acura, which he maintains had parked in the driveway of his home. Defendant notes that Hilliard's testimony and a surveillance video admitted at the suppression hearing indicate that Hilliard approached the home from the side. We note that the preceding finding, finding of fact 10, identifies Defendant's home as a duplex and states that the Acura "pulled into the driveway or adjacent parking area[.]" Hilliard testified that he had parked in a "driveway, slash, cut-through that cuts through a cemetery that runs directly beside" Defendant's home. This description is consistent with a photo of Defendant's home included in Defendant's brief, which shows the "cut-through" as running roughly as close to the left side of the duplex as the driveway does on the right side of the building. For purposes of our resolution of Defendant's appeal, we will presume the trial court's reference to "the same area" referred to the area "directly beside" Defendant's home where the parties agree Hilliard was in fact parked and from which it is undisputed he saw the Acura pull into Defendant's driveway/parking area.

Similarly, Defendant takes issue with the court's finding that Hilliard "approached the Acura," emphasizing that "[t]his is not seen on the surveillance video, which shows Hilliard walking up from a different direction (the left side of the house) and walking straight to the front door." Hilliard testified that he "approached the Acura," which he described as being parked "approximately . . . ten feet from" Defendant's front door. Based on the testimony, the video showing the layout of the area, and the photo in Defendant's brief, for purposes of resolving this appeal, we read this finding of fact as indicating that Hilliard walked toward the Acura and then—as stated in unchallenged findings of fact 13, 14, and 17—followed closely behind the Acura's driver as she approached Defendant's front door.

Findings of fact 12 and 25- Defendant contends that although the trial court found that during the encounter with Defendant, Hilliard was wearing police attire that said "POLICE" across the chest, the surveillance video shows that Hilliard was wearing a plain black police uniform. The transcript from the suppression hearing reveals that

Hilliard testified that he and the other officers in the street crimes unit of the HPPD wear "not a typical police uniform. It is a blue or black shirt with a police vest, a black vest that says 'police' across the chest, and BDU-style pants." Nonetheless, the State concedes that the word "POLICE" appeared on the back rather than the front of the officers' uniforms as depicted in the surveillance video.

However, the surveillance video also reveals that the officers were in police uniforms with badges on the front and insignia on the sleeves. We further note that Defendant, Hilliard, and the trial court agree on the point critical to our analysis below—that Hilliard was wearing clothing which clearly identified him from the front as a law enforcement officer.

Finding of fact 21- The court found that "the door was immediately slammed shut" after the female visitor entered Defendant's home. Defendant contends that "[t]he surveillance video shows that [Defendant] attempted to close the door but it was stopped by Hilliard at first. [Defendant] then successfully closed it." Hilliard testified that Defendant "immediately slammed the door" after the visitor entered—and after Hilliard had already detected "a strong odor of marijuana" "waft[ing]. . . from. . . the inside of the house[.]" But the trial court's finding of fact is supported by the evidence, whether Defendant "immediately slammed the door" completely shut or immediately tried to close the door, was briefly stopped by Hilliard, and then succeeded in closing the door completely.

C. Challenged Conclusions of Law

Defendant next identifies six conclusions of law which he contends are erroneous:

> 6. Officer Hilliard's approach to the front entrance of 1506-A Leonard Ave., was legal in every way.
>
> . . . .
>
> 17. Officer Hilliard was in police attire with the word "POLICE" emblazoned on his chest and positioned approximately two feet from the doorway when it was opened by [Defendant]. Upon his slamming the door shut immediately when the female entered the residence, it was objectively reasonable of the officers to believe that the possessors of the contraband were aware of the close presence of law enforcement and were intent on moving or destroying that contraband.

18. Given the totality of the circumstances, sufficient exigent circumstances existed for the officers to force entry into the residence located at 1506-A Leonard Ave. without a search warrant.

19. The officers had both probable cause and exigent circumstances to force entry into 1506-A Leonard Ave. on August 6, 2020, without a search warrant.

20. Defendant's rights guaranteed by the Fourth Amendment to the United States Constitution were not violated.

21. None of Defendant's constitutional rights were violated.

Defendant argues these conclusions are not supported in that "the trial court erred by denying [Defendant's] motion to suppress under the 'knock and talk' exception where no implied license existed to cut through [Defendant's] side yard and attempt to follow an invited guest into his home" and "by holding that the officers' warrantless entry into [Defendant's] home was supported by probable cause and justified by exigent circumstances." As explained below, we find these contentions without merit.

1. Knock and Talk Exception to the Fourth Amendment

As the United States Supreme Court has stated, "when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 185 L. Ed. 2d 495, 501 (2013) (citation and quotation marks omitted). This constitutional protection includes "the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes." *Id.* (citation and quotation marks omitted).

"A 'knock and talk' is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." *State v. Marrero*, 248 N.C. App. 787, 790, 789 S.E.2d 560, 564 (2016) (citation omitted). This procedure is constitutionally permissible because "no search of the curtilage [of a home] occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011). "Put another way, law enforcement may do what

occupants of a home implicitly permit anyone to do, which is approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *State v. Huddy*, 253 N.C. App. 148, 151-52, 799 S.E.2d 650, 654 (2017) (citation and quotation marks omitted).

This Court has emphasized, however, that "law enforcement may not use a knock and talk as a pretext to search the home's curtilage. . . . [and] the knock and talk doctrine does not permit law enforcement to approach *any* exterior door to a home." *Id.* at 152, 799 S.E.2d at 654 (emphasis in original) (citations omitted). In *Huddy*, for example, an officer was held to have exceeded the scope of a knock and talk where he "ran a license plate on a car whose license plate was not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to 'clear' the sides of the home before approaching the back door." *Id.* at 153, 799 S.E.2d at 655.

This Court also found that officers exceeded the scope of a constitutional knock and talk where they "cut across a person's front yard, swiftly passing a no trespassing sign, and emerge from trees they were using for cover and concealment in order to illuminate, surround, and stop [the resident's] departing car" on a dark winter evening. *State v. Falls*, 275 N.C. App. 239, 240, 853 S.E.2d 227, 229 (2020). One of the officers testified about their route of approach:

> The sidewalk would be what anybody that was going door-to-door selling anything would take, they would go down --up the little sidewalk that jets off the driveway.
>
> There was not a worn path in the grass where we walked, or anything like that. I would think anybody, especially if you parked your vehicle on the roadway, you would go down the driveway. We did -- just because of the freedom of movement, and stuff, we're not going to block the driveway. We don't like parking our patrol cars on the road. So that's why we took the path we did. If you were in a mail truck you would probably stop at the driveway and go down the sidewalk to the door. But that's not the path that we took.

Id. at 242, 853 S.E.2d at 230-31 (brackets and ellipses omitted).

This Court emphasized that "[t]he scope of the implied license to conduct a knock and talk is governed by societal expectations, and when law enforcement approach a home in a manner that is not customary, usual, reasonable, respectful, ordinary, typical, nonalarming,

they are trespassing, and the Fourth Amendment is implicated." *Id.* at 248, 853 S.E.2d at 234 (citation and quotation marks omitted). The Court then noted three pertinent circumstances in that case "[r]elevant to distinguishing between a knock and talk and a search[:] . . . how law enforcement approach the home, the hour at which they did so, and whether there were any indications that the occupant of the home welcomed uninvited guests on his or her property." *Id.* In *Falls*, because the officers had approached the residence in dark, unmarked clothing, after darkness had fallen, through the side yard and past a "no trespassing" sign rather than by the driveway or walkway to the front door, this Court held that "[t]he officers . . . strayed beyond the bounds of a knock and talk[.]" *Id.* at 254, 853 S.E.2d at 238.

We agree with Defendant that the analysis in *Falls* is helpful, but we find the facts of that case easily distinguishable from the matter before us. Defendant emphasizes that Hilliard parked his car "on an adjacent street to the left of his house, out of view," walked through Defendant's side yard, and then "once at the door, . . . stood less than two feet away from [Defendant's] invited guest." Defendant maintains these acts "flouted 'background social norms' and exceeded what a 'reasonably respectful citizen' would do[.]" We disagree.

The street or "cut-through" where the officers parked was directly adjacent to Defendant's home, and nothing suggested that parking on that street as opposed to the street in front of the home or in its driveway was unusual, much less unreasonable or not respectful. Additionally, although Hilliard cut across the side yard of the building to reach the path to the front door, this Court in *Falls* noted that "there may be circumstances where cutting across a person's yard does not exceed the scope of the implied license[.]" *Id.* at 253, 853 S.E.2d at 237 (citation omitted). Hilliard testified that he approached the visitor as she made her way to Defendant's front door, speaking to her, did not stop or cut in front of her, and then followed her to the front door. Hilliard's testimony that he stood about two feet behind the visitor suggests that Hilliard may have been holding open a storm door which the visitor had opened as she knocked on Defendant's door.

In any event, other than his walking through Defendant's side yard, nothing about Hilliard's approach is like that of the officers in *Falls*. *See id.* at 242, 853 S.E.2d at 230-31. The visit was made during the day, Hilliard's attire indicated that he was a law enforcement officer, and he followed the visitor to the front door. Considering "societal expectations," *id.* at 248, 853 S.E.2d at 234, Hilliard approached Defendant's house in a way that was "customary, usual, reasonable, respectful,

ordinary, typical, [and] nonalarming," *Id.* (citation and quotation marks omitted). Thus, Hilliard did not exceed the scope of a knock and talk and transform his presence at Defendant's front door into a search for Fourth Amendment purposes.

Accordingly, we turn to whether, during the knock and talk, circumstances arose which justified and made constitutionally permissible Hilliard's subsequent warrantless entry into Defendant's home.

2. Probable Cause and Exigent Circumstances

> The Fourth Amendment dictates that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to the warrant requirement. The existence of probable cause and exigent circumstances is one such exception.

Marrero, 248 N.C. App. at 794, 789 S.E.2d at 566 (citations, quotations marks, and ellipsis omitted).

"Probable cause refers to those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citations omitted). As the State notes, this Court has held that the "plain smell" of marijuana emanating from a location alone "provide[s] sufficient probable cause to support a search[.]" *State v. Corpening*, 200 N.C. App. 311, 315, 683 S.E.2d 457, 460 (2009).

Here, unchallenged findings of fact 18 and 19 state that Hilliard, an experienced law enforcement officer who had worked on "several hundred drug investigations" and was "familiar with the smell of marijuana[,]" "detected the strong odor of marijuana emanating from the residence in a 'waft' of air that left the residence upon the main door being opened." Thus, the plain smell of marijuana wafting from the front door constituted probable cause.

"An exigent circumstance is found to exist in the presence of an emergency or dangerous situation. The State has the burden of proving that exigent circumstances necessitated the warrantless entry. Determining whether exigent circumstances exist depends on the totality of the circumstances." *Marrero*, 248 N.C. App. at 794, 789 S.E.2d at 566 (citations, quotations marks, and brackets omitted). Moreover, we

consider "objective factors, rather than subjective intent" in making this determination. *Id.* at 795, 789 S.E.2d at 566 (citation omitted). Among the factors to be considered are

> (1) the degree of urgency involved and the time necessary to obtain a warrant; (2) the officer's reasonably objective belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.

Id. (citation and quotation marks omitted).

Here, the trial court found that Hilliard: was following up two reports of drugs sales by a male at the home via the knock and talk and smelled marijuana emanating from the front door; was wearing his police uniform and standing only two feet behind the visitor when Defendant answered the door, admitted the visitor, and then closed the door, leaving Hilliard outside; perceived someone inside the residence was "placing a brace on the door to prevent others from entering"; identified himself as a law enforcement officer; and commanded the door be opened, but it was not. "Given these findings, it is objectively reasonable to conclude that an officer in [Hilliard's] position would have worried that [D]efendant would destroy evidence when he . . . left the scene to obtain a search warrant, especially given the ready destructibility of marijuana." *Id.* at 796, 789 S.E.2d at 567.

We also reject Defendant's proposal that after detecting the smell of marijuana wafting from the door, "Hilliard merely had probable cause for possession of marijuana, a misdemeanor" and "could have attempted to detain [Defendant] and his invited guest outside." First, since Hilliard was conducting the knock and talk to investigate multiple complaints of drug sales from the residence, the odor of marijuana wafting out when Defendant opened the front door suggested possible drug trafficking by sale rather than simple possession. After Defendant closed the door to Hilliard after admitting the visitor, appeared to be bracing the door, and did not respond to Hilliard's command that the door be opened, it is unclear how Hilliard could have detained Defendant outside the home.

III. Conclusion

The evidence at the suppression hearing supported the trial court's pertinent findings of fact, which in turn supported its conclusions of law. Further, the trial court did not err in concluding that the knock

and talk here did not rise to the level of a Fourth Amendment search or that probable cause and exigent circumstances justified the warrantless entry into Defendant's home. Accordingly, the trial court's order denying Defendant's motion to suppress is affirmed.

AFFIRMED.

Judge GRIFFIN concurs.

Judge THOMPSON dissents by separate opinion.

THOMPSON, Judge, dissenting.

I respectfully dissent from the majority opinion and agree with defendant's contentions regarding the following findings of fact and conclusions of law:

A. Challenged Findings of Fact

On appeal, defendant contends that the trial court erred in denying his motion to suppress and challenged four findings of fact in the trial court's order denying his motion to suppress.

Defendant first challenged Finding of Fact 11, which says, "Officer Hilliard parked his patrol car in the same area. He exited his vehicle and approached the Acura." After reviewing the record, I would conclude that this finding of fact is not supported by competent evidence. Officer Hilliard's testimony indicates that Ms. Hemsley, who was driving the gray Acura, parked in defendant's driveway, while Officer Hilliard parked his car on the side street to the right of defendant's residence—between defendant's residence and the cemetery. Therefore, Officer Hilliard was not parked in the same area. Furthermore, the video footage shows that Officer Hilliard walked straight from the side street onto defendant's front porch, and he never approached the gray Acura. Thus, I would conclude that this finding of fact is not supported by competent evidence.

Defendant next challenged Finding of Fact 12, which says, "Officer Hilliard was in police attire with the word 'POLICE' emblazoned across the chest of his uniform." After reviewing the video footage from defendant's front porch, I would conclude that this finding of fact is not entirely supported by competent evidence. As seen in the video footage, there are no words "emblazoned" across Officer Hilliard's chest. Instead,

there is a badge on the left side of Officer Hilliard's chest, a radio clipped to his shirt in the middle of his chest, and on the right side of his chest is what appears to be his last name. With that being said, I do believe there is competent evidence to support a finding of fact that "Officer Hilliard was in police attire[.]"

Defendant's third challenged finding, Finding of Fact 21, says, "The door was immediately slammed shut." After reviewing the evidence, I would conclude that this is not supported by competent evidence. The video footage shows that as defendant attempted to shut his front door, his attempt was thwarted by Officer Hilliard stopping the door with his foot.

Defendant's final challenged finding of fact is Finding of Fact 25, which says,

> Officer Hilliard, who was still wearing his uniform with the word 'POLICE' emblazoned across the front, identified himself verbally as a High Point Police Officer and began to give commands for the door to be opened. Several commands were given. The door was not opened. Officer Hilliard attempted unsuccessfully, to shoulder the door open.

After reviewing the evidence, I would conclude that this finding of fact is only partially supported. The only portion of this finding of fact that is supported by competent evidence is that Officer Hilliard gave several commands for the door to be opened. However, the rest of this finding of fact is not supported by competent evidence. As mentioned above, the word "POLICE" was not "emblazoned" across Officer Hilliard's chest. Secondly, Officer Hilliard unsuccessfully attempted to kick defendant's door, not shoulder it. And most importantly, at no point before Officer Hilliard and Officer Finn forcefully gained entry into defendant's residence did either officer, Hilliard or Finn, identify themselves as law enforcement officers with HPPD.

Although the majority of the above-mentioned findings of fact are unsupported by competent evidence, the crux of this dissent is in the following discussion.

B. Conclusions of Law

Defendant challenged several of the trial court's conclusions of law, but because "[c]onclusions of law are reviewed de novo and are subject to full review[,]" *State v. Huddy*, 253 N.C. App. 148, 151, 799 S.E.2d 650, 654 (2017) (citation omitted), the focus of my dissent is on Conclusion of Law 2. Conclusion of Law 2 says, "Officer Hilliard and the

other officers were not using the 'knock and talk' as a pretext to search the home or the curtilage to the home." However, after reviewing the record de novo, I would conclude that Officer Hilliard and the other officers did precisely that.

Under the knock and talk doctrine, "law enforcement may do what occupants of a home implicitly permit anyone to do, which is approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 151–52, 799 S.E.2d at 654 (citation omitted). "Importantly, law enforcement may not use a knock and talk as a pretext to search the home's curtilage." *Id.* "No one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." *Id.* (internal quotation marks and citation omitted).

After reviewing the evidence, I would conclude that Officer Hilliard, and the other HPPD officers, used the alleged "knock and talk" as a pretext to search defendant's curtilage. The HPPD Chief of Police, Travis Stroud (Stroud), instructed the "Patrol Commanders" to "coordinate amongst [themselves] and conduct a [k]nock and [t]alk" or utilize "some sort of enforcement action" at defendant's residence because the "complaints [we]re probably valid."[1] However, the video footage from defendant's front porch makes it evidently clear that neither Officer Hilliard nor Officer Finn ever knocked on defendant's door, nor did they, at any point, announce their presence on defendant's front porch or announce themselves as law enforcement officers with the HPPD. Instead, the evidence tends to show that Officer Hilliard and Officer Finn in fact utilized a different "sort of enforcement action." The video footage from defendant's front porch shows that Officer Hilliard lingered behind Ms. Hemsley after *she* knocked on defendant's storm door and waited to be invited in. In the video footage, Officer Hilliard is seen standing behind Ms. Hemsley and as she opened the storm door to go inside defendant's residence, Officer Hilliard quickly stepped forward, grabbed the storm door and continued in Ms. Hemsley's footsteps until he was standing in the doorway of defendant's home—an area that defendant did not invite Officer Hilliard to be in. Furthermore, Officer Hilliard testified that he believed that defendant was unaware of police presence on his front porch, and this is corroborated by defendant's testimony that he was unaware of police presence on his front porch.

---

1. HPPD received two complaints (one from City Hall on 24 July 2020 and one from Crime Stoppers on 4 August 2020) regarding potential drugs/narcotics being sold from defendant's residence.

By not conducting the "knock and talk" and attempting to piggyback off of Ms. Hemsley's invitation into defendant's home, the HPPD officers usurped defendant's opportunity to decline to receive the officers. *See Huddy*, at 151–52, 799 S.E.2d at 654 (explaining that the proper execution of a "knock and talk" consists of law enforcement approaching the front door of a home, knocking, waiting briefly to be received, and potentially (if invited to linger longer) engage in *consensual* conversation with the occupant(s)). Indeed, the HPPD officers were not "invited to enter the protected premises" of defendant's home, *id.* at 152, 799 S.E.2d at 654, and a "consensual conversation with" defendant never occurred. *Id.* Instead, when defendant shut the door on Officer Hilliard—an uninvited visitor—Officer Hilliard's initial response was an unsuccessful attempt to kick in defendant's door. Following Officer Hilliard's unsuccessful attempt to kick defendant's door in, he gave defendant several commands to open the door, and when defendant did not comply, Officer Finn kicked the door in. During this time, as Officer Hilliard's testimony indicates, he saw defendant and Ms. Hemsley were standing just on the other side of the door, and defendant can be heard repeatedly asking the officers what they were doing. Therefore, the evidence shows that Officer Hilliard never attempted to "remedy the situation before going any further," which he testified was the purpose of a "knock and talk." Instead, Officer Hilliard used the alleged "knock and talk" as a pretext to search the curtilage of defendant's home, which is precisely what our case precedent says law enforcement cannot do. *See Huddy*, *id.* at 152, 799 S.E.2d at 654.

"When the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v. Jardines*, 569 U.S. 1, 5, 133 S. Ct. 1409, 1414 (2013) (internal quotation marks and citation omitted). And "when it comes to the Fourth Amendment, the home is first among equals." *Id.* at 6, 133 S. Ct. at 1414. "At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* (internal quotation marks and citation omitted). "This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front [door]." *Id.* "We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes." *Id.* (internal quotation marks and citation omitted). The curtilage of "the home is intimately

linked to the home, both physically and psychologically, and is where privacy expectations are most heightened." *Id.* at 7, 133 S. Ct. at 1415 (internal quotation marks and citation omitted). And, "[t]he front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends." *Id.* (internal quotation marks and citation omitted). "As a result, law enforcement ordinarily cannot enter the curtilage of one's home without either a warrant or probable cause and the presence of exigent circumstances that justify the warrantless intrusion." *Huddy*, 253 N.C. App. at 151, 799 S.E.2d at 654.

Yet here, without a warrant or probable cause, the HPPD law enforcement officers physically intruded on defendant's front porch to obtain information. The HPPD officers trawled for evidence *and* observed defendant from just outside his front door (eventually observing him from inside defendant's front doorway), without ever knocking or announcing their presence. For the foregoing reasons, I would conclude that the trial court erred by denying defendant's motion to suppress because the "knock and talk" exception to the Fourth Amendment warrant requirement is inapplicable, and defendant's Fourth Amendment right to be free from unreasonable searches and seizures was violated. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CURTIS LEE STOLLINGS

No. COA24-138

Filed 17 December 2024

Search and Seizure—motion to suppress—findings of fact—unresolved conflicts in evidence—incorrect legal standard

After defendant pleaded guilty to multiple charges (including possession of methamphetamine and carrying a concealed handgun) arising from a traffic stop, during which police searched defendant's person and vehicle after a K-9 unit performed a drug sniff, both defendant's plea agreement and the trial court's order denying defendant's motion to suppress were vacated and the matter was remanded for new proceedings. The court's findings of fact contained mere recitations of witness testimony that failed to resolve material conflicts in the evidence, including: whether the K-9 actually alerted to the presence of drugs inside the vehicle, especially

given the absence of body camera footage of the alert and conflicting testimony among the witnesses regarding the sniff; and whether the officer who frisked defendant did so based on reasonable concerns about officer safety or solely to look for drugs. Further, the trial court applied the wrong legal standard when denying the motion to suppress, concluding that the officers had "reason" to search defendant's person and vehicle rather than determining whether the searches were supported by "probable cause."

Appeal by Defendant from Judgment entered 12 July 2023 by Judge Joseph N. Crosswhite in Rowan County Superior Court. Heard in the Court of Appeals 10 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Martin T. McCracken, for the State.

Cynthia Everson for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Curtis Lee Stollings (Defendant) appeals from the trial court's Order denying his Motion to Suppress and from a Judgment entered 12 July 2023 after Defendant pleaded guilty to Possession of Drug Paraphernalia, Possession of Methamphetamine, and Carrying a Concealed Handgun. The Record before us tends to reflect the following:

On the evening of 7 March 2020, the Rowan County Sheriff's Office (RCSO) was conducting a "special project" around a "fish game arcade" in Salisbury, North Carolina. During the investigation, RCSO Detectives Gerald Gordy and Kelvin Peoples ran the license plate on a parked black SUV and discovered it was registered to a woman whom the Detectives believed to be Defendant's spouse or girlfriend. Detective Gordy later testified he was familiar with Defendant because he had received information in the past that Defendant sold drugs, although he could not recall how recent that information was or from whom he had received it.

Based on this limited information alone, the Detectives decided to follow the vehicle. The SUV left the fish arcade and briefly entered a gas station parking lot, where a small pick-up truck was also parked. Shortly thereafter, the SUV left the gas station, followed by the pick-up truck, and both vehicles pulled into the parking lot of an Applebee's approximately a half mile away. Both vehicles remained a "very short period of

time" before leaving the parking lot and driving in different directions. At no point did anyone in either vehicle exit their respective vehicle, nor was any illegal activity observed.

After leaving the Applebee's parking lot, the SUV traveled up I-85 toward Davidson County. At the Davidson County line, the Detectives stopped the vehicle; the basis for the stop was Defendant's speeding five miles over the speed limit. Defendant was driving the SUV, with a woman in the passenger seat and a child in the back seat. During the stop, K-9 Sergeant William Basinger arrived with his K-9, Kantor; Kantor is trained to sniff for the presence of various illegal drugs, including methamphetamine. Sergeant Basinger conducted a sniff for drugs with the K-9 around the SUV. Detectives Gordy and Peoples were informed the K-9 "alerted" for the presence of drugs near the gas lid on the rear driver's side of the vehicle. Neither Detective Gordy nor Detective Peoples personally observed Kantor alert. Sergeant Basinger's body camera did not capture footage of the sniff.

After being informed the K-9 alerted, Detective Peoples searched Defendant. Detective Peoples reached into Defendant's pants pocket and discovered methamphetamine. At the suppression hearing, Detective Peoples could not recall whether he first frisked Defendant before reaching into Defendant's pocket. While Detective Peoples searched Defendant, Detective Gordy searched the vehicle and discovered a black handgun between the driver's seat and the middle console. Upon discovery of the handgun, since Detective Gordy was not wearing a body camera, he asked Detective Peoples to continue the search of the vehicle. Detective Peoples then completed the search of the vehicle, seizing the handgun and a set of scales. No drugs were found in the vehicle.

On 6 December 2021, Defendant was indicted for Possession of Drug Paraphernalia, Possession with Intent to Sell or Deliver Methamphetamine, and Carrying a Concealed Handgun. Prior to trial, Defendant moved to suppress "all of the evidence in this case" as the product of an unlawful search and seizure. The trial court denied the Motion, concluding that "based on the positive alert by K-9 Kantor, the officers had reason to search both the person and the vehicle of the defendant." Following the denial of his Motion to Suppress, Defendant entered into a plea agreement, reserving his right to appeal the denial of the Motion. In exchange for Defendant's plea, the State agreed to a "consolidated . . . judgment for the drug charges and to leave sentencing for the gun charge in the Court's discretion." On 12 July 2023, the trial court, pursuant to the plea agreement, entered a Judgment for the charge of Carrying a Concealed Handgun and a Conditional Discharge

for the consolidated drug charges. The trial court's written Order denying the Motion to Suppress was filed on 23 August 2023. Defendant timely filed written Notice of Appeal on the same day.

Issue

The dispositive issue on appeal is whether the trial court's written Findings of Fact and Conclusions of Law support its denial of Defendant's Motion to Suppress.

Analysis

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court's conclusions of law, however, are reviewed de novo. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citation omitted). Whether the trial court describes its conclusions as findings of fact or conclusions of law makes no difference to our review: "[w]e will review conclusions of law de novo regardless of the label applied by the trial court." *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012) (citation and quotation marks omitted).

A. *Findings of Fact*

The trial court's Order denying the Motion to Suppress contains thirty-eight Findings of Fact. Our review of the Order is frustrated because the trial court failed to resolve conflicts in the evidence with its Findings, instead reciting the testimony of the investigating officers. "Although . . . recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983). Here, material conflicts remain in the evidence as to whether the officers observed Defendant engage in suspicious activity, the basis for the search of Defendant's person, and whether the K-9 positively alerted on Defendant's vehicle for the presence of drugs. Of the Findings Defendant challenges, Findings 19, 26, 27, 33, and 36 are most relevant to our discussion. We take each of these Findings in turn.

1. *Finding of Fact 19*

Finding of Fact 19 is a summary of Detective Gordy's testimony from the suppression hearing stating he considered the activity of the SUV to be suspicious:

> (19) That Detective Gordy further testified that he saw nothing illegal but did see suspicious activity that he associated with drug activity based on his training and experience such as the activity in the parking lots, the time of day, traveling to the same places as the other vehicle for a short period of time and the vehicles following each other to a separate location, that from Detective Gordy's training and experience he testified that from this activity he was able to form probable cause of drug activity;

Defendant contends Finding of Fact 19 is more properly characterized as a Conclusion of Law since it refers to a determination of probable cause and alternatively argues it is unsupported by competent evidence. Defendant argues the activity the Finding describes—traveling in a parking lot with another vehicle at night—is innocent and cannot support a probable cause determination.

We cannot impart meaningful appellate review of factual findings that "merely recite or summarize witness testimony, but do not state what the [trial court] finds the facts to be." *See Huffman v. Moore Cty.*, 194 N.C. App. 352, 359, 669 S.E.2d 788, 792-93 (2008). "[Material conflicts in the evidence] must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citations omitted). It is unclear whether, by including this recitation of Detective Gordy's testimony in Finding 19, the trial court is concluding Detective Gordy's observations gave him probable cause, so that we should review this Conclusion de novo, or is merely finding Detective Gordy personally believed he had probable cause. Alternatively, Finding 19 might be a Finding that the alleged suspicious activity was in fact observed by Detective Gordy, or that the alleged suspicious activity was in fact indicative of drug activity. We cannot choose between these competing inferences. "[O]nly the trial court, as fact-finder, can determine which inferences shall be drawn and which shall be rejected." *State v. Jordan*, 385 N.C. 753, 759, 898 S.E.2d 279, 284 (2024) (citation and quotation marks omitted).

Our Supreme Court has articulated the problem in the context of orally-made findings:

> "[W]hen announcing an oral ruling, trial courts often will describe the testimony and evidence received at the hearing. The court might say, 'The officer testified that the door was open.' Is this a finding that the officer's testimony is

> credible and, thus, a finding that the door was indeed open? On a cold appellate record, it can be hard to tell."

Id. at 757, 898 S.E.2d at 283.

The same issue arises when the written order only "describe[s] the testimony and evidence received at the hearing." *Id.* Both Detectives Gordy and Peoples testified the observations described in Finding 19 informed their belief Defendant was engaged in a drug transaction. Detective Peoples testified this same belief informed his reasons for searching Defendant's person. Finding of Fact 19 is a recitation of Detective Gordy's testimony that he believed the activity to be suspicious, but fails to resolve whether his observations were accurate, indicative of drug activity, or actually and properly served as the basis of a probable cause determination.

2. *Findings of Fact 26 and 27*

Findings 26 and 27 fail to resolve another material conflict: whether the officers searched Defendant's person based on reasonable concerns about officer safety or in order to find drugs. Finding 26 recites Detective Peoples' testimony that he searched Defendant for weapons, while Finding 27 recites Detective Peoples' testimony that he couldn't remember whether he frisked Defendant before reaching into his pockets and finding methamphetamine:

> (26) . . . Detective Peoples indicated that he first searched the defendant due to activity and to ensure that the defendant did not have any weapons on his person;
>
> (27) Detective Peoples testified that he couldn't recall specifically if he felt something in the pocket before he reached in or not but that the pat down was due to the nature of the stop, the hour of the night, the fact that these are trained crime-reduction unit officers, narcotics officers, FBI task force officers, and that that is the reason for the search. During the search of the defendant, Detective Peoples located methamphetamine in the defendant's pants pocket . . .

Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334, 343-44 (1993) (citations and quotation marks omitted).

> One such exception was recognized in Terry v. Ohio, which held that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot[,] the officer may briefly stop the suspicious person and make reasonable inquiries aimed at confirming or dispelling his suspicions.

Id. at 372-73, 113 S. Ct. at 2135, 124 L. Ed. 2d at 344 (alteration, citations, and quotation marks omitted). The standard in *Terry* applies to traffic stops. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 3149, 82 L. Ed. 2d 317, 334 (1984); *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012).

"[W]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a patdown search to determine whether the person is in fact carrying a weapon." *Dickerson*, 508 U.S. at 373, 113 S. Ct. at 2136, 124 L. Ed. 2d at 344 (citations and quotation marks omitted). "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence[.]" *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 617 (1972). The relevant inquiry is whether the officer had a reasonable belief that the individual was armed and dangerous. *See id*. at 146, 92 S. Ct. at 1923, 32 L. Ed. 2d at 617; *Terry v. Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868, 1881, 20 L. Ed. 2d 889, 908 (1968). Our courts follow these same principles. *See, e.g.*, *State v. Harris*, 95 N.C. App. 691, 697, 384 S.E.2d 50, 53 (1989) (citation omitted) ("[I]t is well within the law to conduct a frisk of a defendant for weapons when it is strictly limited to determination of whether that defendant was armed.").

Defendant argues the search was conducted not to locate weapons, but because it was Detective Peoples' routine practice; Defendant further argues there is no evidence that Detective Peoples frisked Defendant before reaching into his pockets, and even if he had, there was no basis to justify a *Terry* frisk because the officers could not have justifiably believed Defendant was armed.

Findings 26 and 27 recite testimony that might support a finding that the search of Defendant's person was based on Detective Peoples' reasonable belief Defendant was armed and dangerous. Other testimony at the suppression hearing, however, showed Defendant was searched immediately and only after the K-9 alerted. Thus, a material conflict in

the evidence remains as to whether the basis of the search was a *Terry* frisk for weapons or a response to the alleged K-9 alert on the vehicle. Testimony cannot substitute for a finding in this instance. *See Lang*, 309 N.C. at 520-21, 308 S.E.2d at 321; *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. *See also Jordan*, 385 N.C. at 757-58, 898 S.E.2d at 283 ("[W]e cannot infer the necessary findings under *Bartlett* because there is a material conflict in the evidence that the trial court must resolve.").

3. *Findings of Fact 33 and 36*

Another conflict in the evidence exists regarding whether the K-9 alerted for the presence of narcotics. Finding 33 describes Detective Peoples' testimony that he was informed the K-9 alerted and Finding 36 recites Sergeant Basinger's testimony about how the K-9 sniff took place:

> (33) That at the 9-minute-and-14-second mark Detective Peoples could clearly be heard on his bodycam footage saying, "positive". When asked what this meant, he said that it was a question to the K-9 officer to see why he was being summoned to the vehicle. It was at that point that he was informed that the K-9 had alerted on to the possibility of illegal substances in the defendant's vehicle;
>
> (36) That Detective Basinger testified Kantor did not receive any command to sniff . . . He said that the K-9 circled the vehicle and first alerted to suspected illegal substances between the front and rear door seam on the driver's side of the vehicle . . . He indicated that he considered it an alert because Kantor had a change of demeanor. They continued the search and K-9 Kantor had a complete alert on the gas lid at the back left side of the defendant's vehicle . . .

Defendant argues there is no competent evidence showing the K-9 alerted, and as such there was no probable cause to search Defendant's vehicle; nor were there grounds to search Defendant, even if the K-9 had alerted, because probable cause to search a vehicle does not create probable cause to search its occupants.

Whether the K-9 alerted for drugs on the vehicle is critical to the inquiry of whether the officers had probable cause to search the vehicle. *See State v. Degraphenreed*, 261 N.C. App. 235, 246, 820 S.E.2d 331, 338 (2018) ("A positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts.")

(citation omitted). Testimony and body camera footage introduced at the suppression hearing showed Detective Peoples bending over and waving something near the rear tire by the gas lid where the K-9 is subsequently alleged to have detected drugs. Detective Peoples testified there was "absolutely no[]" reason for him to have been waving or rubbing anything against the tire, and despite seeing himself do so on the footage, could not recall why he had bent over or what he was doing at the time. We note that no illegal substances were found at or near the source of the K-9's alleged alert. Furthermore, the body camera footage introduced at the suppression hearing was absent of any footage of the K-9 performing its trained alert.

Ultimately, there is no finding in the Record resolving the conflict surrounding the alleged K-9 alert. Finding 33 provides Detective Peoples' testimony that he was informed of an alert, and Finding 36 provides Sergeant Basinger's testimony describing the K-9 sniff and alert. This witness testimony cannot substitute for a finding by the trial court that the K-9 alerted. *See Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674; *Huffman*, 194 N.C. App. at 359, 669 S.E.2d at 793.

B. *Conclusions of Law*

Defendant also challenges the trial court's Conclusion of Law 2 as applying the wrong legal standard and unsupported by the Findings. We review conclusions of law de novo. *See Fernandez*, 346 N.C. at 11, 484 S.E.2d at 357. Conclusion of Law 2 concerns the basis for both the search of Defendant's person and the vehicle:

> (2) That based on the positive alert by K-9 Kantor, the officers had reason to search both the person and the vehicle of the defendant.

The Fourth Amendment to the United States Constitution protects the people from "unreasonable searches and seizures." U.S. Const. amend. IV. "Generally, warrantless searches are not allowed absent probable cause and exigent circumstances," *State v. Harper*, 158 N.C. App. 595, 602, 582 S.E.2d 62, 67, *disc. review denied*, 357 N.C. 509, 509, 588 S.E.2d 372, 373 (2003), and a warrant may not be issued without probable cause. U.S. Const. amend. IV. Our state constitution likewise has adopted this same standard. *See* N.C. Const. art. I § 20.

The warrantless search of a vehicle is permissible if based on probable cause. *State v. Guerrero*, 292 N.C. App. 337, 341, 897 S.E.2d 534, 537 (2024) ("It is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a

public roadway . . . may take place.") (alteration in original) (citation and quotation marks omitted). Thus, the standard for assessing the legality of the search of Defendant's vehicle is whether the officers had probable cause. The trial court, however, concluded only that the officers had "reason" to conduct the search. We note that, in its Conclusion of Law 1, the trial court properly concluded the officers had "probable cause" to stop the vehicle for speeding, but Conclusion of Law 2 does not use the same "probable cause" language; Conclusion of Law 2 only concludes the officers had "reason" to conduct both searches.

Furthermore, even if the trial court properly concluded the K-9 sniff gave probable cause to search the vehicle, it could not have given probable cause to search Defendant's person.

> "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."

Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 342 (1979). *See also State v. Malunda*, 230 N.C. App. 355, 360, 749 S.E.2d 280, 284 (2013) (probable cause to search vehicle when officers smelled marijuana did not amount to probable cause to search passenger in that vehicle) and *Degraphenreed*, 261 N.C. App. at 246, 820 S.E.2d at 338 (positive K-9 sniff gives probable cause to search only the area or item where the K-9 alerts).

Remand is appropriate where the trial court has applied the wrong legal standard. *See State v. Williams*, 195 N.C. App. 554, 561, 673 S.E.2d 394, 398-99 (2009) ("Where . . . the trial court mistakenly applies an incorrect legal standard in determining whether a defendant's constitutional rights have been violated for purposes of a motion to suppress, the appellate court must remand the matter to the trial court for a 'redetermination' under the proper standard."). We note also that, the Findings, as they currently exist in the Order, cannot support the trial court's ultimate Conclusion there was "reason" or probable cause to conduct either search based on the alleged K-9 alert because, as discussed above, there was no finding that the K-9 alerted.

Thus, where the trial court did not apply the probable cause standard for either search, the trial court's denial of the Motion to Suppress was entered upon an improper legal standard. Therefore, the trial court's

Order is not supported by its Findings of Fact or Conclusions of Law. Consequently, we vacate the trial court's Order denying the Motion to Suppress and the Judgment subsequently entered and remand this matter to the trial court for new findings and application of the correct legal standard to the evidence. *See State v. McKinney*, 361 N.C. 53, 65, 637 S.E.2d 868, 876 (2006) (remanding to "afford the trial court an opportunity to evaluate" a motion to suppress "using the appropriate legal standard."). We express no opinion on the ultimate merits. *See id.*

Furthermore, because the Judgment was imposed as part of a plea agreement, 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. *See*, *e.g.*, *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding judgment should be vacated, guilty plea set aside, and the case remanded for disposition of original charges where trial court erroneously imposed aggravated sentence based solely on the defendant's guilty plea and stipulation as to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 327, 734 S.E.2d 571, 571 (2012).

Conclusion

Accordingly, for the foregoing reasons, we vacate the Judgment against Defendant and set aside the plea agreement in its entirety. We remand to the trial court for new proceedings on Defendant's Motion to Suppress, including for findings of fact resolving disputes in the evidence and conclusions of law and, if necessary, to proceed to trial. We further note: "if the judge who conducted the hearing is not available to enter a new order on remand, a new evidentiary hearing on the motion to suppress is required[.]" *State v. Swain*, 276 N.C. App. 394, 399, 857 S.E.2d 724, 727 (2021).

VACATED AND REMANDED.

Judge STROUD concurs. Judge GORE concurs in the result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 17 December 2024)

BAREFOOT v. LAFAYETTE CEMETERY PARK CORP. No. 24-282	Cumberland (21CVS7251)	Affirmed
CLARK v. BALDWIN No. 24-547	Wake (20CVS007603-910)	No Error
GEICO INDEM. CO. v. POWELL No. 24-209	Nash (22CVS1318)	Affirmed
GRONLUND v. HAWK No. 24-614	Harnett (23CV003394)	Affirmed in Part, Reversed in Part, and Remanded
HILL v. HILL No. 24-329	Mecklenburg (23CVS5788)	Affirmed in Part, Vacated in Part, and Remanded
IN RE C.K.R. No. 24-122	Burke (21JT120) (21JT121)	Affirmed
IN RE M.C. No. 24-448	Onslow (19JA144)	AFFIRMED In Part, and DISMISSED In Part.
KOTSIAS v. FLA. HEALTH CARE PROPS. No. 23-1029-2	N.C. Industrial Commission (X59853)	AFFIRMED IN PART AND REMANDED. ALL COSTS TAXED TO APPELLANT.
MIDLAND CREDIT MGMT., INC. v. MITCHELL No. 24-123	Forsyth (23CVD1164)	Dismissed
MILLER v. UNITED PROP. & CAS. INS. CO. No. 22-734	New Hanover (19CVS2293)	Affirmed
N.C. FARM BUREAU MUT. INS. CO. v. BARNHARDT No. 24-404	Cabarrus (22CVS568)	Reversed
SOSNA v. CAUSEY No. 24-338	Wake (23CVS4186-910)	Affirmed

STATE v. DAVIS No. 24-144	Lenoir (21CRS50323)	No Error
STATE v. FORD No. 24-130	Rowan (21CRS53404)	No Error
STATE v. GREENE No. 24-345	Rowan (20CRS50270)	No Error
STATE v. HAYES No. 23-1142	Bertie (20CRS50132) (20CRS50202)	Vacated and Remanded
STATE v. HINES No. 24-171	Columbus (18CRS493-94)	No Error
STATE v. JENKINS No. 24-427	Randolph (22CRS51164) (23CRS189)	No Error
STATE v. JONES No. 24-384	Forsyth (22CRS223) (22CRS54824)	No Error
STATE v. MARTINEZ No. 23-905	Brunswick (18CRS55383)	No Plain Error
STATE v. MERRELL No. 24-292	McDowell (22CRS50092) (22CRS50094-95)	No Error
STATE v. PHILLIPS No. 24-273	Cabarrus (21CRS53444-45)	No Error
STATE v. QUICK No. 23-503	Johnston (21CRS259-60) (21CRS50524-25)	No Error
STATE v. RAMEY No. 24-395	Haywood (23CRS34)	Dismissed
STATE v. RUTHERFORD No. 24-96	Cabarrus (19CRS53171)	No Error.
STATE v. SMITH No. 24-226	Union (22CRS298072) (22CRS392)	Vacated in Part and Remanded
STATE v. TAYLOR No. 24-363	McDowell (20CRS50516)	No Plain Error in part, and Vacated and Remanded in part.

STATE v. WILLIAMS No. 24-465	Gaston (20CRS055958)	No Error
STATE v. WILSON No. 24-342	Caswell (21CRS50133)	No Error
THOMAS v. E&J AUTO., INC. No. 24-365	Craven (23CVD961)	Affirmed as Modified and Remanded
VALDOVINOS v. DUKE UNIV. No. 24-84	N.C. Industrial Commission (18-054517)	Affirmed
WYNNEFIELD PROPS., INC. v. EMERGENCY RESTORATION EXPERTS, LLC No. 24-240	Guilford (19CVS7928)	NO ERROR IN PART, VACATED IN PART, AND REMANDED.
YOW v. DISPATCH & SERVS., INC. No. 24-405	Mecklenburg (23CVS6406)	AFFIRMED In Part, and DISMISSED In Part.

CL HOWARD INVESTMENTS I, LLC, PLAINTIFF
v.
WILMINGTON SAVINGS FUND SOCIETY, FSB AS TRUSTEE FOR BCAT 2020-3TT;
AND SUBSTITUTE TRUSTEE SERVICES, INC., DEFENDANTS

No. COA24-466

Filed 31 December 2024

Mortgages and Deeds of Trust—multiple deeds of trust—lien position—effect of loan modification by senior lienholder—no loss of priority

In a declaratory action to settle the lien priority between a senior deed of trust and a junior deed of trust (both duly recorded), where, after both deeds of trust had reached their maturity date, the holder of the senior deed of trust entered into a loan modification (which was also recorded) with the debtor to extend the maturity date of the loan and recapitalize the remaining principal balance, the loan modification did not operate to create a new deed of trust or to extinguish the senior deed of trust—as confirmed by the plain language of the senior deed of trust, loan modification, and relevant statutory provisions. Further, the senior deed of trust had not expired at the time of subsequent foreclosure proceedings; therefore, the senior deed of trust did not lose its lien position relative to the junior deed of trust and plaintiff, who purchased the property after the junior deed of trust was foreclosed, did not have superior title. The trial court's order granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment was reversed and the matter was remanded for entry of summary judgment in favor of defendants.

Appeal by defendants from order entered 7 December 2023 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 6 November 2024.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for plaintiff-appellee.

The Hutchens Law Firm & The Law Office of John T. Benjamin, Jr. PA, by Claire Collins Dickerhoff and John T. Benjamin, Jr., for defendants-appellants.

GORE, Judge.

Defendants appeal the order granting plaintiff's motion for summary judgment and denying defendants' motion for judgment on the pleadings. The issue before this Court is whether pursuant to N.C.G.S. § 47-20, a senior deed of trust loses its priority to a junior deed of trust when the senior deed of trust is modified via a loan modification to extend the maturity date and filed at a date later than the junior deed of trust's initial filing date. We hold it does not. Upon careful review of the briefs and the record, we reverse and remand for the reasons herein.

I.

On 18 January 1999, Linda M. Anderson ("debtor") granted a first deed of trust for the property located at 4015 Burnham Court, Winston-Salem, North Carolina, 27105 as security for repayment of a loan in the amount of $52,850.00 (the "Senior Deed of Trust"). The Senior Deed of Trust was registered in Book 2047, Page 188, in the Forsyth County Register of Deeds. On the same day, debtor also granted a second deed of trust as security for repayment of a second loan in the amount of $22,650.00 (the "Junior Deed of Trust"). The Junior Deed of Trust was registered in Book 2047, Page 196, in the Forsyth County Register of Deeds. It is undisputed, that at the time of registration, the Junior Deed of Trust was in a second lien position to the Senior Deed of Trust in the chain of title to the property.

Both deeds of trust reached their maturity dates on 22 January 2014. On 1 October 2014, the holder of the note and the Senior Deed of Trust entered into a loan modification ("Loan Modification") with debtor to modify the maturity date of the loan from 2014 to 2033, and to recapitalize the unpaid principal balance of $46,620.96. The Loan Modification stated that all the covenants, agreements, stipulations, and conditions contained in the Note and Senior Deed of Trust were to "remain in full force and effect, except as . . . modified."

On 17 May 2021, the Junior Deed of Trust was foreclosed. The Notice of Foreclosure of a Deed of Trust was registered in Book 3618, Page 4086 in the Forsyth County Register of Deeds. Plaintiff purchased the property in 2021, and a Special Warranty Deed titled to plaintiff was registered in Book 3655, Page 2042. In 2022, the holder of the Senior Deed of Trust and Loan Modification initiated foreclosure proceedings after debtor defaulted on the loan as modified.

Plaintiff filed a declaratory action (the present case) against defendants pursuant to N.C.G.S. § 47-20, seeking declaratory judgment that the Senior Deed of Trust was extinguished upon recording of the Loan Modification and that plaintiff had superior title in the chain of title to

the property. Defendants filed motions in opposition to the complaint, and plaintiff filed a motion for summary judgment. In response, defendants filed a motion for judgment on the pleadings. The trial court heard arguments and entered an order denying defendants' motion for judgment on the pleadings and granting plaintiff's motion for summary judgment. Defendants timely appealed the final order.

II.

Defendants appeal of right pursuant to N.C.G.S. § 7A-27(b)(1). Defendants seek review of one issue: whether defendants' Senior Deed of Trust lost its priority lien position to the Junior Deed of Trust upon its filing of a Loan Modification that extended the Senior Deed of Trust's maturity date and recapitalized the remaining principal balance. Plaintiff argues that according to section 47-20, the Loan Modification effectively extinguished the Senior Deed of Trust and gave its Junior Deed of Trust a first priority lien. Plaintiff further argues that upon the foreclosure of the Junior Deed of Trust, the Loan Modification was extinguished, and defendants could no longer bring a foreclosure action against the real property.

Conversely, defendants argue the Loan Modification was merely an extension of the Senior Deed of Trust, and therefore, the later filing date on the Loan Modification had no effect on the priority position of the Senior Deed of Trust. Defendants argue they could still initiate foreclosure proceedings upon default of the loan.

We have the same standard of review for a motion for summary judgment and a motion for judgment on the pleadings. We review these motions de novo. *See Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, *disc. rev. denied*, 360 N.C. 78 (2005); *see also Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572 (1999). Plaintiff and defendants agree there was no genuine issue of material facts—the facts are undisputed—and instead seek review of whether the trial court erred in its determination as a matter of law. Accordingly, under a de novo review, we "consider the matter anew and freely substitute our own judgment for that of the lower court." *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422 (2023) (cleaned up).

Defendants argue the trial court erred by granting plaintiff's motion for summary judgment that enjoined the foreclosure of the Senior Deed of Trust and quieted title to plaintiff, free and clear of the Senior Deed of Trust. Specifically, defendants argue the trial court erred by determining as a matter of law that the Senior Deed of Trust, as modified, was extinguished upon the foreclosure of the Junior Deed of Trust. We agree.

Plaintiff relied upon section 47-20 of the North Carolina General Statutes in its argument that the filing of the Loan Modification extinguished the Senior Deed of Trust and elevated the Junior Deed of Trust to a senior lienholder position. Section 47-20 states,

> No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article . . . . *Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected*, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined by:
>
> (1) The earliest document number set forth on the registered instrument.
>
> (2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

N.C.G.S. § 47-20 (2023) (emphasis added).

Plaintiff's argument in reliance on this statute, which the trial court appeared to have accepted, is twofold. Plaintiff argues the Loan Modification effectively extinguished the Senior Deed of Trust upon its registration. Because section 47-20 promotes lien position based upon the earlier registration, plaintiff argues that its Junior Deed of Trust stepped into a senior lien position. Plaintiff argues the foreclosure of the Junior Deed of Trust had the effect of extinguishing all liens junior to it, and this would include the Loan Modification as it was registered at a later date and recorded at a later sequential book and page number. According to plaintiff, defendants should have sought a subordination agreement to "memorialize [plaintiff's] agreement to remain in a second position subject to the [Loan Modification]" and the failure to do so resulted in the Junior Deed of Trust stepping into a first lien position. Plaintiff's argument is flawed in multiple ways.

First, we address the interpretation of section 47-20. Plaintiff argued the portion of the statute that states, "Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected," means defendants should have sought a subordination agreement from the junior lienholder to maintain their senior lien position. Whereas defendants argue this language is an exception to the statute's general requirements for establishing priority. Defendants argue the exception simply allows that "in the event there is a separate registered instrument that changes the priority interest of an affected party, then that instrument would control." Upon review of the statute, we determine plaintiff's interpretation goes well beyond the plain language of the statute.

Plaintiff cites no binding case law to support their interpretation. "Statutory interpretation properly begins with an examination of the plain words of the statute. If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Belmont Ass'n, Inc. v. Farwig*, 381 N.C. 306, 310 (2022) (cleaned up). "Courts should give effect to the words actually used in a statute and should neither delete words that are used nor insert words that are not used into the relevant statutory language during the statutory construction process." *N.C. Farm Bureau Mut. Ins. Co. v. Dana*, 379 N.C. 502, 510 (2021). "[S]tatutes should be construed so that the resulting construction 'harmonizes with the underlying reason and purpose of the statute.' " *Id.* (citation omitted).

We agree with defendants that the plain language of the statute creates an exception to account for parties that enter into a subordination agreement or any agreement contrary to the general race statute framework. Plaintiff's argued interpretation for a senior lienholder to obtain a subordination agreement from a junior lienholder prior to modifying a loan, would promote foreclosure rather than remedial efforts such as a loan modification. Such an interpretation and application would be contrary to the statutory scheme for mortgages and deeds of trust that promotes remedial measures prior to foreclosure of an owner-occupied residence. *See* N.C.G.S. § 45-21.16C(b) (2023); N.C.G.S. §§ 45-100 et seq. (2023). Beyond this, adoption of plaintiff's interpretation would require us to insert words not used and would contravene the previously stated statutory interpretation precedence. We will not go against precedence to support an interpretation that requires word surplusage and clashes with the underlying reason and purpose of the statute.

Next, we address plaintiff's argument regarding the effect the Loan Modification had on the Senior Deed of Trust. Plaintiff appears to

argue that because the Senior Deed of Trust was modified and the Loan Modification memorializing this modification was technically registered after the date of the Junior Deed of Trust, the Senior Deed of Trust lost its lien position and became junior to the Junior Deed of Trust. This is a very simplistic and inaccurate application of section 47-20 that disregards what a Deed of Trust is and what a Loan Modification is. "A deed of trust is a three-party arrangement in which the borrower conveys legal title to real property to a third party trustee to hold for the benefit of the lender until repayment of the loan." *Skinner v. Preferred Credit*, 361 N.C. 114, 120 (2006). "When the loan is repaid, the trustee cancels the deed of trust, restoring legal title to the borrower, who at all times retains equitable title in the property." *Id.* at 121. Black's Law Dictionary defines a modification in the context of contract law as "a change to something, an alteration or amendment." *Modification*, *Black's Law Dictionary* (12th ed. 2024). Looking at these definitions, we recognize a loan modification is not an instrument to convey title on its own like a deed of trust and does not exist separate and apart from the instrument it modifies.

There is currently no North Carolina case law that directly addresses the present issue. However, our Courts have discussed loan modifications within the realm of contract law. Additionally, the Restatement (Third) of Property section 7.3 on loan modifications conforms with the existing North Carolina statutory law and case law that does discuss deeds of trust.

In Chapter 45 of the North Carolina General Statutes on Mortgages and Deeds of Trust, section 45-36.24 provides for extension of maturity dates in security instruments beyond the general statutory limits. Specifically, section 45-36.24 states in part:

> (b) Automatic Lien Expiration. [U]nless the lien of a security instrument has been extended . . . , the security instrument has been foreclosed, or the security instrument has been satisfied of record pursuant to G.S. 45-37, the lien of a security instrument automatically expires, and the security instrument is conclusively deemed satisfied of record pursuant to G.S. 45-37 . . . 15 years after the maturity date [of the secured obligation stated in the security instrument.]
>
> . . .
>
> (c) Methods To Extend a Lien.--The lien of a recorded security instrument may be extended one or more times

> by recording (i) a lien maturity extension agreement or (ii) a notice of maturity date. . . . A lien maturity extension agreement or notice of maturity date is ineffective unless recorded before the lien expires. The lien of the original security instrument may not be extended to a date more than 50 years after the date the security instrument was originally recorded in the office of the register of deeds without the written agreement of the then owner of the property encumbered by the lien of the security instrument.
>
> (d) Lien Maturity Extension Agreement.–
>
> > (1) The lien of a recorded security instrument may be extended to a date specified in a lien maturity extension agreement, provided the lien maturity extension agreement is recorded before the lien expires. When a lien maturity extension agreement has been duly recorded, the lien of the security instrument will expire on the date specified in the lien maturity extension agreement.
> >
> > (2) A document (including any document that modifies, amends, or restates a security instrument) is a lien maturity extension agreement[.]

N.C.G.S. § 45-36.24(b), (c), (d) (2023). The plain language of this statute provides for an extension of the maturity date in security instruments. The statute makes plain that a maturity date in a security instrument does not expire until, at minimum, fifteen years from the maturity date. § 45-36.24(b). Section 45-36.24(b) states that upon automatic expiration, the security instrument is "conclusively deemed satisfied of record." *Id.* However, parties may extend the maturity date beyond the statutory limitations, if they enter into a lien maturity extension agreement and properly register it. *See* § 45-36.24(c).

Beyond section 45-36.24, the statutorily prescribed foreclosure proceedings for owner-occupied residential property includes a mandate for the clerk to continue the hearing if there is "good cause to believe additional time or additional measures have a reasonable likelihood of resolving the delinquency without foreclosure." § 45-21.16C(b). Loan modifications are identified in this statute as a form of good cause to consider. *See* § 45-21.16C(b). North Carolina statutory law also provides for continued lien priority for loans with future advances. *See* N.C.G.S. § 45-70(a) (2023). The statute unequivocally states future

advances on loans do not affect the priority of a lien holder, unless the additional amount or "interest accrued" is greater than the "maximum principal amount" in the recorded security instrument. § 45-70(a), (a1). In such situations, the amount that exceeds the maximum principal amount "shall not be afforded the priority" that the statute grants to future advances and obligations. *Id.*

North Carolina case law has established the following distinction between a satisfaction and a renewal for deeds of trust and mortgages. "A new note, where not given in payment, but merely in renewal does not change the original debt." *Cable v. Hardin Oil Co.*, 10 N.C. App. 569, 575 (1971). "Where a note is given merely in renewal of another note, and not in payment, the renewal does not extinguish the original debt nor in any way change the debt, except by postponing the time of payment." *W.R. Grace & Co. v. Strickland*, 188 N.C. 369, 372 (1924).[1] However, in the case that the "second note be given and accepted in payment of the debt, and not in renewal of the obligation, a different principle will apply." *Id.* In the case of a mortgage or deed of trust settlement, "by [the mortgagor's] settlement and taking a new note in settlement, with a mortgage to secure it, the [prior mortgage is] discharged, bec[omes] extinct, and the [mortgagee] los[es] [its] lien under it[.]" *Smith v. Bynum*, 92 N.C. 108, 110 (1885). "The substitution of one note and mortgage for another will not discharge the lien of the original note and mortgage unless the latter is surrendered to the mortgagor or canceled of record. It is only a renewal or acknowledgment of the same debt." *Wilkes v. Miller*, 156 N.C. 428, 431 (1911).

Finally, we construe a loan modification and its effect on the original deed of trust through the laws of contract. *See Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335–36 (2015). "When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning." *In re Fortescue*, 75 N.C. App. 127, 130 (1985) (internal quotation marks and citations omitted). "The court must construe the language of the contract according to its ordinary meaning, and in light of the stated purpose of the parties in executing the contract, to ascertain the intention of the parties with respect to particular provisions." *Id.*

---

1. "[T]he word 'renewal' or 'renewed' signifies more than the substitution of one obligation for another. It means the substitution in place of one engagement of a new obligation on the same terms and conditions—that is, the re-establishment of a particular contract for another period of time." *Id.*

> The making of a second contract dealing with the subject matter of an earlier one does not necessarily abrogate the former contract. To have the effect of rescission, it must either deal with the subject matter of the former contract so comprehensively as to be complete within itself and to raise the legal inference of substitution, or it must present such inconsistencies with the first contract that the two cannot in any substantial respect stand together. Before the new contract can be accepted as discharging the old, the fact that such was the intention of the parties must clearly appear.
>
> If upon comparison it should be found that rescission has not been effected, the two instruments must be read and construed together in ascertaining the intent of the parties and in determining what portions of the agreement are still enforceable. In such construction the rules applied to interpretation of a single contract are applicable, perhaps with added propriety. We must, of course, keep within the bounds of the writings, but the circumstances surrounding their execution, the relation of the parties and the object to be accomplished, are all to be consulted in arriving at the intent.

Com. Nat'l Bank of Charlotte v. Charlotte Supply Co., 226 N.C. 416, 426–27 (1946) (cleaned up).

Based upon this established precedence, we now consider the Loan Modification and its effect upon the Senior Deed of Trust. Both parties acknowledge the Loan Modification modified the Senior Deed of Trust in two ways—it provided for a later maturity date, and it recapitalized the principal amount still owed on the mortgage. The Loan Modification contained the following provisions of interest:

> This Loan Modification Agreement ("Agreement"), effective on 10/01/14 . . . modifies, amends, and supplements (to the extent this Agreement is inconsistent with their terms): (1) the Mortgage, Deed of Trust, . . . or Security Deed ("Security Instrument"), as set forth herein above, and . . . (2) the Loan Agreement ("Note") to Lender, dated January 18, 1999, and secured by the Security Instrument, which covers the real and personal property described in the Security Instrument and defined therein as the "Property" located at 4015 Burnham CT Winston Salem, NC 27105 . . .

> Terms not defined in this Agreement are as defined in the Note and/or Security Agreement.
>
> . . .
>
> 8. (a) All the rights and remedies, stipulations, and conditions contained in the Security Instrument relating to default in the making of payments under the Security Instrument shall also apply to default in the making of the modified payments hereunder.
>
> (b) All covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect, except as herein modified, and none of the Borrower's obligations or liabilities under the Note and Security Instrument shall be diminished or released by any provisions hereof, nor shall this Agreement in any way impair, diminish, or affect any of Lender's rights under or remedies on the Note and Security Instrument, whether such rights or remedies arise thereunder or by operation of law. Also, all rights of recourse to which Lender is presently entitled against any property or any other persons in any way obligated for, or liable on, the Note and Security Instrument are expressly reserved by Lender.
>
> (d) Nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument.
>
> Except where otherwise specifically provided in this Agreement, the Note and Security Instrument will remain unchanged, and Borrower and Lender will be bound by, and comply with, all of the terms and provisions thereof, as amended by this Agreement.

The Senior Deed of Trust contained the following language about modifications:

> This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with Interest, and all renewals, extensions and modifications of the Note; . . . Borrower irrevocably grants and conveys to Trustco and Trustee's successors and assigns, in trust, with power of sale, . . . 4015 Burnham Court Winston Salem, North Carolina 27105.

The plain language of the Senior Deed of Trust and the Loan Modification demonstrates that the parties to the loan intended to modify the Senior Deed of Trust, not extinguish it. The Senior Deed of Trust included a provision to allow for modification; the Loan Modification only extended the maturity date and recapitalized the principal amount to reflect the remaining principal amount from the Senior Deed of Trust. The plain language in the Loan Modification states its purpose is to supplement the Senior Deed of Trust. According to the terms in the Loan Modification, all other terms in the Senior Deed of Trust that were not modified remain in effect. Accordingly, the Loan Modification was a supplement to the Senior Deed of Trust and did not extinguish the original lien.

The terms of the Restatement (Third) of Property section 7.3(b) are generally followed among multiple jurisdictions. *See* Mortgages and deeds of trust—Modification, 2 N.C. Real Estate § 21:87 (3rd ed.). Having already discussed the statutes and laws related to deeds of trust and loan modifications in North Carolina, we determine that the Restatement (Third) of Property section 7.3(b) properly applies within our established jurisprudence. Section 7.3(b) states the following:

> If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests and is not within the scope of a reservation of right to modify[.]

Restatement (Third) of Property (Mortgages) § 7.3(b) (1997). Applied to the present case—the Senior Deed of Trust did not lose its priority at the time it registered the Loan Modification. A junior lienholder is charged with notice when there is an unsatisfied mortgage of record to the property. *Collins v. Davis*, 132 N.C. 106, 112 (1903). Plaintiff, the junior lienholder, is also charged with inquiry notice because "inquiry of the mortgagee would have elicited information that the mortgage was still in force as between the original parties." *Id.* at 113.

Both parties properly acknowledge the effect of a foreclosure sale on junior lienholders. "The sale under a mortgage or deed of trust cuts out and extinguishes all liens, encumbrances and junior mortgages executed subsequent to the mortgage containing the power." *In re Foreclosure of Lien By Ridgeloch Homeowners Ass'n*, 182 N.C. App. 464, 469 (2007) (cleaned up). In the present case, the plaintiff's Special Warranty Deed was recorded after the sale of the foreclosed Junior

Deed of Trust. Because the Senior Deed of Trust was not discharged or extinguished by the Loan Modification, the Senior Deed of Trust, as modified by the Loan Modification, remained in a first lien position in the chain of title. Accordingly, the foreclosure proceedings of the Senior Deed of Trust were improperly enjoined, and the Senior Deed of Trust, as modified, was improperly extinguished by the trial court.

Although plaintiff argues the Loan Modification was materially prejudicial, it is enough to say plaintiff was not prejudiced in this case. An extension of the maturity date did not prejudice the Junior Deed of Trust considering the statutory expiration of the Senior Deed of Trust was fifteen years beyond the 21 January 2014 maturity date. The initiation of foreclosure proceedings for the Senior Deed of Trust in 2022 was well within the fifteen-year statutory expiration timeframe even without any modification.

Further, because plaintiff alternatively argued that the Loan Modification was a novation, we briefly discuss what a novation is and recognize the Loan Modification did not meet the requirements of a novation in this case. As stated by our Supreme Court:

> A novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished. The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract.
>
> Novation implies the extinguishment of one obligation by the substitution of another. Ordinarily, as stated in *Growers Exchange v. Hartman*, 220 N.C. 30 (1941), in order to constitute a novation a transaction must have been so intended by the parties.

Wachovia Realty Inv. v. Hous., Inc., 292 N.C. 93, 104 (1977) (cleaned up). As discussed, the plain language in the Senior Deed of Trust and the Loan Modification unequivocally states the intent of the parties—to extend the maturity date—not to extinguish the Senior Deed of Trust and establish the Loan Modification as a new contract.

Because the Loan Modification did not create a new deed of trust nor extinguish the Senior Deed of Trust, and because the Senior Deed of Trust had not expired at the time of the foreclosure proceedings, the trial court erred in its entry of an order that enjoined the foreclosure proceedings and extinguished the Senior Deed of Trust. Therefore, the

trial court erred by granting plaintiff's motion for summary judgment and by denying defendants' motion for judgment on the pleadings.

III.

For the foregoing reasons, we reverse the trial court's order granting plaintiff's motion for summary judgment and denying defendants' motion for judgment on the pleadings, and remand for entry of an order not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges FLOOD and THOMPSON concur.

FIFTH AVENUE UNITED METHODIST CHURCH OF WILMINGTON, PLAINTIFF
v.
THE NORTH CAROLINA CONFERENCE, SOUTHEASTERN JURISDICTION, OF THE UNITED METHODIST CHURCH, INC.; THE BOARD OF TRUSTEES OF THE NORTH CAROLINA CONFERENCE, SOUTHEASTERN JURISDICTION, OF THE UNITED METHODIST CHURCH, INC.; CONNIE SHELTON; TARA C. LAIN; DEBORAH BLACK; MIKE PRIDDY; REBECCA W. BLACKMORE; EARL HARDY; M. FRANCIS DANIEL; BECCA DETTERMAN; SUE W. HAUSER; HEATHER REAVES; ISMAEL RUIZ-MILLAN; DENA M. WHITE; JON STROTHER; KENNETH LOCKLEAR; DAVID BLACKMAN; AND MICHAEL D. FRESE, DEFENDANTS

No. COA23-1013

Filed 31 December 2024

1. Churches and Religion—subject matter jurisdiction—church property dispute—lack of ecclesiastical entanglement

In a dispute between plaintiff church and its parent denomination (one of several related entities listed as defendants) over the church's property—which the church had owned independently for nearly eighty years prior to affiliating with the denomination and which was seized by the denomination after the church inquired about disaffiliating pursuant to the denomination's Book of Discipline—where the church asserted several claims against the denomination that could be determined using neutral principles of secular law—and, thus, did not implicate the ecclesiastical entanglement doctrine under the First Amendment—the trial court erred by granting the denomination's motions to dismiss under Civil Procedure Rule 12(b)(1) (for lack of subject matter jurisdiction) the

church's claims for breach of contract, fraud, constructive fraud, quiet title, and judicial modification of trust.

2. Churches and Religion—church property dispute—dismissal for failure to state a claim—sufficiency of allegations

In a dispute between plaintiff church and its parent denomination (one of several related entities listed as defendants) over the church's property—which the church had owned independently for nearly eighty years prior to affiliating with the denomination and which was seized by the denomination after the church inquired about disaffiliating pursuant to the denomination's Book of Discipline—the trial court erred by dismissing the church's claims for declaratory judgment and quiet title for failure to state a claim under Civil Procedure 12(b)(6), since the complaint alleged sufficient facts to meet the elements of both claims. However, the trial court properly dismissed the church's claim for promissory estoppel, which has not been recognized as an affirmative cause of action under North Carolina law.

3. Injunctions—preliminary injunction—church property dispute—likelihood of success on the merits—irreparable injury

In a dispute between plaintiff church and its parent denomination (one of several related entities listed as defendants) over the church's property—which the church had owned independently for nearly eighty years prior to affiliating with the denomination and which was seized by the denomination after the church inquired about disaffiliating pursuant to the denomination's Book of Discipline—the trial court erred by denying the church's request for a preliminary injunction because the church demonstrated a likelihood of success on the merits of its claims—including that the denomination failed to follow its own policies with regard to the disaffiliation process—and that it would suffer irreparable injury without injunctive relief—including that it had been permanently excluded from accessing the property.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Plaintiff from order entered 15 September 2023 by Judge Tiffany Peguise-Powers in New Hanover County Superior Court. Heard in the Court of Appeals 4 March 2024.

Coats & Bennett, PLLC, by Attorney Gavin B. Parsons, for the plaintiff-appellant.

Poyner Spruill, LLP, by Attorneys Eric P. Stevens and Colin R. McGrath, for the defendant-appellee.

STADING, Judge.

This matter concerns a dispute between a church in Wilmington and its denomination over the ownership of certain real estate (the "Property") originally deeded to the church. The church congregation has held services on the Property since 1889. That congregation is known as Fifth Avenue United Methodist Church of Wilmington ("Fifth Avenue"), the plaintiff in this action. The defendants (collectively, "Defendants"), represent the United Methodist Church denomination (the "UMC") and include: the North Carolina Conference, Southeastern Jurisdiction of the United Methodist Church (the "Conference"); the Board of Trustees of the Conference (the "Board"); and individually named defendants holding positions with the Conference.

Fifth Avenue appeals from an order denying its request for preliminary injunctive relief and granting Defendants' motions to dismiss all claims under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (6) (2023). After careful consideration, we hold that the trial court committed error by dismissing Fifth Avenue's claims for breach of contract, quiet title, judicial modification of trust, fraud, and constructive fraud pursuant to Rule 12(b)(1). The trial court also committed error by dismissing Fifth Avenue's claims for declaratory judgment and quiet title pursuant to Rule 12(b)(6). Furthermore, the trial court committed error by denying Fifth Avenue's request for preliminary injunctive relief. However, the trial court did not commit error by dismissing Fifth Avenue's claim for promissory estoppel pursuant to Rule 12(b)(6).

I. Background

Fifth Avenue is a historic church established in 1847 and situated near the Cape Fear River in Wilmington. In 1889, the church constructed its historic sanctuary on the Property. The Property's tax value presently exceeds $2,000,000.00. In 1968, Fifth Avenue affiliated with the UMC. The UMC is governed by the *Book of Discipline* (the "BOD"), which sets forth rules and procedures for the UMC, its conferences, and its individual churches. The BOD is "published, and generally revised and updated every four years by the General Conference of the UMC."

The UMC's hierarchical structure as provided in the BOD consists of: (1) the General Conference, which is over the entire UMC denomination; (2) geographically based Annual Conferences, each led by a bishop; and (3) districts within each Annual Conference, led by a

district superintendent. As an affiliate of the UMC, Fifth Avenue was a part of the Harbor District (the "District") within the North Carolina Annual Conference. Defendant Connie Shelton serves as the Bishop of the North Carolina Annual Conference (the "Bishop"). Defendant Tara C. Lain serves as the superintendent of the Harbor District (the "District Superintendent").

The dispute between Fifth Avenue and Defendants centers largely on the application of particular provisions in the BOD concerning the ownership of Fifth Avenue's church property. Among these provisions, paragraph 2501 provides, "[a]ll properties of United Methodist local churches . . . are held, *in trust*, for the benefit of the entire denomination, and the ownership and usage of church property is subject to the [BOD]." The trust clause, paragraph 2501, "reflects the connectional structure of the Church by ensuring that the property will be used solely for purposes consonant with the mission of the entire denomination as set forth in the [BOD]." Furthermore, the trust clause states that it "is and always has been irrevocable, except as provided in the [BOD]. Property can be released from the trust [or] transferred free of trust . . . only to the extent authority is given by the [BOD]."

In 2019, the UMC General Conference enacted paragraph 2553 of the BOD, which provides circumstances and a process by which an individual church may disaffiliate from the UMC. According to the BOD, to disaffiliate from the UMC under this provision, a church must: (1) ask its district superintendent to call a "church conference . . . in accordance with [paragraph] 248"; (2) hold the conference within 120 days "after the district superintendent calls for the conference"; and (3) vote for disaffiliation by a "two-thirds (2/3) majority vote." In addition, paragraph 2553.4(c) provides that "[a] disaffiliating local church shall have the right to retain its real and personal, tangible and intangible property. All transfers of property shall be made prior to disaffiliation. All costs for transfer of title or other legal work shall be borne by the disaffiliating local church." Therefore, successful disaffiliation under paragraph 2553 allows for local church property to be released free of the trust clause in paragraph 2501. Even so, according to the District Superintendent, a local church's affirmative vote to disaffiliate "is not absolute, and . . . is not effective unless . . . ratified by the annual conference through a majority vote of members at an annual conference session." Important here, Paragraph 248 works in conjunction with paragraph 2553 and operates as follows:

> [T]here are two ways in which a church conference can be called by the district superintendent. One is at his/her

> own discretion. The other is when he/she is requested to do so by the pastor, the church governing body, or 10 percent of the professing membership of the local church. In the latter cases, the district superintendent's duty is purely ministerial and is *not subject to his/her discretion*.

(emphasis added).

On 18 January 2023, Fifth Avenue contacted the Annual Conference inquiring about the disaffiliation process under paragraph 2553. Two weeks later, on 1 February 2023, Fifth Avenue's church council met and voted eight–to–two in favor of moving forward with the disaffiliation process. In light of this vote, Fifth Avenue proceeded with the steps outlined in paragraph 2553 by submitting the essential paperwork for the UMC to conduct a "Charge Conference" vote.[1] Then, Fifth Avenue requested that the District Superintendent "hold a Charge Conference for [Fifth Avenue] to conduct a vote on disaffiliation" pursuant to paragraphs 248 and 2553. Later that month, on 27 February 2023, the Annual Conference confirmed receipt of Fifth Avenue's disaffiliation request; noting that it had received all of the required information for Fifth Avenue to proceed with the church's disaffiliation vote.

Three weeks later, on 19 March 2023, Fifth Avenue's pastor informed the congregation that the District Superintendent would hold an informational meeting regarding disaffiliation on the following Sunday, 26 March 2023. On 21 March 2023, Fifth Avenue made an additional written request that the District Superintendent "schedule a Church Conference vote on disaffiliation in accordance with [paragraph] 2553 of the BOD prior to March 31, 2023." Fifth Avenue's bulletin, circulated in anticipation of the 26 March 2023 meeting, stated, " 'Disaffiliation' informational meeting for **Professing Members only** this Sunday evening @ 6 pm, presented by Tara Lain, District Superintendent."

Without the knowledge of any member or pastor of Fifth Avenue, and in the context of requests to schedule a disaffiliation vote, on Friday, 24 March 2023—two days before Fifth Avenue's scheduled informational meeting with the District Superintendent—Defendants seized the Property and closed Fifth Avenue pursuant to paragraph 2549. In doing so, Defendants promptly adopted a "Resolution for Closure of Fifth Avenue" (the "Resolution of Closure"), and recorded an "Affidavit of Declaration of Ownership" (the "Affidavit of Ownership") of the Property in the New Hanover County Registry. All individual defendants,

1. A "Charge Conference" is an official meeting of the local church membership.

including the District Superintendent and the Bishop, signed the Resolution of Closure asserting that "exigent circumstances" warranted the immediate closure of Fifth Avenue and seizure of the Property under paragraph 2549.

The "exigent circumstances" stated by Defendants to warrant closure of Fifth Avenue included: (1) declining membership and missional activity; and (2) Fifth Avenue's pending application with the Annual Conference for disaffiliation. Fifth Avenue retorts that the UMC's own data, published in 2020, shows that its average worship attendance "was higher than 235 of the 785 churches in the North Carolina Conference of the UMC." Nonetheless, Defendants reasoned that permanent closure under paragraph 2549.3(b) was appropriate "because [Fifth Avenue] no longer serve[d] the purpose for which it was organized and incorporated."

The BOD's *Disposition of Property of a Closed Local Church* clause, paragraph 2549.3(b), provides:

> At any time between sessions of annual conference, if the presiding bishop, the majority of the district superintendents, and the appropriate district board of church location and building all consent, they may, in their sole discretion, declare that exigent circumstances exist that require immediate protection of the local church's property, for the benefit of the denomination. In such case, title to all the real and personal, tangible and intangible property of the local church shall vest immediately in the annual conference board of trustees who may hold or dispose of such property in its sole discretion, subject to any standing rule of the annual conference. Exigent circumstances include, but are not limited to, situations where a local church no longer serves the purpose for which it was organized or incorporated . . . or where the local church property is no longer used, kept, or maintained by its membership as a place of divine worship of The United Methodist Church. When it next meets, the annual conference shall decide whether to formally close the local church.

Members of Fifth Avenue worshipped on the Property on the morning of Sunday, 26 March 2023, unaware that Defendants had effectively closed the church two days earlier. That Sunday evening, members of Fifth Avenue—still unaware of Defendants' Resolution of Closure—gathered at the local church for the scheduled disaffiliation informational

meeting with its District Superintendent. However, the Bishop and the District Superintendent both attended and notified Fifth Avenue's pastor and membership that they had closed Fifth Avenue two days prior. The next day, Fifth Avenue was excluded from the Property by Defendants changing the locks to the fellowship hall and church sanctuary. Months later, between 15–17 June 2023, at its annual meeting, Defendants' Annual Conference voted to ratify the closure of Fifth Avenue's church due to exigent circumstances, explaining:

> The Effective Date of the Resolution for Closure of Fifth Avenue United Methodist Church . . . was March 24, 2023. At that time the Church had submitted its disaffiliation inquiry form and *was requesting a church council meeting to vote on disaffiliation*, but no meeting had been scheduled or vote held. Paragraph 2549.3(b) . . . clearly states that "*At any time* between sessions of annual conference, if the presiding bishop, the majority of the district superintendents, and the appropriate district board of church location and building all consent, they may, *in their sole discretion*, declare that exigent circumstances exist that require immediate protection of the local church's property . . . ." The [BOD] plainly establishes that the existence of exigent circumstances allows the presiding bishop, the Cabinet, and the appropriate district committee of church location and building to act at any time, regardless of what other circumstances or options a local church is addressing.

(first emphasis added).

On 27 June 2023, Fifth Avenue filed this action claiming that Defendants had no right to seize the Property and had otherwise deprived Fifth Avenue of their right to disaffiliate from the UMC—as granted by the BOD—and retain its Property free from any trust provision in the BOD. In its complaint, Fifth Avenue brought the following causes of action and requests for relief: (1) breach of contract; (2) promissory estoppel; (3) declaratory judgment; (4) fraud; (5) constructive fraud; (6) quiet title; (7) judicial modification of trust; and (8) preliminary and permanent injunction.[2] In response, Defendants moved to dismiss all of Plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6).

---

2. On appeal, Fifth Avenue does not raise the issue of whether the trial court erred by denying its request for a permanent injunction. We therefore do not address the issue in this opinion. N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs.").

See N.C. Gen. Stat. § 1A-1, R. 12(b)(1), (6). On 15 September 2023, after a hearing, the trial court granted Defendants' motion to dismiss all of Fifth Avenue's claims. Fifth Avenue timely entered its notice of appeal on 18 September 2023.

II. Jurisdiction

The trial court's order dismissing all of Fifth Avenue's claims is a final judgment. Accordingly, our Court has jurisdiction to consider Fifth Avenue's appeal. N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Analysis

Fifth Avenue submits several issues for our consideration: Whether the trial court committed error by (1) dismissing Fifth Avenue's claims for breach of contract, fraud, constructive fraud, quiet title, and judicial modification of trust for lack of subject matter jurisdiction pursuant to Rule 12(b)(1); (2) dismissing Fifth Avenue's claims for promissory estoppel, declaratory judgment, and quiet title for failure to state a claim pursuant to Rule 12(b)(6); and (3) denying Fifth Avenue's request for preliminary injunctive relief. For the reasons below, we hold that the trial court erred in dismissing Fifth Avenue's claims for breach of contract, quiet title, judicial modification of trust, fraud, and declaratory judgment. But the trial court did not err in dismissing Fifth Avenue's claim for promissory estoppel. We also hold that the trial court erred in denying Fifth Avenue's request for injunctive relief.

A. Ecclesiastical Entanglement – Rule 12(b)(1)

[1] In the matter *sub judice*, the trial court granted Defendants' motion to dismiss the following claims under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1): (1) breach of contract, (2) fraud, (3) constructive fraud, (4) quiet title, and (5) judicial modification of trust. Fifth Avenue contends that the trial court erroneously dismissed all of these claims because they "do not require examination, interpretation, or determination of religious doctrine." "We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) (quoting *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009)).

"Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no

power to act . . . ." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). "The principle that civil courts lack subject matter jurisdiction to resolve disputes involving 'purely ecclesiastical questions and controversies' has long been recognized." *Nation Ford Baptist Church Inc. v. Davis*, 382 N.C. 115, 121, 876 S.E.2d 742, 750 (2022) (quoting *Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972)). Indeed, "[w]hen the resolution of a dispute requires the interpretation of religious doctrines or spiritual practices, the court must abstain from deciding purely religious questions." *Davis*, 382 N.C. at 116, 876 S.E.2d at 747. "The constitutional prohibition against court entanglement in ecclesiastical matters is necessary to protect First Amendment rights identified by the 'Establishment Clause' and the 'Free Exercise Clause.' " *Harris*, 361 N.C. at 270, 643 S.E.2d at 569 (citation omitted). The *Davis* Court explained:

> The impermissible entanglement doctrine limits a court's authority to resolve disputes involving religious organizations. Courts possess jurisdiction over only those claims that can be resolved through application of neutral principles of secular law that govern all similar organizations and entities. A court must carefully distinguish between claims that will necessarily require it to become entangled in spiritual matters and those that can potentially be resolved purely on civil grounds. Essentially, if the issues raised in a claim can be "resolved on the basis of principles of law equally applicable to" an "athletic or social club," then the court has jurisdiction to proceed. If the issue raised in a claim requires the court to "determine ecclesiastical questions" or wade into "a controversy over church doctrine," then a court may not proceed because doing so would be "wholly inconsistent with the American concept of the relationship between church and state."

382 N.C. at 128, 876 S.E.2d at 754 (first quoting *Atkins v. Walker*, 284 N.C. 306, 319, 200 S.E.2d 641, 650 (1973); then quoting *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445–46, 89 S. Ct. 601, 604 (1969)).

But "the First Amendment does not provide religious organizations absolute immunity from civil liability." *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510–11, 714 S.E.2d 806, 810 (2011). "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Atkins*, 284 N.C. at 316, 200 S.E.2d at 648. "While the civil courts have no jurisdiction over and no concern with purely ecclesiastical questions and controversies

due to constitutional guarantees of freedom of religious profession and worship, the courts do have jurisdiction to determine property rights which are involved in, or arise from, a church controversy." *Looney v. Cmty. Bible Holiness Church*, 103 N.C. App. 469, 473, 405 S.E.2d 811, 813 (1991). "Where civil, contract[ ] or property rights are involved, the courts [can] inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." *Davis*, 382 N.C. at 123, 876 S.E.2d at 751 (quoting *W. Conf. of Original Free Will Baptists v. Creech*, 256 N.C. 128, 140–41, 123 S.E.2d 619, 627 (1962)).

"[T]o determine whether a civil court has jurisdiction to entertain a dispute, '[t]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine.' " *Davis*, 382 N.C. at 123, 876 S.E.2d at 751 (quoting *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998)). "The specific relief a plaintiff seeks does not dictate a court's jurisdiction to adjudicate a claim. Rather, a court must have jurisdiction over 'the *nature* of the case and the *type* of relief sought in order to decide a case,' not over every possible fact pattern and legal issue connected to a complaint." *Davis*, 382 N.C. at 127, 876 S.E.2d at 754 (quoting *Catawba Cnty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 88, 804 S.E.2d 474, 478 (2017)).

1. Quiet Title and Judicial Modification of Trust

Fifth Avenue argues that the trial court erred in dismissing its quiet title and judicial modification of trust claims for lack of subject matter jurisdiction, contending that these claims can be resolved by the application of neutral legal principles. Specifically, Fifth Avenue contends that the trial court has subject matter jurisdiction to consider its property and trust claims because there remains a genuine, secular question of whether it was in a connectional relationship with the UMC concerning the Property. Fifth Avenue maintains as such because none of the deeds pertaining to the Property refer to the trust clauses contained in the BOD, "save one green space parcel conveyed in 1986." After carefully considering our precedents resolving similar disputes, we agree.

"[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment." *Atkins*, 284 N.C. at 316, 200 S.E.2d at 648 (quoting *Presbyterian Church in United States*, 393 U.S. at 449, 89 S. Ct. at 606). "[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Atkins*, 284 N.C. at 312, 200 S.E.2d at 645. "As a

general rule the parent body of a connectional church has the right to control the property of local affiliated churches, and, as a corollary, this right will be enforced in civil courts." *Looney*, 103 N.C. App. at 473, 405 S.E.2d at 813; *see also A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 412–13, 308 S.E.2d 73, 85 (1983). That said, "a local church may have retained sufficient independence from the general church so that it reserved its right to withdraw at any time, and, presumably take along with it whatever property it independently owned prior to and retained during its limited affiliation with the general church." *Looney*, 103 N.C. App. at 473–74, 405 S.E.2d at 813.

Fifth Avenue offers case law in support of the notion that property and trust disputes involving connectional churches can be resolved in civil courts. *See A.M.E. Zion Church*, 64 N.C. App. at 416, 308 S.E.2d at 87 (remanded to determine "whether the defendant local church was . . . in a hierarchical relationship with the plaintiff body with respect to property matters."); *see also Looney*, 103 N.C. App. at 474, 405 S.E.2d at 813–14 (noting that there is a distinction between connectional and hierarchical churches, that a connectional church may be congregational with respect to property matters, and that a question of this nature may be submitted to a jury); *see also Fire Baptized Holiness Church v. McSwain*, 134 N.C. App. 676, 680–81, 518 S.E.2d 558, 560 (1999) (affirming that whether a church had surrendered its property to the denomination was a proper jury question under *Looney*).

For example, in *Looney*, our Court considered "whether the [ ] local church gave up its right to own and control [its] local church property by affiliating with the Church of God denomination." 103 N.C. App. at 471, 405 S.E.2d at 812. The facts of *Looney* provide that the local church affiliated with the Church of God, beginning in 1956, and its "trustees conveyed the church property to . . . [the] trustees for the Community Church of God." *Id.* at 474, 405 S.E.2d at 813–14. Later, the denomination "altered its policy statement" concerning how its constituents should lead their daily lives. *Id.* at 472, 405 S.E.2d at 812. As a result of that change, the local church disassociated from the denomination. *Id.* at 472, 405 S.E.2d at 813. Then, the plaintiff "dismissed the Community Church of God local board of trustees[,] appointed a successor state board of trustees," and "executed deeds conveying to themselves title to the real property occupied by the [local church]." *Id.* at 473, 405 S.E.2d at 813. The *Looney* Court noted "three central points":

> Viewing the evidence in the light most favorable to defendant non-movant, three central points appear to form the decisive framework.

> (1) Defendant's predecessor congregation or church affiliated with the plaintiff denominational church in 1955 and remained so affiliated until 1988.
>
> (2) The discipline of the denominational church manifest an implied assent of local churches to denominational control of local church property. This evidence, if not contradicted, would make the plaintiffs' case.
>
> (3) The third point is the nature of the property transactions themselves. When the defendant local church affiliated with the plaintiff denominational church, the property was deeded to trustees of, or for, the local church, not to the denominational church or to trustees of, or for, the denominational church. This pattern was followed in all property transactions during the entire period of affiliation. Thus this evidence created a jury question as to whether *as to church property* the local church intended to establish a connectional relationship with the denominational church.

Id. Ultimately, our Court held that the "evidence created a jury question as to whether[,] *as to church property*[,] the local church intended to establish a connectional relationship with the denominational church." *Id.* at 474, 405 S.E.2d at 813–14.

Here, the four parcels making up the Property consist of: (1) the church sanctuary; (2) the fellowship hall; (3) parking lots; and (4) undeveloped green space. Fifth Avenue's quiet title and judicial modification of trust claims hinge on the fact that only one of these four parcels was deeded to the UMC, its trustees, or the denomination in general—the "one green space parcel conveyed in 1986." That 1986 deed stated, "In trust, that said premises shall be kept, maintained, and disposed for the benefit of The United Methodist Church and subject to the usages and the Discipline of The United Methodist Church." In contrast, Plaintiff's 1969 deed—the year after it affiliated with the UMC—conveyed part of the Property to the "Trustees of the Fifth Avenue United Methodist Church of Wilmington," thereby not adhering to the language set out in paragraph 2503 of the BOD.[3] The deeds

3. Paragraph 2503 of the BOD provides: "[A]ll written instruments of conveyance by which premises are held or hereafter acquired for use as a place of divine worship or other activities for members of The [UMC] shall contain the following trust clause: *In trust, that said premises shall be used, kept, and maintained as a place of divine worship of the United Methodist ministry and members of The [UMC]; subject to the Discipline, usage,*

to the other parcels used language similar to the 1969 deed, conveying part of the Property to the "Trustees of the Fifth Avenue Methodist Church" and the "Trustees of the Fifth Street Methodist Church," respectively, including the church sanctuary.

As in *Looney*, the BOD "manifest[ed] an implied assent of local churches to denominational control of local church property" by way of the mandatory trust clause in paragraphs contained in the BOD. *Id.* There thus remains a genuine question "whether as to church property," Fifth Avenue "intended to establish a connectional relationship with the denominational church." *Id.* And as the *Looney* Court provided, in scenarios such as these, "the courts do have [subject matter] jurisdiction to determine property rights which are involved in, or arise from, a church controversy." *Id.* at 473, 405 S.E.2d at 813.

Similarly, in *African Methodist Episcopal Zion Church*, our Court determined "that civil courts may settle certain types of disputes arising from a church controversy by applying or following the rules of the [ ] Church Discipline." 64 N.C. App. at 413–14, 308 S.E.2d at 86. In that case, the local church "sought to disaffiliate from the A.M.E. Zion Church, apparently as a result of an increase in assessments levied by the 1976 General Conference." *Id.* at 394, 308 S.E.2d at 75. The local church thereafter sent a letter signed by its board of trustees notifying the denomination of "their decision to withdraw . . . ." *Id.* In response, the denomination stated that while the local church may disaffiliate, its "property must remain within the Connection." *Id.* at 395, 308 S.E.2d at 76. The denomination required all property to be held in a trust comparable to the one in the present case:

> [B]eginning with the 1968 Discipline at Paragraph 434, Section 2, it is specifically provided that the absence of the 'trust clause' in deeds and conveyances previously executed does not relieve a local church from connectional responsibilities. Neither the 1873 deed for the First Tract nor the 1976 deed for the Second Tract contained the trust language required by the 1940 and subsequent Disciplines.

Id. at 396–97, 308 S.E.2d at 76. The trust clause provided that a local church's failure to expressly include the trust language shall not absolve

---

and ministerial appointments of said Church as from time to time authorized and declared by the General Conference and by the annual conference within whose bounds the said premises are situated. This provision is solely for the benefit of the grantee, and the grantor reserves no right or interest in said premises."

that local church of its responsibility to the denomination, if the intent of the local church is shown by any or all of the following:

> (a) the conveyance of the property to the trustees of the local African Methodist Episcopal Zion Church or any of its predecessors;
>
> (b) the use of the name, customs, and policy of the African Methodist Episcopal Zion Church in such a way as to be thus known to the community as a part of this denomination;
>
> (c) the acceptance of the pastorate of ministers appointed by a bishop of the African Methodist Episcopal Zion Church, or employed by the presiding elder of the district in which it is located.

Id. at 396 n.1, 308 S.E.2d at 76.

Relying on the trust clause language, the denomination asserted that the local church manifested an intent and desire to be bound by the trust clause with respect to its church property. *Id.* at 397, 308 S.E.2d at 76–77. In response—similar to the present matter—the local church contended "that the 1873 deed does not contain the trust language required by the . . . Discipline and that the property has never been conveyed to . . . [the denomination]." *Id.* at 400, 308 S.E.2d at 78. The trial court ultimately determined that "[t]he language contained in the Discipline which attempts to impose a trust upon the property based upon usage and practice of the local church is not sufficient to impose such a trust." *Id.* at 405, 308 S.E.2d at 81. The trial court further determined that "[n]o trust in favor of the African Methodist Episcopal Zion Church in America was created as concerns the property . . . ." *Id.* Upon review, this Court vacated and remanded the trial court's judgment for a trial *de novo* to determine "whether the defendant local church was in fact in a hierarchical relationship with the plaintiff parent body with respect to property matters." *Id.* at 416, 308 S.E.2d at 87 (emphasis omitted).

Like our precedents discussed above, we agree that Fifth Avenue has alleged a dispute against Defendants regarding its right to the Property. And as in those cases, resolution of this dispute invokes separate and distinct legal principles outside the interpretation of the UMC's religious doctrine. *See A.M.E. Zion Church*, 64 N.C. App. at 412, 308 S.E.2d at 85 ("[T]he courts do have jurisdiction as to civil, contract and property rights which are involved in, or arise from, a church controversy."); *see also Looney*, 103 N.C. App. at 473, 405 S.E.2d at 813 ("[T]he courts do

have jurisdiction to determine property rights which are involved in, or arise from, a church controversy."). Considering the foregoing, the trial court does not lack subject matter jurisdiction since Fifth Avenue's claims for quiet title and judicial modification of trust may be settled by neutral principles of law. *A.M.E. Zion Church*, 64 N.C. App. at 414-15, 308 S.E.2d at 87 (citation omitted) ("[T]he 'discipline' of a hierarchical Methodist Church, as it pertains to property of local churches, may be considered a 'neutral principle of law' in the resolution of church property disputes between an affiliated local church and its parent body."); *Presbyterian Church in United States*, 393 U.S. at 449, 89 S. Ct. at 606 ("Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded.").

2. Breach of Contract

Fifth Avenue next argues that even if the Property is subject to a trust under the BOD, the trial court erred in dismissing its claim arising from its right to disaffiliate and retain the Property free of the trust clause under paragraph 2553. Fifth Avenue contends that its breach of contract claim survives dismissal at this stage because it does not require a determination of ecclesiastical issues and can be settled by neutral principles of contract law. Fifth Avenue maintains that Defendants failed to follow the disaffiliation procedures set out in paragraph 2553 by not allowing a church conference vote within 120 days, and under *Nation Ford Baptist Church Inc. v. Davis*, a court has jurisdiction to review such an issue. 382 N.C. 115, 876 S.E.2d 742. For the reasoning below, we agree and hold that the trial court committed error by dismissing Fifth Avenue's breach of contract claim because determining whether Defendants "acted within the scope of their authority" and "observed the organization's own organic forms and rules is founded in neutral principles of secular law." *Id.* at 124, 876 S.E.2d at 752 (quoting *Creech*, 256 N.C. at 140–41, 123 S.E.2d at 627).

In *Davis*, our Supreme Court stated that "[w]here civil, contract[ ] or property rights are involved, the courts [can] inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." *Davis*, 382 N.C. at 123, 876 S.E.2d at 751 (brackets in original) (quoting *Creech*, 256 N.C. at 140–41, 123 S.E.2d at 627). In that case, the Court held that the "claim for a declaratory judgment establishing which bylaws apply, whether the [c]hurch followed those bylaws, and whether there was an employment contract . . .

can potentially be resolved solely by application of neutral principles of corporate, contract, and employment law." *Davis*, 382 N.C. at 128, 876 S.E.2d at 754.

Similarly, here, the core of the issues presented by Fifth Avenue's breach of contract claim asked the trial court to determine whether there was a contract between the parties, and if so, whether the UMC followed its own procedures. *Id.* Paragraph 2553 of the BOD granted local churches the right to disaffiliate from the UMC and retain their property free of any trust obligation.[4] Considering the trust clause of paragraph 2501, the trust may be revoked "as provided in the [BOD]." In this case, paragraph 2553 of the BOD provided a mechanism for Fifth Avenue to "retain its real and personal, tangible and intangible property." The process highlights multiple steps, one of which is that the District Superintendent call for the church conference, which "shall be conducted in accordance with [paragraph] 248 . . . and shall be held within one hundred twenty (120) days," for the membership to vote on disaffiliation. Per paragraph BOD 248, if a local church governing body requests a church conference vote on disaffiliation, the district superintendent has no discretion in the matter and must do so. Thus, at this stage in the litigation, Fifth Avenue's breach of contract claim simply asks whether Defendants' actions complied with the steps outlined in BOD paragraphs 248 and 2553, not the substantive merits of their decision to permanently close Fifth Avenue under paragraph 2549. *See Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 329, 605 S.E.2d 161, 164 (2004) (citation omitted) ("While the Courts can under no circumstance referee ecclesiastical disputes, they can adjudicate 'property disputes,' provided that this can be done without resolving underlying controversies over religious doctrine."). And moreover, determining whether Defendants followed their own procedures does not require a civil court "to interpret or weigh church doctrine." *Davis*, 382 N.C. at 123, 876 S.E.2d at 751 (quoting *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398). Rather, a resolution of the breach of contract claim asks for a determination of whether the parties performed pursuant to the plain language of their contractually agreed upon terms; in this case, the terms of BOD paragraphs 248 and 2553.

---

4. The right to disaffiliate is *expressly limited* by the language of paragraph 2553 as follows: "The choice by a local church to disaffiliate with The [UMC] under this paragraph shall be made in sufficient time for the process for exiting the denomination to be complete prior to December 31, 2023. The provisions of [paragraph] 2553 expire on December 31, 2023 and shall not be used after that date."

Our *de novo* review thus leads us to hold that the trial court committed error by dismissing Fifth Avenue's breach of contract claim pursuant to Rule 12(b)(1). The trial court has not been divested of subject matter jurisdiction over Fifth Avenue's breach of contract claim because it can be resolved by neutral principles of contract law under *Davis*, 382 N.C. at 123, 876 S.E.2d at 751 (citations omitted).

3. Fraud and Constructive Fraud

Fifth Avenue next submits that the trial court committed error by dismissing its claims for fraud and constructive fraud because they do not require the court to examine or determine ecclesiastical issues. More precisely, Fifth Avenue contends that whether Defendants colluded to take the Property "under the guise of legitimate action can be determined without delving into the validity of the reasons" provided for closure. After scrutinizing the record and applicable law, we agree.

A claim for fraud is established by "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C. 519, 526–27, 649 S.E.2d 382, 387 (2007) (citation omitted). But "[a] claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud." *Id.* at 528, 649 S.E.2d at 388 (citation omitted). "[T]his cause of action arises where a confidential or fiduciary relationship exists, which has led up to and surrounded the consummation of the transaction in which [the] defendant is alleged to have taken advantage of his position of trust to the hurt of [the] plaintiff." *Id.* (internal quotation marks and citation omitted).

When Defendants adopted the Resolution of Closure, purporting accordance with the exigent circumstances clause of BOD paragraph 2549, one of Defendants' articulated justifications was that "membership and missional activity of the Church has recently declined . . . ." The Resolution of Closure noted that "the Church has a current membership of 205 and average weekly attendance of approximately 20 members[.]" Additionally, Defendants referenced "local needs in the community" as exigency warranting closure of the church. But a civil court "cannot answer the question of whether the [governing body of the church] 'in good conscience . . . act[ed] honestly, in good faith and in the best interests of the [c]hurch.' " *Davis*, 382 N.C. at 125, 876 S.E.2d at 752. Here, we do not seek to tread on the sanctity of church doctrine. Therefore, without specifically holding so, we note that inquiring into Fifth Avenue's fraud and constructive fraud claims on those bases *alone* could impermissibly require a civil court to determine whether these

particular claimed exigent circumstances were proclaimed in good faith and in accordance with church doctrine. *Id.*

Yet, remarkable here, Defendants cited another exigency, that "the congregation has initiated a procedure seeking . . . to disaffiliate from the United Methodist Church[.]" Defendants, by their own actions, have intertwined the contractual dispute as a purported exigent circumstance underlying closure—which can be resolved by application of neutral principles of contract law. *See id.* at 123, 876 S.E.2d at 751. The BOD, which Defendants rely upon to support dismissal of the fraud and constructive fraud claims under Rule 12(b)(1), provided the mechanism for Fifth Avenue's disaffiliation. Defendants now seek to use the BOD and this mechanism against Fifth Avenue. And at this stage in the proceedings, our *de novo* review considers the contents of Fifth Avenue's pleading as well as other evidence, such as affidavits. *Smith*, 128 N.C. App. at 493, 495 S.E.2d at 397 ("Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation [of a Rule 12(b)(1) motion] to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing."). This cited exigency—disaffiliation—considered in conjunction with other representations by Defendants, can be resolved by application of neutral principles of contract law and does not require the interpretation or weighing of church doctrine. *Davis*, 382 N.C. at 123, 876 S.E.2d at 751.

According to Fifth Avenue's complaint, "the Conference confirmed to [Fifth Avenue] and its Pastor that it had in fact received all information and material necessary for Plaintiff to take the next step in the disaffiliation process and conduct a Church Conference vote." This information included copies of Fifth Avenue's real property deeds. The complaint also alleged that Defendants represented to Fifth Avenue that it would have a meeting about disaffiliation—mandated by protocols outlined in the BOD—but the meeting turned into a surprise announcement about the church's closure. In the context of the representations and the pendency of the scheduled meeting, unbeknownst to Fifth Avenue, Defendants adopted the Resolution of Closure and filed their Affidavit of Ownership of the Property. Thus, Fifth Avenue's fraud claims do not hinge on whether Defendants' reasons provided for closure under paragraph 2549 were made "honestly, in good faith and in the best interests of the [c]hurch.' " *Davis*, 382 N.C. at 125, 876 S.E.2d at 752. Rather, the claims, questioning whether the representations made by Defendants concerning the "information meeting" and receiving the necessary paperwork to proceed with a "Church Conference vote," do not fall within the protections of the impermissible entanglement doctrine. *See id.* at 128, 876 S.E.2d at 754.

Adding support to Fifth Avenue's claims, the District Superintendent conceded that with the closure of other "churches in the Harbor District . . . under [her] leadership," she "led the congregation in an assessment . . . of the church," and "depending on the results of the study, [she] would preside over a church conference in which the assembled members voted on whether to close." But in this instance, the District Superintendent stated that since Fifth Avenue "already indicated it did not wish to close but instead wanted to disaffiliate . . . discussion would not have been productive." In any event, the day after the purported disaffiliation meeting, Defendants changed the locks on the sanctuary and fellowship hall. Fifth Avenue alleges that Defendants' actions deprived it of the right to vote on disaffiliation, caused a cloud on the Property's title, and prevented its members from worshipping and conducting activities. Accordingly, Fifth Avenue's complaint and affidavits included in the record allow for an adequate assessment of the elements of fraud and constructive fraud claims without delving into doctrine. The trial court thereby committed error by dismissing Fifth Avenue's fraud and constructive fraud claims pursuant to Rule 12(b)(1).

B. Failure to State a Claim—Rule 12(b)(6)

[2] In the present matter, the trial court granted Defendants' motion to dismiss the following claims pursuant to Rule 12(b)(6): promissory estoppel, declaratory judgment, and quiet title. Fifth Avenue contends that the trial court committed error by granting Defendants' motion on this basis because it sufficiently stated claims for all three causes of action.

"On appeal from a motion to dismiss under Rule 12(b)(6) this Court reviews *de novo* 'whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]' " *Christmas v. Cabarrus Cnty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation omitted) (brackets and ellipses in original). "This Court views the allegations in the complaint in the light most favorable to the non-moving party." *BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 291, 826 S.E.2d 746, 756 (2019). "[U]nder de novo review, the appellate court as the reviewing court considers the Rule 12(b)(6) motion to dismiss anew: It freely substitutes its own assessment of whether the allegations of the complaint are sufficient to state a claim for the trial court's assessment." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022).

Dismissal is appropriate where: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on

its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). However, "[a] complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial." *McAllister v. Khie Sem Ha*, 347 N.C. 638, 641, 496 S.E.2d 577, 580 (1998) (quoting *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1980)).

1. Declaratory Judgment

Fifth Avenue submits that the trial court committed error by dismissing its claim for declaratory judgment. In doing so, Fifth Avenue maintains that it sufficiently alleged facts to establish this claim and survive a motion to dismiss under Rule 12(b)(6). After conducting a *de novo* review, we agree.

North Carolina's Declaratory Judgment Act is codified under N.C. Gen. Stat. § 1-253 (2023) ("Courts of record permitted to enter declaratory judgments of rights, status and other legal relations"). "A motion to dismiss for failure to state a claim is seldom appropriate 'in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail.' " *Morris v. Plyler Paper Stock Co.*, 89 N.C. App. 555, 557, 366 S.E.2d 556, 558 (1988) (citation omitted). The "issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Morris*, 89 N.C. App. at 557, 366 S.E.2d at 558 (quoting *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 381 (1987)). "The motion is allowed only when 'there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy.' " *Morris*, 89 N.C. App. at 557, 366 S.E.2d at 558 (quoting *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974)). A claim for declaratory judgment is sufficiently stated if:

> (1) a real controversy exists between or among the parties to the action; (2) that such controversy arises out of *opposing contentions* of the parties, made in good faith, *as to the validity* or construction of a . . . *contract in writing*, or as to the validity or construction of a statute, or municipal ordinance, contract, or franchise; and (3) that the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in

> the controversy, and may be determined by a judgment or decree in the action, the court has jurisdiction, and on the facts admitted in the pleadings or established at the trial, may render judgment, declaring the rights and liabilities of the respective parties, as between or among themselves, and according relief to which the parties are entitled under the judgment.

N.C. Consumers Power, Inc., 285 N.C. at 449, 206 S.E.2d at 188 (emphasis added). North Carolina has long allowed declaratory judgment actions to interpret written instruments. *LDDC, Inc. v. Pressley*, 71 N.C. App. 431, 434, 322 S.E.2d 416, 418 (1984); *see also York v. Newman*, 2 N.C. App. 484, 489, 163 S.E.2d 282, 286 (1968) (citation omitted) ("A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title."); *see also Johnson v. Wagner*, 219 N.C. 235, 236, 13 S.E.2d 419, 420 (1941) ("An action to determine the rights of the parties under a charitable trust created by will, in which the trustees and all of the agencies who are beneficiaries of the trust are made parties, is justiciable under the Declaratory Judgment Act.").

In its complaint, Fifth Avenue requested that the trial court declare:

> a. That the trust has terminated because the purpose of the trust ha[s] become unlawful, contrary to public policy, or impossible to achieve;
>
> b. That to the extent the trust has not terminated, it is revocable; and
>
> c. That Plaintiff is entitled to the quiet, exclusive, uninterrupted, and peaceful possession of its property (real and personal) without any interference from Defendants.

Our case law shows that Fifth Avenue sufficiently stated a claim for declaratory relief because it demonstrated that: (1) "a real controversy exist[ed]" concerning the Property; (2) the controversy was the result of "opposing contentions of the parties . . . as to the construction of" paragraphs 248, 2501, 2503, and 2553 of the BOD; and (3) both Fifth Avenue and Defendants may have legal rights that could be adjudicated by a court of law as discussed in our analyses about the claims for quiet title and judicial modification of trust. *Id.* Even if the trial court determined that Fifth Avenue "may not be able to prevail," that reasoning alone is not enough to justify dismissal pursuant to Rule 12(b)(6). *Morris*, 89 N.C. App. at 557, 366 S.E.2d at 558 (citation omitted).

We therefore hold that the trial court committed error by dismissing Fifth Avenue's claim for declaratory judgment because its "complaint alleged sufficient facts to establish the existence of a genuine controversy and to survive [D]efendants' motion to dismiss under Rule 12(b)(6)." *Id.*

2. Quiet Title

Fifth Avenue next submits that the trial court committed error by dismissing its claim for quiet title because it sufficiently stated such a claim. In support of its contention, Fifth Avenue cites a case from our Court providing the two requirements to establish a *prima facie* case for removing cloud upon title: "(1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to plaintiff's title, estate or interest." *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004) (citation omitted). After consideration, we agree the complaint fulfills both requirements to establish a *prima facie* case for quiet title.

The complaint asserted Fifth Avenue has an interest in the Property. *See id.* Fifth Avenue claimed it "received its real property from donors who wanted [its] congregation to have use of the church sanctuary and property forever." Deeds were attached to the complaint in support of this contention. The complaint also alleged Fifth Avenue "acquired and held title to its real property (save one parcel acquired in 1986 [containing language from the trust clauses in the BOD]) prior to . . . its later affiliation with the UMC." The complaint further alleged that Defendants assert a claim in the Property adverse to Fifth Avenue's interest on account of the BOD's "denominational trust grant[ing] them control over [Fifth Avenue's] real property . . . ." *See id.*

Our review of the claims alleged on the face of the complaint, viewed in the light most favorable to the non-moving party, shows that Fifth Avenue's quiet title claim meets the essential requirements to survive a motion to dismiss. *See McAllister*, 347 N.C. at 641, 496 S.E.2d at 580; *see also BDM Invs.*, 264 N.C. App. at 291, 826 S.E.2d at 756. Consequently, we hold the trial court's dismissal of Fifth Avenue's quiet title claim pursuant to Rule 12(b)(6) was in error.

3. Promissory Estoppel

Fifth Avenue next submits that "there is a good faith basis to extend the law and recognize its claim for promissory estoppel." We agree with Fifth Avenue that promissory estoppel has not been officially recognized as an affirmative cause of action under North Carolina law. *See Home Elec. Co. of Lenoir, Inc. v. Hall & Underdown Heating & Air*

Conditioning Co., 86 N.C. App. 540, 545, 358 S.E.2d 539, 542 (1987). Rather, "[t]he North Carolina cases which have applied the doctrine have only done so in a defensive situation, where there has been an intended abandonment of an existing right by the promisee. North Carolina case law has not approved the doctrine for affirmative relief." *Id.* at 543, 358 S.E.2d at 541. Presently, *state* court precedent does not extend this doctrine to cases such as the present one. *See Clement v. Clement*, 230 N.C. 636, 55 S.E.2d 459 (1949); *see also Wachovia Bank & Tr. Co., N.A. v. Rubish*, 306 N.C. 417, 293 S.E.2d 749 (1982); *see also Home Elec. Co. of Lenoir*, 86 N.C. App. 540, 358 S.E.2d 539; *contra Allen M. Campbell Co., Gen. Contractors, Inc. v. Virginia Metal Indus., Inc.*, 708 F.2d 930 (4th Cir. 1983). We hold that the trial court's dismissal of this claim was proper.

C. Preliminary Injunction

[3] In its final submission, Fifth Avenue contends that the trial court committed error by not issuing preliminary injunctive relief because it demonstrated a likelihood of success on the merits and irreparable injury if not granted. *See* N.C. Gen. Stat. § 1-485 (2023) (when preliminary injunction issued). We agree.

"The scope of appellate review in the granting or denying of a preliminary injunction is essentially *de novo*. '[A]n appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself.' " *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984) (citation omitted and brackets in original). A preliminary injunction is warranted "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Emp't Staffing Grp., Inc. v. Little*, 243 N.C. App. 266, 270, 777 S.E.2d 309, 312 (2015) (citation omitted); *see also Setzer v. Annas*, 286 N.C. 534, 537, 212 S.E.2d 154, 156 (1975). "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980).

Fifth Avenue contends that the trial court erred by denying its preliminary injunction because it is likely that Defendants breached their contract by failing to call a church conference vote within 120 days of

submitting a disaffiliation application.[5] The record evidence demonstrates that Fifth Avenue requested Defendants to call the church conference vote by adhering to the procedures set out in BOD paragraphs 248 and 2553. Moreover, Fifth Avenue's "church governing body" requested that Defendants schedule the vote on two occasions. The first request occurred before the District Superintendent scheduled the "informational meeting." Yet, per paragraph 248 of the BOD, if a local church governing body requests a church conference vote on disaffiliation, the district superintendent has no "discretion" in the matter. Under these circumstances, "the district superintendent's duty is purely ministerial . . . ." In this case, the District Superintendent failed to schedule the meeting within 120 days of receiving the disaffiliation application from Fifth Avenue's governing body. Fifth Avenue has thus demonstrated a likelihood of success on the merits with respect to at least its breach of contract claim. *Little*, 243 N.C. App. at 70, 777 S.E.2d at 312.

Fifth Avenue has also demonstrated that it is likely to suffer irreparable injury if the injunction is not granted given that it has been permanently excluded from the Property. *Id.* On 27 March 2023, Defendants placed locks on Fifth Avenue's church, effectively ousting it from the Property. Since then, Fifth Avenue has been unable to open its doors to over 200 active members in its community. As a result, the injury that Fifth Avenue faces is "both real and immediate." *Bd. of Light & Water Comm'rs v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 423, 271 S.E.2d 402, 404 (1980). Without injunctive relief, Fifth Avenue could potentially suffer further harm during the course of the litigation on remand hereinafter; the Property could be sold, not kept in proper condition, or harmed in a myriad of other manners.

Our review reveals that the trial court erred in denying Fifth Avenue's request for preliminary injunctive relief. *See Robins & Weill, Inc.*, 70 N.C. App. at 540, 320 S.E.2d at 696. Accordingly, we reverse the trial court's order and remand for entry of a preliminary injunction enjoining Defendants from taking any action to encumber, impair, change, or otherwise alter the Property. *See QSP, Inc. v. Hair*, 152 N.C. App. 174, 179, 566 S.E.2d 851, 854 (2002) (reversing the trial court's order denying preliminary injunction and remanding "for entry of a preliminary injunction enjoining defendant from further breach . . . ."); *see also TSG Finishing, LLC v. Bollinger*, 238 N.C. App. 586, 602, 767 S.E.2d 870, 882

5. Although Fifth Avenue could conceivably succeed on the merits of several of its proffered claims, including quiet title, judicial modification of trust, fraud, and constructive fraud, we limit our analysis to the contract claim.

(2014) (reversed and remanded "with instructions to issue the preliminary injunction.").

IV. Conclusion

For the above reasons, we hold that the trial court committed error by dismissing Fifth Avenue's claims for breach of contract, quiet title, judicial modification of trust, fraud, and constructive fraud for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). We also hold that it was error to dismiss Fifth Avenue's claims for declaratory judgment and quiet title for failure to state a claim pursuant to Rule 12(b)(6). We therefore reverse the trial court's order ruling on these claims and remand for further proceedings consistent with this opinion. However, the trial court did not commit error by dismissing Fifth Avenue's claim for promissory estoppel. Finally, we hold that the trial court committed error by denying Fifth Avenue's request for preliminary injunctive relief; accordingly, we reverse and remand this part of the trial court's order.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge GRIFFIN concurs.

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

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

I concur in the majority's determination and analysis that the claim for promissory estoppel was properly dismissed and in reversing the trial court's dismissal of Fifth Avenue's claim for breach of contract. I believe the trial court is permitted to assess whether Fifth Avenue is contractually entitled to disaffiliate following closure, as this can be decided under neutral principles of law. However, I respectfully dissent from the remainder of the majority opinion. I believe the First Amendment church doctrine warrants dismissal of Fifth Avenue's claims apart from the breach of contract claim and would affirm the trial court's judgment in those respects.

As the majority correctly notes, "the principle that civil courts lack subject matter jurisdiction to resolve disputes involving purely ecclesiastical questions and controversies has long been recognized by this Court," and is based in the intention of the First Amendment to foster "a spirit of freedom for religious organizations, an independence from secular

control or manipulation–in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Nation Ford Baptist Church Inc. v. Davis*, 382 N.C. 115, 121–22 (2022) (cleaned up). However, religious organizations do not have absolute immunity from civil liability, and "[w]hen the State has a legitimate interest in resolving a secular dispute, 'civil court is a proper forum for that resolution.' " *Id.* at 122 (citations omitted).

"Consistent with these First Amendment principles, the impermissible entanglement doctrine precludes judicial involvement only in circumstances involving disputes that implicate controversies over church doctrine and practice," including matters concerning religious doctrines or creeds, the church's form of worship, the adoption of regulations concerning church membership, the power of authorized church officials to exclude individuals from membership or association, or "when a court resolves an underlying legal claim or when it issues a form of relief." *Id.* at 122–23 (cleaned up). Ultimately, the "dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine[,]" and where claims "can be resolved *solely* by applying neutral principles of law, there is no impermissible entanglement." *Id.* at 123 (citations omitted) (emphasis added). "[C]ivil courts cannot decide disputes involving religious organizations where the religious organizations would be deprived of interpreting and determining their own laws and doctrine." *Smith v. Privette*, 128 N.C. App. 490, 494 (1998).

Plaintiff contends the trial court was able to conduct a neutral determination of whether defendants breached the Book of Discipline ("BOD"), and whether provisions of the purported trust are subject to modification based on defendants' breach of the BOD. In my view, however, the decision to close the church is a matter of church doctrine and cannot be resolved solely by applying neutral principles of law. The BOD establishes the organization and structure of the UMC and includes the trust clause requiring a denominational trust be included in deeds to church property. The BOD also provides that upon a declaration of exigent circumstances, title to local church property vests with the annual conference board of trustees, and the formal closure of the church is considered at a meeting of the annual conference board, which votes to approve or disapprove the closure.

This necessarily implicates a controversy over church doctrine and practice; the decision to close the church and the surrounding procedure is governed by the BOD, and in my view reversing the trial court's dismissal of these claims would deprive defendant "of interpreting and determining their own laws and doctrine." *Smith*, 128 N.C. App. at 494. Accordingly, I would affirm the trial court's dismissal of the entangled claims and respectfully concur in part and dissent in part.

MARY JANE GALLAGHER-MASONIS, PLAINTIFF
v.
JOHN MASONIS, DEFENDANT

No. COA24-185

Filed 31 December 2024

1. Appeal and Error—order settling record on appeal—binding on appellate court—certiorari review denied

In an ex-husband's appeal from the trial court's order confirming an arbitration award in his divorce case, the Court of Appeals denied a petition for a writ of certiorari filed by the ex-wife (as part of her cross-appeal) seeking review of the trial court's order settling the record on appeal, which included a large volume of arbitration transcripts and exhibits that were not filed, served, or considered at the hearing before the trial court. As a general matter, this type of order could not be challenged via appeal, since the trial court alone had the authority to settle the appellate record and, therefore, its decision was both final and binding. Further, although the Court of Appeals did have discretion to review the order by granting certiorari, it declined to do so where the ex-wife's argument lacked merit sufficient to justify certiorari review.

2. Divorce—equitable distribution—arbitration award—review by trial court—classification of marital home and mortgage debt

The trial court in a divorce case did not err in affirming and modifying portions of an arbitration award concerning the marital home, which the arbitrator distributed to the ex-wife while classifying the mortgage on the home as the ex-husband's separate debt. Although the home was originally owned by the ex-husband before the marriage, the arbitrator properly classified it as marital property in accordance with the parties' postnuptial agreement, which explicitly nullified the parties' prenuptial agreement classifying the home as the ex-husband's separate property. The arbitrator lacked the legal authority to set specific conditions for the ex-husband to pay off the mortgage early, and therefore the trial court properly vacated those conditions. However, the court properly upheld the ex-husband's general obligation to continue paying the mortgage, since he was already legally obligated to do so under the mortgage's own terms. Lastly, the trial court's decision to strike the arbitrator's statement regarding her authority to compel the sale of the marital

home was not considered on appeal, as it did not impact the outcome of the case.

3. Divorce—equitable distribution—arbitration award—review by trial court—ex-wife's home—valuation—treatment of ex-husband's payments toward mortgage

The trial court in a divorce case did not err in affirming portions of an arbitration award concerning a house titled to the ex-wife and encumbered by a mortgage. Specifically, the arbitrator properly classified the home based on the parties' own stipulations, which were binding, and which classified twenty-two percent of the home's net value as the ex-wife's separate property and seventy-eight percent as marital property. Further, regarding the ex-husband's payments made toward the ex-wife's separate mortgage debt, the arbitrator did not err by reimbursing the ex-husband for any post-separation payments while declining to credit him for any pre-separation payments (which the arbitrator treated instead as support payments for the ex-wife and the parties' child), since the ex-husband failed to present any evidence or arguments at arbitration regarding his contributions to the ex-wife's separate property during the marriage. Additionally, the arbitrator did not err in failing to consider potential capital gains tax consequences from the sale of the home, since the ex-husband did not present any evidence or arguments at arbitration on this issue either.

4. Arbitration and Mediation—equitable distribution—trial court's order confirming arbitration award—standard of review on appeal

On appeal from a trial court's decision confirming an arbitration award, any findings of fact that are not clearly erroneous are accepted as true, while its conclusions of law are reviewed de novo. Therefore, in an appeal from a trial court's order affirming an arbitration award in a divorce case, where the ex-husband argued that the arbitrator abused her discretion in awarding fifty-seven percent of the marital estate to the ex-wife and in ordering the ex-husband to pay three-and-a-half years' worth of prospective alimony, the order was affirmed because the ex-husband failed to argue any error in the trial court's findings of fact or conclusions of law.

5. Divorce—alimony and child support—arbitration award—review by trial court—use of actual income—duration and amount of alimony and support

The trial court in a divorce case did not err in affirming portions of an arbitration award ordering the ex-husband to pay alimony to

his ex-wife and child support for the parties' only child from the marriage. Although the ex-wife worked before and during part of the marriage before quitting her job, where she earned a six-figure salary each year, the arbitrator did not err in considering her actual income rather than her earning capacity when determining alimony and child support obligations, as there was no evidence that the ex-wife—who, with the ex-husband's consent, left work in order to be a stay-at-home mom—had acted in bad faith or had deliberately suppressed her income. Further, the amount and duration of alimony was not excessive where the arbitrator had properly considered multiple factors, including the ex-wife's accustomed standard of living, the ex-husband's "illicit sexual behavior," and the ex-wife's need for time to re-enter the workforce. Finally, the arbitrator properly calculated the child support award based on the child's reasonable monthly needs.

Appeal by defendant and cross-appeal by plaintiff from order entered 28 April 2023 by Judge Roy H. Wiggins in District Court, Mecklenburg County. Heard in the Court of Appeals 22 October 2024.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit, and Katherine W. Smith, for plaintiff-appellee/cross-appellant.

Amy Elizabeth Simpson for defendant-appellant/cross-appellee.

STROUD, Judge.

Defendant appeals the trial court's order modifying in part and confirming an arbitration award and consent order. Plaintiff cross-appeals, arguing the trial court erred in not wholly confirming the arbitration award. We affirm the trial court's order.

I. Background

Plaintiff ("Wife") and Defendant ("Husband") were married in October 2015. Husband and Wife have one child, Francis,[1] born in July 2017. Before the marriage, the parties entered into a premarital agreement that "provided for a waiver of alimony and rendered all property owned by a party as of the date of marriage and also acquired by a party after the date of marriage as that party's [s]eparate [p]roperty." In May

1. A pseudonym is used to protect the identity of the minor child.

2017, the parties entered into a postnuptial agreement that "declared the [p]remarital [a]greement null and void," but the postnuptial agreement also included terms regarding the agreed classification of marital and separate property.

As to marital and separate property, the primary difference in the premarital agreement and the postnuptial agreement was that the postnuptial agreement provided Husband would sign a Deed transferring ownership of the marital home to Husband and Wife as tenants by the entirety and the marital home would then be "considered [m]arital [p]roperty." As to assets and liabilities other than the marital home, the postnuptial agreement stated:

> **Each party annexed a statement of his or her Separate Property and financial obligations to the parties' Premarital Agreement. Although the parties' Premarital Agreement is being voided with the understanding that this Postnuptial Agreement shall be in full force and effect, each party confirms that the Exhibits attached to the parties' Premarital Agreement confirm each party's Separate Property as of the date of marriage.**

(Emphasis in original.)

Exhibit A of the premarital agreement listed Husband's "Separate assets and liabilities[;]" it listed a residence in Myers Park ("Myers Park Home") with a value of $1,500,000.00 as his separate property and the mortgage on the Myers Park Home with an "approximate current balance" of $1,000,000.00 as his separate debt. Under the terms of the postnuptial agreement, the Myers Park Home was designated as marital property but the mortgage was still clearly designated as Husband's separate debt.

On 24 August 2021, Wife filed a complaint for child custody and support, divorce from bed and board, and attorney fees. On or about 1 November 2021, Husband filed "Affirmative Defenses; Answer, Counterclaims; Motion for Forensic Psychiatric Evaluation and to Appoint Expert." (Capitalization altered.) The parties separated in November 2021. On or about 30 December 2021, Wife filed a motion in the cause for equitable distribution, postseparation support, and alimony. Wife also filed a notice of voluntary dismissal of the divorce from bed and board claim that same day. On 26 January 2022, the parties entered a Consent Order to Arbitration and Stay of Proceedings in which they agreed to submit "all pending claims and potential claims

between them arising out of their marriage" to binding arbitration under the North Carolina Family Law Arbitration Act to be performed by Robin J. Stinson.

Before the arbitration, on or about 11 July 2022, the parties resolved their child custody claims by a "Consent Order (Re: Child Custody)[.]" The consent order granted joint legal custody of Francis to the parties and set out a schedule for physical custody. The consent order left the issue of attorney fees related to custody to be resolved in the arbitration proceeding.

Arbitration was held from 11-14 July 2022. At the start of the arbitration, the parties entered into a Final Equitable Distribution Pretrial Order ("FPTO") setting out the parties' contentions regarding "classification, valuation, and distribution of property and debts which are claimed to be marital and divisible property and debts." The parties also entered into Stipulations regarding the sale of the home on Isle of Palms ("IOP Home"). The IOP Home was titled to Wife and encumbered by a mortgage held by South State Bank. The parties agreed to terms for marketing and sale of the IOP Home and gave the Arbitrator the "authority to classify, value, and distribute the marital and/or divisible property and debt components of the net proceeds from the sale" and to "classify, value and return to the separate property owner the separate property component, if any, of the net proceeds of the sale." The Arbitrator also found "[t]he parties have stipulated that 22 percent of the net value of the [IOP H]ome is [Wife's] separate property and, therefore, the remaining 78 percent of the net value of the home is marital property, which is to be divided between the properties."[2] As to the equitable distribution claims, the Arbitrator was to rule "on all unresolved issues of classification, valuation, and distribution." The Arbitrator also was to resolve Wife's claims for alimony and child support. The Arbitrator heard testimony from Husband, Wife, and four other witnesses; Wife submitted 52 documents as exhibits as evidence at the arbitration, and Husband submitted 476 exhibits.

On or about 12 September 2022, the Arbitrator entered the "Arbitration Decision and Award on Equitable Distribution, Child Support and Alimony" ("Original Arbitration Award"). On or about 3 October 2022, Wife sent a letter to the Arbitrator seeking "to clarify" some provisions

2. We note the stipulation as to 22% of the IOP Home being separate property and 78% being marital property is not discussed in the parties' "Stipulations" document. However, neither party disputes this finding and both parties' arguments discuss this stipulation as accurate.

of the Original Arbitration Award. Husband responded to this letter on or about 13 October 2022, objecting to some clarifications and accepting others. After a final letter sent by Wife, the Arbitrator entered a "Modified Arbitration Decision and Award on Equitable Distribution, Child Support and Alimony" ("Arbitration Award") on or about 31 October 2022.

As to equitable distribution, the Arbitrator classified the Myers Park Home as marital property based upon the terms of the postnuptial agreement. Also in accord with the postnuptial agreement, the mortgage on the Myers Park Home was classified as Husband's separate debt. The Arbitration Award ordered Husband to continue paying the mortgage on the Myers Park home with specific conditions requiring Husband to pay off the mortgage early. As to the IOP Home, "[t]he parties stipulated that 22 percent of the net value of the home is [Wife's] separate property and, therefore, the remaining 78 percent of the net value of the home is marital property, which is to be divided between the parties." Overall, the Arbitrator concluded "[t]he net value of the parties' marital and divisible estate . . . is $4,959,270.00." The Arbitrator determined "the value of the assets distributed to [Wife] are $2,961,729.00 and the value of the assets distributed to [Husband] are $1,997,541.00." The Arbitrator determined an equal division of assets "is not equitable in this case" and distributed 57% of the estate to Wife and 43% to Husband. As "57 percent of the net marital and divisible estate is $2,826,783.90" and "43 percent of the net marital and divisible estate is $2,132,486.10[,]" Wife was to pay Husband "a distributive award of $134,945.10" "upon the closing of the sale of the IOP [Home]."

As to alimony, the Arbitrator concluded Husband earned $1,300,000.00 annually and "has been the primary income provider for [Wife] during the marriage." The Arbitrator determined Husband was "able to provide support" to Wife and Wife was "actually and substantially dependent upon his income . . . to maintain her accustomed standard of living during the marriage." Husband was deemed the supporting spouse under North Carolina General Statute Section 50-16.1A. The Arbitrator also noted Husband's act of "illicit sexual behavior" and many other factors in her alimony determination. The Arbitrator ultimately ordered Husband to pay $10,000.00 in alimony to Wife per month starting 1 September 2022 through 31 December 2025.

Finally, as to child support, the Arbitration Award calculated the "reasonable monthly needs" for Francis to be $6,044.74. To meet these needs, the Arbitrator ordered Husband to pay $6,000.00 per month effective 1 September 2022 through 1 August 2023, and then $4,895.00 per month thereafter. Husband was also required to "continue medical,

dental and vision insurance coverage" for Francis and to be responsible "for 100% of the yearly deductible and co-insurance applicable to any reasonable and medically necessary" claim.

On 17 November 2022, Wife filed a "Motion to Confirm Arbitration Award and Consent Order and Enter Judgment/Order" asking the trial court to confirm the child custody consent order and Arbitration Award. The matter came on for hearing on 2 March 2023 and on 28 April 2023 the trial court entered an "Order Confirming Arbitration Award and Consent Order and Entry of Judgment/Orders." Husband filed written notice of appeal on 25 May 2023 and Wife filed notice of conditional cross-appeal "solely to the extent that such ruling does not wholly confirm the Modified Arbitration Decision and Award on Equitable Distribution, Child Support, and Alimony" on 5 June 2023.

II. Arbitration

Before we address the issues presented by the parties on appeal, we note that this is an appeal of the trial court's order modifying in part and confirming an arbitration award. In large part, the parties' briefs – especially Husband's – have attempted to treat this appeal as an appeal from a trial court's order after a contested hearing, but arbitration proceedings, and appeals from arbitration awards, are distinct proceedings. After an arbitration is completed, the trial court's job is to determine if the arbitration award should be confirmed, modified, or vacated under North Carolina General Statute Sections 50-53, 50-54, and 50-55, not to retry the entire case. *See* N.C. Gen. Stat. § 50-53 (2023) ("Confirmation of award."); N.C. Gen. Stat. § 50-54 (2023) ("Vacating an award."); N.C. Gen. Stat. § 50-55 (2023) ("Modification or correction of award."). This Court's job on appeal is to review the trial court's order modifying or confirming the award to determine if it committed any legal error in its confirmation or modification of the arbitration order:

> Our Supreme Court has interpreted the legislative intent of N.C. Gen. Stat. § 1-567.14, whose provisions are virtually identical to N.C. Gen.Stat. § 50-55, in *Cyclone Roofing Co. v. LaFave Co.* and held that:
>
> > Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators' exceeding their authority shall be modified or corrected by the reviewing courts. If an arbitrator makes a mistake, either as to law or fact[,] unless it is an evident mistake in the description of any person, thing or property referred to in the award, it is the misfortune of the party. There is

> no right of appeal and the Court has no power to revise the decisions of judges who are of the parties' own choosing.
>
> 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (internal citations omitted). The Court explained that:
>
> > an award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus arbitration instead of ending would tend to increase litigation.

Semon v. Semon, 161 N.C. App. 137, 142, 587 S.E.2d 460, 463-64 (2003) (citations, quotation marks, brackets, and ellipses omitted).

III. Petition for Writ of Certiorari

[1] We first address Wife's petition for writ of certiorari ("PWC") asking this Court to "review the Order Resolving Appellate Record Settlement Dispute . . . entered on 9 February 2024" ("Record-Contents Order"). Wife requests we reverse the trial court's order settling the record and "exclude from consideration the multivolume arbitration transcript and voluminous Rule 9(d) Exhibits that were never filed, served, submitted for consideration, admitted, or made subject to an offer of proof in the trial court within the purview of Appellate Rule 11(c)."

Wife did not file written notice of appeal of the Record-Contents Order under Rule 3 of our Rules of Appellate Procedure, but a trial court order settling a record is not reviewable by an appeal. *See Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n, Inc.*, 225 N.C. App. 296, 304, 737 S.E.2d 795, 801 (2013) ("Only the judge of the superior court or of the district court from whose order or judgment an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required. This Court has held that the appellate court is bound by the contents of the record on appeal. The record imports verity and the Court of Appeals is bound thereby. Where asked to settle the record on appeal, the trial judge then has both the power and the duty to exercise supervision to see that the record accurately presents the questions on which this Court is expected to rule. This Court must receive and act upon the case settled for this Court as importing absolute verity and as it comes from the court below. This Court has no authority to suggest to, direct or require the judge, in settling the case, as to what facts he shall state, or what matter he shall set forth. Thus, the trial judge's

settlement of the record on appeal is final, and cannot be reviewed by this Court on appeal." (citations omitted)).

Wife contends this Court should grant review by certiorari under North Carolina Rule of Appellate Procedure 21(a)(1), which provides that "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists[.]" N.C. R. App. P. 21(a)(1). Wife cites to our Supreme Court's decision in *Craver v. Craver*, where the Court noted that

> [g]enerally the action of the trial judge in settling the record on appeal when the parties cannot agree thereon is final and not subject to direct appeal. However, a challenge to the trial court's settlement may be preserved by an application for certiorari *made incidentally* with the perfection of the appeal upon what record there is.

298 N.C. 231, 237, n. 6, 258 S.E.2d 357, 361, n. 6 (1979) (emphasis in original). Although this Court does have discretion to review a trial court's settlement of the record on appeal by granting certiorari, "[o]ur courts have frequently observed that a writ of certiorari is an extraordinary remedial writ." *Branch Banking & Tr. Co. v. Peacock Farm, Inc.*, 241 N.C. App. 213, 220, 772 S.E.2d 495, 500 (2015) (citations and quotation marks omitted).

A party seeking review in this manner should ordinarily demonstrate legal error or other merit sufficient to justify this action; "[w]e ordinarily allow such petitions only where there are wide-reaching issues of justice and liberty at stake and the issues on appeal are meritorious." *LouEve, LLC v. Ramey*, 286 N.C. App. 263, 268, 880 S.E.2d 431, 435 (2022) (citation and quotation marks omitted).

Wife's petition here challenges the trial court's inclusion in the settled record 1,540 pages of transcript from the arbitration hearing and 8,034 pages of a "compendium of Rule 9(d) copies of Exhibits and Other Items" "that neither party filed, served, submitted for consideration, admitted, or made the subject of an offer of proof regarding their competing motions to confirm or vacate the underlying arbitration award." She contends that the trial court did not receive or consider the transcript or the exhibits at the hearing on confirmation of the Arbitration Award. Although the parties quibble in the briefs about the meaning of "submitted for consideration" and "served" in Rule11(c), it is apparent from the transcript of the hearing on confirmation of the Arbitration Award that the trial court did not consider or receive most, if not all, of

these 9,600 pages of transcript and documents at the confirmation hearing.[3] But Wife's petition overlooks another portion of Rule 11(c):

> The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, *but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.*

N.C. R. App. P. 11(c) (emphasis added).

In settling the record, the trial court was *not* deciding "whether material desired in the record" was "relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal." *Id.* Wife's primary argument is really that most, if not all, of the 9,600 pages are not "relevant to the issues on appeal," and she is mostly correct, given the limitations of our review applicable to an appeal of an arbitration award. *Id.* Husband essentially concedes this point, as he argues

> [i]t is clear, that within the confines of the specific facts in this case the Materials are being *offered only for the purpose of providing this Court with the context, should it need it*, which approach is consistent with the North Carolina Rules of Appellate Procedure, Rule 9(a)(1), which requires that the record in a civil action contain "so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned."

(Emphasis added.)

The trial court held a hearing on settlement of the record and entered an order. Wife has failed to demonstrate legal error or merit sufficient to justify review of that order by certiorari, and we therefore decline to

---

3. All of the documents were in evidence at the arbitration. Some of the documents were certainly discussed or considered in the trial court hearing, but the arbitration transcript was not. Many of the documents, such as copies of hundreds of pages of financial accounts statements, were not addressed at all before the trial court.

exercise our discretion to grant review of certiorari of the trial court's Record-Contents Order.

IV. Husband's Appeal of Confirmation Order

Husband raises two main issues on appeal: (1) "the trial court erred as a matter of law in confirming the equitable distribution decree contained in the [Arbitration A]ward[;]" and (2) "confirmation of the alimony and child support awards constitutes reversible error." (Capitalization altered.) Wife cross-appeals, contending the Arbitration Award should have been confirmed entirely.

A. Standard of Review

We are reviewing the trial court's order confirming in part and modifying in part the Arbitration Award. Before the trial court, Husband filed a motion for the trial court to vacate or modify the Arbitration Award under North Carolina General Statute Section 50-54(a)(2), (a)(3) and (a)(8), which states:

> (a) Upon a party's application, the court shall vacate an award for any of the following reasons:
>
> . . . .
>
> (2) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing the rights of a party;
>
> (3) The arbitrators exceeded their powers;
>
> . . . .
>
> (8) If the parties contract in an arbitration agreement for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights.

N.C. Gen. Stat. § 50-54.

Husband did not actually raise any argument regarding the Arbitrator under subsections (2) or (3); he has raised only error of law under subsection (8). Husband requested in the alternative that the trial court modify the Arbitration Award under North Carolina General Statute Section 50-55, which provides that:

> (a) Upon application made within 90 days after delivery of a copy of an award to an applicant, the court shall modify or correct the award where at least one of the following occurs:

> (1) There is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award;
>
> (2) The arbitrators have awarded upon a matter not submitted to them, and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.
>
> (b) If the application is granted, the court shall modify or correct the award to effect its intent and shall confirm the award as modified or corrected. Otherwise, the court shall confirm the award as made.

N.C. Gen. Stat. § 50-55.

Wife filed a motion to confirm the Arbitration Award under North Carolina General Statute Section 50-53, which provides:

> Unless the parties otherwise agree in writing that part or all of an award shall not be confirmed by the court, upon a party's application, the court shall confirm an award, except when within time limits imposed under G.S. 50-54 through G.S. 50-56 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 50-54 through G.S. 50-56.

N.C. Gen. Stat. § 50-53.

Under the North Carolina Family Law Arbitration Act, this Court's review of the trial court's order confirming and modifying the Arbitration Award is quite limited. In this case, the parties agreed to arbitration subject to "judicial review of errors of law in the award" so an award may be vacated only if the arbitrator "committed an error of law prejudicing a party's rights." *Barton v. Barton*, 215 N.C. App. 235, 238-39, 715 S.E.2d 529, 531 (2011) (citation omitted).

> If the parties contract in an arbitration agreement for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights. N.C. Gen. Stat. § 50-54(a)(8) (2009). The court shall modify or correct the award where (1) there is an evident miscalculation of figures or an evident mistake in the description of a person,

> thing, or property referred to in the award. N.C. Gen.Stat. § 50-55(a)(1) (2009).
>
> If an arbitrator makes a mistake, either as to law or fact unless it is an evident mistake in the description of any person, thing or property referred to in the award it is the misfortune of the party. There is no right of appeal and the Court has no power to revise the decisions of judges who are of the parties' own choosing. An award is intended to settle the matter in controversy, and thus save the expense of litigation.
>
> If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus arbitration instead of ending would tend to increase litigation.
>
> On appeal of a trial court's decision confirming an arbitration award, we accept the trial court's findings of fact that are not clearly erroneous and review its conclusions of law de novo.

Id. (citations, quotation marks, brackets, and ellipses omitted).

Here, neither party has challenged any of the trial court's findings of fact as clearly erroneous. Thus, in this appeal, we "review its conclusions of law de novo." *Id.* (citation and quotation marks omitted).

B. Arbitration Award of Equitable Distribution

Both Husband and Wife make arguments as to the trial court's confirmation and modification of the Arbitration Award as to equitable distribution. Husband argues (1) the "Arbitrator . . . had no legal authority to make the substantive modifications to the [O]riginal [Arbitration A]ward at the request of counsel[4][;]" (2) the Arbitrator "erred in distributing the former marital residence to Wife[;]" (3) the Arbitrator "erred in the valuation, classification and distribution of the" IOP Home; and (4) the "Arbitrator . . . erred in concluding that it was equitable to award 57%

4. We will not address this issue separately. Both parties submitted requests for corrections or clarifications to the Arbitrator as allowed by North Carolina General Statute Section 50-52, *see* N.C. Gen. Stat. § 50-52 (2023), and the only modification Husband contends was improper as a "substantive" change was the modification regarding the terms for payment of the mortgage on the Myers Park Home. We will address this issue directly in reviewing the trial court's confirmation of the Arbitration Award.

of the marital estate plus prospective alimony of 3 ½ years was equitable (sic)." (Capitalization altered.) Wife cross-appeals, arguing (1) "[t]he trial court erred when it vacated the provision relating to the [A]rbitrator's authority to compel the sale of a marital asset" and (2) "[t]he trial court erred when it vacated the provisions of the [ ] Arbitration Award incidentally affecting [ ]Husband's separate property."

The Confirmation Order modified the Arbitration Award in two ways. Both changes involve the Myers Park Home. First, paragraph 3 in the "Sterling Road House" section of the Arbitration Award states:

> 3. [Husband] requests that the house be sold. However, per N.C. Gen. Stat. Section 50-20, it is the court's role to classify, value and distribute the property and *N.C. Gen. Stat. Section 50-20 does not authorize the court to order the sale of marital assets*. Therefore, the [Myers Park Home] is to be distributed to [Wife].

(Emphasis added.) The trial court vacated the portion of the Arbitration Award that states "N.C. Gen. Stat. Section 50-20 does not authorize the court to order the sale of marital assets[,]" italicized above, and confirmed the remaining part of the paragraph. Then, paragraph 8 in the "Sterling Road House" section states:

> 8. [Husband] shall pay the mortgage of the SunTrust/Truist Principal by making the monthly payments of principal and interest until the mortgage is paid in full, subject to the following conditions. [Husband] shall also be responsible for payment of the 2022 ad valorem property taxes not covered by the mortgage escrow balance. *Upon sale of the IOP house, [Husband] shall make a lump sum payment toward the principal mortgage balance owed of $500,000.00. The outstanding mortgage balance shall be paid off in its entirety by [Husband] no later than December 31, 2025. In the event that [Wife] sells the house prior to December 31, 2025, then [Husband] shall pay directly to [Wife] the monthly principal payments which appear in the mortgage's amortization schedule on until (sic) December 31, 2025, then he shall pay to [Wife] no later than December 31, 2025 the payoff of the mortgage as it appears on the mortgage amortization schedule for December 2025.*

(Emphasis added.) The trial court vacated the last three sentences of paragraph 8, italicized above, but confirmed the rest of the paragraph.

1. Legal Error in Distribution of the Myers Park Home and Mortgage

[2] Husband raises on appeal many arguments challenging the Arbitrator's distribution of the Myers Park Home and the mortgage encumbering the home. He approached this issue from many different angles. His primary objection to the Arbitration Award is that the Myers Park Home was classified as marital property and distributed to Wife while the mortgage on the home was classified as his separate debt and he is responsible for paying that debt. He also contends the Arbitrator had no authority to "distribute" the separate debt to him or to set any conditions on when or how he would pay that debt.

Before addressing his arguments, we note that the classification of the Myers Park Home as marital property and the classification of the mortgage as Husband's separate debt was agreed upon in the parties' postnuptial agreement. Husband is very unhappy about the postnuptial agreement. In his Motion to Vacate and/or Modify the Arbitration Award, he candidly states that

> the only reason that [Husband] had a "separate debt" in the form of a mortgage (i.e. securing the former marital residence – *as provided in more detail hereinbelow*) is because [Wife] threatened to divorce him if he did not change the Prenuptial Agreement and to bring that home into the marital estate. When he succumbed and modified the Prenuptial Agreement into a Postnuptial Agreement, an error was made whereby the asset was made a marital asset, but the debt was not. As a result, [Husband] was financially harmed by a) being "bullied" into bringing a separate asset into the marriage; b) being forced to pay what should have been made a marital asset but wasn't because of poor drafting (to the tune of over $1 million debt); c) being "punished" in the "equitable" analysis for having paid that separate debt during the marriage; and d) being denied credit for having paid [Wife's] separate debt during that same marriage."

(Emphasis in original.)

In his contentions regarding factors to be considered under North Carolina General Statute Section 50-20(c) in the equitable distribution, Husband contended as to Factor (c)(12), "[a]ny other factor just and proper[,]" that

> Wife bullied Husband into modifying the prenuptial agreement and into agreeing to title a house he owned prior to the date of marriage into joint names which under North Carolina law is deemed a "gift" to the marriage. This gift has resulted in over $1.1 million being infused into the marital estate which is an inequitable result dramatically in favor of Wife.[5]

In his argument before the trial court on the motion to vacate the Arbitration Award, he again makes this argument at the very start. He argued that the entire Arbitration Award was

> built around having her keep that house. So arguably that -- Other than it being a major law -- error of law, how she treated this, it permeates throughout the award, which is another, just another justification for why you can't simply modify the award. You have to vacate it. How this asset and debt were treated in our opinion was -- is the key issue. So I'm going to raise it first.

Thus, Husband's primary argument on this issue was that Wife "bullied" him into voiding their prenuptial agreement and then entering into the postnuptial agreement, and his attorney mistakenly failed to make the mortgage debt marital instead of separate. But Husband has not challenged the postnuptial agreement in any way, and that agreement is very clear. Its meaning was not in dispute, and the Arbitrator correctly applied the terms of the postnuptial agreement. In this appeal, we are considering only whether the trial court committed legal error in confirming the Arbitration Award. *See id.* at 238-39, 715 S.E.2d at 531.

Husband argues that since the mortgage debt was "only in Husband's name and was not refinanced during the marriage" and the Arbitrator "distributed" it as separate property, the "Arbitrator . . . had no legal authority to either 'distribute' his separate debt or to set conditions for the payment thereof." Wife's cross-appeal also involves the former marital home, so we will address her cross-appeal in this section as well. Wife argues "[t]he trial court erred when it vacated the provision relating to the [A]rbitrator's authority to compel the sale of a marital asset" and

---

5. Wife countered Husband's contentions on this factor by alleging that the postnuptial agreement provisions on the Myers Park Home were part of an arrangement to protect the marital estate from depletion by Husband's payment of "the college expenses of his three children from his former marriage" as well as his "substantial child support and alimony obligations to his previous wife."

"[t]he trial court erred when it vacated the provisions of the . . . Arbitration Award incidentally affecting [ ]Husband's separate property[,]" specifically the detailed conditions for Husband's payment of the mortgage.

a. Payment of Mortgage on the Myers Park Home

Both Husband and Wife make arguments as to the mortgage encumbering the former marital home. Wife argues the trial court should not have vacated the part of the Arbitration Award that set out how and when the mortgage must be paid while Husband argues the trial court correctly vacated part of the provision outlining payment of the mortgage but should have also vacated the entire provision.

Although both Husband and Wife focus on the specific paragraphs of the Arbitration Award addressing the Myers Park Home and the mortgage, we will include the Arbitrator's findings of fact about the home to place these paragraphs in context:

> 1. As of the date of separation the parties owned a house and lot located [in Myers Park] as tenants by the entirety. The house was built by [Husband] prior to marriage and was titled in his sole name as of the date of marriage. However, the house was re-titled as tenants by the entirety pursuant to the terms of the parties' Agreement and, by the terms of the Agreement, is considered Marital Property.
>
> 2. [Wife] desires to have the house distributed to her, in part, so that [Francis] can continue to live in his home. The home is in the Myers Park area and is within walking distance from [a park], where [Wife] and [Francis] spend a lot of time. [Francis] has friends in the neighborhood with whom he plays.
>
> 3. [Husband] requests that the house be sold. However, per N.C. Gen. Stat. Section 50-20, it is the court's role to classify, value and distribute the property and N.C. Gen. Stat. Section 50-20 does not authorize the court to order the sale of marital assets. Therefore, the [Myers Park Home] is to be distributed to [Wife].
>
> 4. Each party offered expert testimony with regard to the current (date of trial) value of the house, with [Wife's] expert opining that the May 19, 2022 fair market value of the house was $2,300,000.00 and [Husband's] expert opining that the June 21, 2022 fair market value of the house was $2,600,000.00.

5. [Husband's] expert used more recent comparison sales in her expert witness report, although it is noted that one of her comparison sales was actually a broker under contract sale. Two of the comparison sales used by [Husband's] experts were sales which occurred after [Wife's] expert had prepared his report. Additionally, the comparison sales utilized by [Wife's] expert were located in a different school district than the school district where the house is located, that being [redacted]. In a fast-moving market, more recent comparison sales are a better indicator of the actual fair market value of the house.

6. The current fair market value, to be distributed to [Wife], is $2,600,000.00. The current SunTrust/Truist mortgage (principal and interest) is distributed to [Husband] as his separate debt.

7. As referenced earlier, the Agreement provides that the SunTrust/Truist Mortgage which is a lien on the house is [Husband's] separate debt. The June 2022 balance owed on this debt is $791,964.88 and the date of separation balance on the mortgage debt is $808,154.57. [Husband's] paydown of the mortgage from date of separation through the date of arbitration was a paydown of support. (it is noted that [Wife] has made no claim for retroactive/back child support or retroactive/back alimony).

8. [Husband] shall pay the mortgage on the SunTrust/Truist Principal by making the monthly payments of principal and interest until the mortgage is paid in full, subject to the following conditions. [Husband] shall also be responsible for payment of the 2022 ad valorem property taxes not covered by the mortgage escrow balance. Upon sale of the IOP house, [Husband] shall make a lump sum payment toward the principal mortgage balance owed of $500,000.00. The outstanding mortgage balance shall be paid off in its entirety by [Husband] no later than December 31, 2025. In the event that [Wife] sells the house prior to December 31, 2025, then [Husband] shall pay directly to [Wife] the monthly principal payments which appear in the mortgage's amortization schedule [ ] until December 31, 2025, then he shall pay to [Wife] no later than December 31, 2025 the payoff of the mortgage as it appears on the mortgage amortization schedule for December 2025.

The trial court vacated part of the Arbitration Award by removing the italicized portions of Finding 8:

> 8. [Husband] shall pay the mortgage of the SunTrust/Truist Principal by making the monthly payments of principal and interest until the mortgage is paid in full, subject to the following conditions. [Husband] shall also be responsible for payment of the 2022 ad valorem property taxes not covered by the mortgage escrow balance. *Upon sale of the IOP house, [Husband] shall make a lump sum payment toward the principal mortgage balance owed of $500,000.00. The outstanding mortgage balance shall be paid off in its entirety by [Husband] no later than December 31, 2025. In the event that [Wife] sells the house prior to December 31, 2025, then [Husband] shall pay directly to [Wife] the monthly principal payments which appear in the mortgage's amortization schedule [ ] until December 31, 2025, then he shall pay to [Wife] no later than December 31, 2025 the payoff of the mortgage as it appears on the mortgage amortization schedule for December 2025.*[6]

(Emphasis added.)

Specifically, Husband argues the "Arbitrator . . . had no legal authority to either 'distribute' his separate debt or to set conditions for the payment thereof." Husband also argues the Arbitrator did not have authority to order him to continue to pay the mortgage on the Myers Park Home at all, since it is his separate debt. We agree neither the Arbitrator nor the trial court have authority to "distribute" a separate debt, but the Arbitration Award does not "distribute" the mortgage. In the context of the Arbitration Award, the Arbitrator was simply recognizing the fact that the mortgage is Husband's separate debt which he is legally responsible to pay. But even if the Arbitrator did not have authority to set out a specific schedule for Husband's payment of the mortgage as a separate

---

6. The trial court did not modify the Decree as to the Myers Park Home and mortgage in the Arbitration Award, which provides:

> 6. As his separate debt, [Husband] shall assume and pay in a timely fashion the parties' respective principal and interest obligation on said mortgage, with [Husband] paying the mortgage as outlined above in the Findings of Fact. [Husband] shall indemnify and hold [Wife] harmless from payment on the [Myers Park Home] mortgage.

debt for purposes of equitable distribution, we cannot overlook the rest of the Arbitration Award, which also addressed child support and alimony. Even the findings specifically addressing equitable distribution note the interplay of the payment of the mortgage with Wife's claims for child support and alimony. As this Court noted in *Capps v. Capps*, there is an "obvious relationship . . . between the property that one has and his or her need for support and the ability to furnish it." 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984). The Arbitrator also made findings of fact regarding distributional factors for purposes of equitable distribution and of factors under North Carolina General Statute Section 50-16.3A for alimony addressing the needs of Wife and Francis for the Myers Park Home. Specifically, the Arbitrator found as a distributional factor that Wife "needs to receive ownership of the former marital residence, where she and [Francis] reside, in order to provide a home for [Francis]. [Wife] and [Francis] have resided in the former marital residence since the date of the separation of the parties." The Arbitrator also considered Husband's "substantial separate debt in the [Myers Park Home] mortgage" and the "non-liquid" character of the Myers Park Home. The Arbitrator found as to the alimony factor of "The Standard of Living of the Spouses Established During the Marriage" that "[t]he parties enjoyed a high standard of living during their six-year marriage. They lived in a 4,844 square foot house, with 5 bedrooms and 4.2 bathrooms."

As a general rule, "the trial court is only permitted to distribute marital and divisible property." *Crowell v. Crowell*, 372 N.C. 362, 368, 831 S.E.2d 248, 252 (2019) (*Crowell I*). Husband relies heavily on our Supreme Court's 2019 opinion in *Crowell I*. Our Supreme Court concluded in *Crowell I* that "trial courts are not permitted to disturb rights in separate property in making equitable distribution award orders." *Id.* at 370, 831 S.E.2d at 254. The Court also stated:

> We acknowledge that where a marriage is in debt, it is difficult to envision a scenario in which the making of a distributive award will not affect a party's separate property in some manner. Nevertheless, within the confines of N.C.G.S. § 50-20, the trial court in this case was only permitted to use that debt in calculating the amount of the distributive award, *not to dictate how the debt was to be paid*.

Id. at 371, 831 S.E.2d at 254 (emphasis added) (footnote omitted).

Wife argues this Court's opinion in *Crowell v. Crowell*, 289 N.C. App. 112, 888 S.E.2d 227 (2023) (*Crowell II*), "permits entering a ruling that incidentally affects a party's separate property rights" and

> [t]his Court explained that the original order was overturned not because it had some propensity to affect a party's separate property, but, rather, because it ordered a party to specifically use their separate property to satisfy a marital debt. . . . A court's order that has a collateral effect on separate property, therefore, is entirely permissible.

Crowell II stated "[t]he original order was not overturned on the basis that it had some propensity to affect [the p]laintiff's separate property; rather, it was overturned because 'the trial court ordered [the p]laintiff to *use* specific items of separate property to satisfy marital debt, *immediately* affecting her rights in that property.' " *Id.* at 116, 888 S.E.2d at 230 (emphasis in original). Wife contends that the trial court erred by removing the specific conditions for Husband's payment of the mortgage because these conditions are merely a "collateral effect" on the separate debt.

In *Crowell I*, the trial court ordered the plaintiff to sell her separate property to pay a distributive award; our Supreme Court concluded "[b]ecause this component of the trial court's order unquestionably disturbed [the] plaintiff's rights in her separate property, the trial court's actions amounted to an impermissible distribution of that property." *Crowell I*, 372 N.C. at 370-71, 831 S.E.2d at 254. In both *Crowell I* and *Crowell II*, the parties had no minor children. *Id.* at 363, 831 S.E.2d at 249. *Crowell I* and *II* addressed only equitable distribution; the order on appeal did not include alimony. *See id.* ("Following a three-day hearing, on 15 August 2016, the trial court entered an equitable distribution order and an order denying [the] plaintiff's request for an award of alimony, the latter of which was not appealed. The trial court's decision regarding equitable distribution is the only decision on appeal.").

Here, we must consider the trial court's ruling on the confirmation of the Arbitration Award in the context of the award, which addressed alimony and child support as well as equitable distribution. The parties entered into an Arbitration Agreement to have arbitration of all these claims together. The parties have a child, Wife has primary custody of the child, and they reside in the Myers Park Home. Wife was awarded alimony and child support, and the Arbitration Award includes findings about the home. The needs of Wife for alimony and of Francis for child support both take into account the fact that Husband is paying the mortgage on the home in which they live. Although the Arbitrator found that Wife has household expenses such as utilities and house and yard maintenance, her needs as found by the Arbitrator specifically do not include a mortgage payment on the home because it was being paid

by Husband. It is apparent throughout the 41-page Arbitration Award that the Arbitrator here was considering not only equitable distribution but also the need of Wife to remain in the Myers Park Home for the benefit of the child and the potential consequences of Husband's failure to pay the mortgage on the home as to Wife's need for alimony or child support.

Under these circumstances, and under *Crowell I* and *Crowell II*, the Arbitrator did not have legal authority to require that the mortgage debt be paid early or from the proceeds of the sale of the IOP Home for purposes of equitable distribution. *See id.* at 370, 831 S.E.2d at 254. By requiring him to pay $500,000.00 on the mortgage upon sale of the IOP Home and to pay the balance by a particular date, the trial court required Husband to use his proceeds from the sale to pay down this particular debt, much as the trial court in *Crowell I* and *Crowell II* attempted to require the plaintiff to sell her separate property to pay a marital debt. *See id.* The trial court correctly vacated this portion of Paragraph 8. Although Husband cannot be required to pay the mortgage early, the trial court did not commit legal error by requiring Husband to continue to pay the mortgage since his failure to do so would directly affect the support of both Wife and the child. Requiring Husband to pay a separate mortgage he was already legally bound to pay in the manner he was already required to pay it does not interfere with his separate assets. Husband may choose to pay the mortgage on the schedule as required by the promissory note, or he may choose to pay it off sooner; the trial court merely required him to comply with his pre-existing legal obligation. The trial court did not err by confirming this portion of Paragraph 8.

Husband also contends the Arbitrator "reversibly erred by separating the real property from the debt that secured it." Specifically, Husband argues the "Arbitrator. . . effectively ordered the divestment of Suntrust/Truist (the third party mortgage creditor/trustee holding legal title to the land) of its 'ownership' of the real property" and thus "effectively triggered default . . . by severing the legal relationship between the Mortgage Debt and its security[.]" It is also undisputed that the mortgage documents were not produced either at the arbitration or to the trial court. Wife asserts this issue could not have been reached for this reason.

The facts of this case are unusual; the parties' postnuptial agreement made the Myers Park Home marital property but made the mortgage a separate debt. But if anyone "separate[ed] the real property from the debt that secured it," it was not the Arbitrator or the trial court, it was the parties, in their postnuptial agreement. Suntrust/Truist is not a party to this case, and we express no opinion whatsoever as to the

legal effect, if any, of this arrangement as to any non-party to this action. Husband's argument in this regard is without merit.

Therefore, the trial court correctly vacated the part of paragraph 8 setting out specific conditions for payment of the mortgage as the Arbitrator did not have authority to order these specific conditions for Husband's early payment of a separate debt. And the trial court did not err by denying Husband's request to remove the provision that he

> shall pay the mortgage on the SunTrust/Truist Principal by making the monthly payments of principal and interest until the mortgage is paid in full, subject to the following conditions. [Husband] shall also be responsible for payment of the 2022 ad valorem property taxes not covered by the mortgage escrow balance.

b. Wife's Cross-Appeal as to Authority to Compel the Sale of the Marital Home

Wife has cross-appealed and challenges the trial court's modification of the Arbitration Award by striking the portion of paragraph 3 in italics:

> [Husband] requests that the house be sold. However, per N.C. Gen. Stat. Section 50-20, it is the court's role to classify, value and distribute the property *and N.C. Gen. Stat. Section 50- 20 does not authorize the court to order the sale of marital assets*. Therefore, the [Myers Park Home] is to be distributed to [Wife].

(Emphasis added.)

Wife argues "[t]he trial court erred when it vacated [the] Arbitrator['s] . . . finding that she lacked authority to compel the sale of a marital asset under N.C.G.S. § 50-20." Wife argues in this section of her brief that Husband argued to the trial court the Arbitrator must have erroneously relied on *Miller v. Miller*, 253 N.C. App. 85, 799 S.E.2d 890 (2017), but "notwithstanding *Miller*, the Arbitrator could compel the sale of a marital asset pursuant to the decision in *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 547 (2000)[.]" But Wife mostly argues that the trial court could not have *known* whether the Arbitrator relied on *Miller*, and since the record does not show "any evidence of what legal authority was filed, served, submitted for consideration, admitted, or made subject to an offer of proof[,]" the trial court could not tell which legal authority the Arbitrator relied on. Wife does not cite to any authority supporting the assertion that the trial court cannot rely on caselaw unless it is

shown in the record that the same caselaw was "filed, served, submitted for consideration, admitted, or made subject of an offer of proof" at arbitration, quoting North Carolina Rule of Appellate Procedure 11(c). This statement from Rule 11(c) applies to evidence and other information provided to the trial court by the parties, not law. In fact, an arbitrator or a trial court can and should rely upon any relevant legal authority needed to address an issue it must decide, whether or not a party has presented that authority. In many cases and on many issues, the parties may not formally submit any case or statute to an arbitrator or court, but that does not mean the arbitrator or trial court can rule without considering any relevant statutes or caselaw. The issue of the sale of the former marital home was raised at arbitration, and Wife does not contend the issue was not preserved; Wife only contends the trial court could not rely on the case argued by Husband to the trial court. The trial court can and should consider any relevant statute or caselaw in its discretion.

But beyond the law the Arbitrator may or may not have relied upon, we have been unable to determine why Wife objects to the trial court's ruling on this portion of the Arbitration Award and what the legal effect of addressing this issue may be. Wife surely does not contend that the Arbitrator should have compelled her to sell the Myers Park Home; that is the opposite of her position. Husband argues the statement that "N.C. Gen. Stat. 50-20 does not authorize the court to order the sale of marital assets" is correct. Whether this statement of law is in general correct or not, neither party has explained what difference our ruling would make in this case, and we decline to address it further and thus we will not disturb the trial court's ruling in this regard.

We will turn next to the valuation, classification, and distribution of the IOP Home.

2. Valuation, Classification, and Distribution of the IOP Home

[3] Husband next argues the Arbitrator erred "in the valuation, classification, and distribution of the [IOP Home]" (1) "in her treatment of payments by the marriage toward Wife's separate debt/asset" and (2) "by failing to consider the capital gains consequence from the sale of [the] IOP [Home]." (Capitalization altered.)

a. Treatment of Payments Toward the IOP Home on Wife's Separate Debt/Asset

Husband first argues the "Arbitrator . . . erred in her treatment of payments by the marriage toward Wife's separate debt/asset." Husband contends the "Arbitrator . . . ignored th[e] directive" under North Carolina

General Statute Section 50-20(c)(8) which "requires that in determining what constitutes an equitable distribution of the marital property, trier of fact is to consider any direct contribution to an increase in the value of separate property that occurs during the marriage." (Emphasis in original.)

Under North Carolina General Statute Section 50-20(c)(8),

> [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. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:
>
> . . . .
>
> (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.

N.C. Gen. Stat. § 50-20(c)(8) (2023). We also note the parties made several stipulations as to the IOP Home, which are binding upon the parties. *See Clemons v. Clemons*, 265 N.C. App. 113, 117, 828 S.E.2d 501, 505 (2019) ("It is well-established that stipulations in a pretrial order are binding upon the parties and upon the trial court. . . . In equitable distribution cases, stipulations in the pretrial order are intended to limit the evidence needed and to define the issues the trial court must decide." (citations omitted)).

One of the stipulations noted in the Arbitration Award is that "22 percent of the net value of the [IOP H]ome is [Wife's] separate property, and, therefore, the remaining 78 percent of the *net* value of the home is marital property, which is to be divided between the parties." (Emphasis added.) Husband states "the parties stipulated that 22 percent of the asset and debt (i.e. the net value) of [the] IOP [Home] was Wife['s] separate property and the remaining 78 percent was marital." Wife contends the underlying mortgage ("South State Mortgage") was not a part of this stipulation. But by stipulating "22 percent of the *net value* of the home" is Wife's separate property and "78 percent of the *net value* of the home is marital property[,]" (emphasis added), the underlying debt should be part of this valuation. *See McNeely v. McNeely*, 195 N.C. App. 705, 710, 673 S.E.2d 778, 781 (2009) ("Prior to ordering an equitable distribution of marital property, the trial judge

is required to calculate the net fair market value of the property. The trial court calculates the net fair market value of a property, by reducing its fair market value by the value of any debts that are attached to the property." (citations and quotation marks omitted)). Wife contends the stipulation must have only been as to the "asset itself, the IOP Home, and not to the underlying debt . . . as evidenced by [Husband's] contention that he sought a dollar-for-dollar credit on the paydown of the entire SouthState Mortgage[.]" But Wife's argument ignores the plain language of the parties' written Stipulations[7] regarding the sale of the IOP Home and the distribution of the net proceeds of the sale:

> For purposes of this Agreement, the term "net proceeds from sale" shall be defined to mean the gross sales price *less mortgage payoffs (the South State Bank indebtedness referenced above)*, real estate commissions, tax pro-rations, revenue stamps, homeowners' association dues, reimbursement to Husband of 50% of repairs advanced by him as reference in paragraph 9 above, and other closing costs attributable to the sellers in accordance with the parties' real estate sales contract, plus any amount due the parties by way of refund or escrowed funds, final payoff overpayment, or other similar items.

(Emphasis added.) They also stipulated that the Arbitrator "shall have the authority to classify, value, and distribute" the marital or divisible property and debt components of the "net proceeds" of the sale.

Husband contends he "paid 100% of all expenses associated with [the] IOP [Home] from his marital earnings . . . and after the date of separation, Husband paid 100% of all expenses associated with [the] IOP [Home] from marital monies." Husband argues "Wife's separate debt was paid by the marriage for every one of [the 53 months between the purchase and closing]." Husband argues the Arbitrator "refused" to

> a) classify the marital monies paid out of Husband's marital accounts toward the reduction of marital debt post-date of separation as divisible; b) distribute the divisible property as part of equitable distribution; c) order that Wife pay the closing costs associated with the sale of her separate interest post-date of separation; or d) give Husband

7. These Stipulations did not address the 78% marital and 22% separate property classification as noted in the Arbitration Award; that portion of the stipulation was apparently made separately, perhaps at the arbitration hearing. But neither party challenged the Arbitrator's finding on the stipulation of these percentages.

> an unequal distributional factor in his favor for the marriage's substantial payment of Wife's separate debt.

(Footnotes omitted.)

However, Wife contends "Husband did not calculate or otherwise indicate how much the marriage contributed towards the paydown of the SouthState Mortgage during the marriage" and argues Husband "did not present evidence on the marriage's contribution towards paydown of [ ]Wife's separate property portion of the SouthState mortgage during the marriage." And while Husband asserts in his brief that he "paid the marital and separate components of the expenses for the IOP Ho[m]e from Wells Fargo [ ], a marital bank account," he did not argue at arbitration that the trial court should consider "[a]ny direct contribution to an increase in value of separate property which occurs during the course of the marriage" as shown by the FPTO. Husband left the section for his arguments addressing "[a]ny direct contribution to an increase in value of separate property which occurs during the course of the marriage" under North Carolina General Statute Section 50-20(c)(8) blank. *See Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) ("As has been said many times, the law does not permit parties to swap horses between courts in order to get a better mount, meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." (citations and quotation marks omitted)).

While Husband did not argue at arbitration or to the trial court about the IOP Home expenses during the marriage, he did make arguments as to the effect of expenses from after separation to the arbitration. Specifically, in the FPTO spreadsheet as to the South State Mortgage, it states "H[usband] seeks dollar credit for these amounts as divisible property or his separate property or as a factor in the calculation of an unequal distribution." But the Arbitration Award recognized the stipulations "give the Arbitrator the authority to reimburse [Husband] for any part of the monies he pays to maintain the IOP [H]ome from the date of separation through the date of closing" and also found for purposes of equitable distribution, Husband "should be reimbursed for the payments made by [Husband] for mortgage installment payments (principal and interest), property taxes, and homeowners' insurance premiums from July 11, 2022 through the closing on the sale of the IOP [Home] prior to the distribution of the remaining proceeds[.]" Thus, the Arbitrator considered these payments and ordered Husband be reimbursed.

Husband also argues he "received no credit for these payments as 'reasonable' post-separation support or child support." However, Wife

argues "[t]his is simply inaccurate. The Arbitrator explicitly found that [ ]Husband's post-date of separation payments towards the IOP [Home] Expenses from date of separation constituted support for [ ]Wife and the minor child." But in the Arbitration Award the Arbitrator found as follows:

> The amounts [Husband] has paid on these expenses from date of separation through July 11, 2022 are (sic) set forth on Exhibit A are to be considered in the nature of support for [Wife] and [Francis], and [Husband] shall receive no credit for these payments. However, [Husband] should be reimbursed for the payments made by [Husband] for mortgage installment payments (principal and interest), property taxes, and homeowners' insurance premiums from July 11, 2022 through the closing on the sale of the IOP [H]o[me] prior to the distribution of the remaining proceeds between the parties

Thus, the Arbitrator *considered* post-separation and child support in this context but gave Husband "no credit for these payments" as Husband contends. Husband does not demonstrate any error of law in how the Arbitrator addressed the payments he made for the IOP Home.

b. Consideration of Capital Gains Tax

Next, Husband contends the Arbitrator erred "by failing to consider the capital gains consequences from the sale of [the] IOP [Home]." Husband argues North Carolina General Statute Section 50-20(c)(11) "requires that in making an unequal division of the net marital estate to one spouse or another, the trier of fact **must** consider the tax consequences each party would have incurred 'if the marital and divisible property had been sold or liquidated on the date of valuation.' " (Emphasis in original.) The only case Husband cites in this section of his brief is an unpublished case, *Kiell v. Kiell*, 221 N.C. App. 669, 729 S.E.2d 127 (2012) (unpublished), although Husband fails to note the opinion's unpublished status as required by North Carolina Rule of Appellate Procedure 30(e)(3). *See* N.C. R. App. P. 30(e)(3) ("When citing an unpublished opinion, a party must indicate the opinion's unpublished status.").

Nonetheless, as Wife notes, and is shown by the parties' FPTO, in the attached document outlining the parties' arguments as to the valuation, classification, and distribution, Husband left blank the section addressing his argument as to the "tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated

on the date of the valuations" under North Carolina General Statute 50-20(c)(11). Husband has not directed us to anything in the record showing Husband produced any evidence at the arbitration or to the trial court as to the tax consequences. Thus, "[a]s [Husband] failed to present evidence during the hearing regarding potential tax consequences caused by an equal distribution, the trial court did not err in failing to consider tax consequences in awarding an equitable distribution." *Power v. Power*, 236 N.C. App. 581, 584, 763 S.E.2d 565, 567 (2014) (citation omitted). Husband has not demonstrated any legal error in the trial court's confirmation of this portion of the Arbitration Award.

3. Arbitrator's Conclusion as to the Total Award

[4] Husband's final argument as to the equitable distribution is the "Arbitrator . . . erred in concluding that it was equitable to award 57% of the marital estate plus prospective alimony of 3 ½ years was equitable (sic)." (Capitalization altered.) Husband essentially argues that the Arbitrator "seemingly ignore[d] the interplay" between equitable distribution and alimony. Husband argues that the Arbitrator abused her discretion in the equitable distribution award. He has not identified any legal error either by the Arbitrator or by the trial court.

"On appeal of a trial court's decision confirming an arbitration award, we accept the trial court's findings of fact that are not clearly erroneous and review its conclusions of law de novo." *Barton*, 215 N.C. App. at 239, 715 S.E.2d at 531 (citation omitted). As Husband has failed to argue any error in the trial court's findings of fact or conclusions of law as to the consideration of the equitable distribution factors or the Arbitration Award, this argument is without merit.

4. Conclusion as to Equitable Distribution

The trial court did not err by vacating the part of paragraph 8 that set out specific conditions as to Husband's early payment of the mortgage and similarly did not err in confirming the part of paragraph 8 that required Husband to pay the mortgage generally. And Wife has not demonstrated how the statement regarding the Arbitrator's authority to order the sale of the Myers Park Home would affect this appeal, we will not discuss that issue further. Finally, the trial court did not commit any legal error in its modification and confirmation of the equitable distribution Arbitration Award.

C. Alimony and Child Support Awards

[5] Husband argues the "Arbitrator . . . erred by acknowledging that Wife was underemployed at the time of the proceeding but failing to

use earning capacity to calculate alimony and child support" and the "Arbitrator['s] . . . determination of the amount of Wife'[s] child support obligation is manifestly unsupported by reason." (Capitalization altered.) By use of the words, "manifestly unsupported by reason," Husband's argument is phrased as an argument that the Arbitrator abused her discretion. *See*, *e.g.*, *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) ("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." (citation omitted)). But our standard of review in this appeal is to determine if the trial court committed any legal error in confirming the Arbitration Award. *See Barton*, 215 N.C. App. at 238-39, 715 S.E.2d at 531. To the extent Husband is arguing the Arbitrator abused her discretion, we will not address his argument, as we review the trial court's confirmation of the Arbitration Award of alimony and child support only for legal error.

> Whether a spouse is entitled to an award of alimony or post-separation support is a question of law. This Court reviews questions of law *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Collins v. Collins, 243 N.C. App. 696, 699, 778 S.E.2d 854, 856 (2015) (citations, quotation marks, and brackets omitted).

"Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith." *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (citations and emphasis omitted). Further,

> child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified. Additionally, a party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed his income or otherwise acted in deliberate disregard of the obligation to provide reasonable support.

Ellis v. Ellis, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) (citations, quotation marks, and brackets omitted).

> It is clear, however, that before the earnings capacity rule is imposed, it must be shown that the party's actions which reduced his income were not taken in good faith. Thus,

> where the trial court finds that the decrease in a party's income is substantial and involuntary, without a showing of deliberate depression of income or other bad faith, the trial court is without power to impute income, and must determine the party's child support obligation based on the party's actual income.

Id. at 364-65, 485 S.E.2d at 84 (citations, quotation marks, and brackets omitted). And, in the child support context, voluntary underemployment can be a basis to impute income instead of using actual income if the underemployment results from "bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation." *Diehl v. Diehl*, 177 N.C. App. 642, 650, 630 S.E.2d 25, 30 (2006) (citation and quotation marks omitted).

Husband does not directly contend in his brief that Wife is acting in bad faith as to her income. As to alimony, Husband contends "there is no logical basis for [the] Arbitrator['s] . . . determination that Wife 'needs' 3 ½ years from the Proceeding and winter break of [Francis's] kindergarten year to find a job and get him settled" since both Francis and Wife are healthy, "Wife voluntarily left a full-time job paying $160,000 annually[,]" Francis attends school, and Wife has a "paid assistant." Wife notes one of the findings from the Arbitration Award which states:

> Prior to marriage, [Wife] worked as Vice-President of Business Development with [redacted]. Thereafter, she worked as the Director of Development at [redacted]. She later took a development position at [redacted], where she earned approximately $160,000.00. [Wife] left that employment with [Husband's] consent and [Francis] was born one month later and she did not work at all save and except some parttime project work with [redacted]. By and large, for the remainder of the marriage, [Wife] did not work outside of the home through the date of separation, and she was a stay-at-home mother and homemaker through the separation of the parties.

This finding shows the Arbitrator found Wife was not acting in bad faith as she was originally working before and during some of the marriage and only stopped working with the consent of Husband to take care of Francis. Husband does not dispute this fact but contends Wife should "not be allowed to work part-time at home[.]" The Arbitrator considered many factors in its alimony award, including Husband's marital misconduct and relative earnings of each party. There is nothing in our record to suggest the Arbitrator committed legal error by failing to find Wife

acted in bad faith or deliberately suppressed her income to receive more support. Husband's argument as to the Arbitrator's use of Wife's actual income instead of earning capacity is without merit.

Finally, Husband argues the "Arbitrator['s] . . . determination of the amount of Wife'[s] child support obligation is manifestly unsupported by reason." Again, Husband seeks to rely upon abuse of discretion, the standard of review we would use for a trial court's order for child support; instead, we are reviewing the trial court's order confirming an arbitration award. The trial court must "vacate the award if the arbitrators have committed an error of law prejudicing a party's rights." N.C. Gen. Stat. § 50-54(a)(8). He has not identified any error of law in the Arbitrator's determination of child support. Husband's main argument is that Wife got "more alimony than she needs," and we have already rejected that argument. Husband has not demonstrated that the trial court committed any error of law in confirming the Arbitration Award as to child support.

V. Conclusion

We conclude the trial court did not err in vacating the part of paragraph 8 that set out specific conditions requiring Husband to pay the mortgage early and did not err in confirming the part of paragraph 8 which required Husband to continue paying the mortgage generally. We also conclude the trial court did not err in confirming the Arbitration Award as to the distribution of the IOP Home, the overall equitable distribution, alimony, and child support. We therefore affirm the trial court's order.

AFFIRMED.

Judges MURPHY and FLOOD concur.

HONACHER v. UHLHORN

[297 N.C. App. 304 (2024)]

CATHERINE HONACHER, PLAINTIFF
v.
MICHAEL CLEMMONS UHLHORN, DEFENDANT

No. COA24-35

Filed 31 December 2024

1. Jurisdiction—personal jurisdiction—waiver—subject matter jurisdiction—judicial admission

The district court did not err in denying defendant's motion to dismiss plaintiff's complaint and motion for a domestic violence protection order on jurisdictional grounds where defendant: (1) waived any right to contest the court's personal jurisdiction over him by failing to raise such a challenge in his consolidated answer and motions, and (2) made a judicial admission in his first verified answer that plaintiff was a resident of Orange County, North Carolina—as plaintiff had alleged in her complaint and motion—thus bringing the matter under the court's subject matter jurisdiction pursuant to Chapter 50B of the North Carolina General Statutes.

2. Domestic Violence—protection order—grounds for issuance—harassment—findings of fact sufficient

The district court did not err in issuing a domestic violence protection order to plaintiff against her former romantic partner (defendant)—based on allegations that defendant harassed plaintiff by, among other actions, placing fraudulent liens on her property, making complaints about her to tax and other government entities, filing unsupported legal cases against her, contacting real estate professionals about her property, and reporting to law enforcement and the Insurance Commission that plaintiff had committed arson—where the evidence and the findings of fact made thereupon demonstrated harassment (as defined in N.C.G.S. § 14-277.3A(b)(2)) in that defendant's communications to third parties: (1) were made to induce action against plaintiff and thus were "directed at" her; (2) served no legitimate purpose but were intended to harass plaintiff while maintaining deniability (a credibility determination by the trial court made after defendant neither appeared before it nor presented any witness to support the truth of his allegations); and (3) placed plaintiff in fear of continued harassment rising to a level of substantial emotional distress in that his attempts to extort money from plaintiff damaged her financial and mental health.

HONACHER v. UHLHORN

[297 N.C. App. 304 (2024)]

Appeal by defendant from order entered 29 June 2023 by Judge Sherri T. Murrell in District Court, Orange County. Heard in the Court of Appeals 14 May 2024.

Catherine Honacher, pro se, plaintiff-appellee.

Law Office of Matthew Charles Suczynski, PLLC, by Matthew C. Suczynski, for defendant-appellant.

STROUD, Judge.

Defendant appeals from an Amended Domestic Violence Protection Order ("DVPO") entered on 29 June 2023. We affirm the Amended DVPO.

I. Background

Plaintiff filed a form complaint and motion for DVPO in the trial court on 26 October 2022 alleging that Defendant had placed Plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. Plaintiff alleged that she and Defendant were persons of the opposite sex who were not married but had lived together. Per the complaint, Plaintiff purchased a house in Hurdle Mills in 2014. Plaintiff contributed $305,000.00 to the purchase; Defendant contributed $60,000.00. The property was titled to Plaintiff, and "[t]here was never a discussion of how the property would be split if [they] separated." Eventually, the parties broke up. Defendant moved to Ohio in 2018. Plaintiff alleged that Defendant harassed her "to give him[] a ridiculous amount of money." Defendant made a report about her to Orange County Animal Control, which resulted in Plaintiff paying over $1,200.00 to update rabies vaccinations for every animal she owned. Defendant discontinued the propane gas service for Plaintiff's residence without warning. In court documents filed in Ohio, Defendant accused Plaintiff of stealing his investment in the Hurdle Mills house. Defendant placed liens on Plaintiff's Hurdle Mills property as well as real property Plaintiff owned in Madison, Rockingham County and then threatened to foreclose on the properties. Defendant filed a report with the Rockingham County Sheriff's Department and the North Carolina Insurance Commission alleging that Plaintiff had started a fire in her home in 2014 for the insurance proceeds, which a sheriff's detective and an Insurance Commission agent questioned her about in 2021. Plaintiff also alleged that Defendant slammed a vehicle door on her arm in December 2018 and threw a chair at her.

Defendant filed a verified, consolidated answer, motions to dismiss the complaint and DVPO motion, and "claims for relief" on 12 December 2022. Defendant's answer did not deny Plaintiff's allegation that "I live in Orange County, North Carolina." Instead, Defendant alleged affirmatively that "Plaintiff is a resident of Orange County, North Carolina." Defendant also alleged he had not had any personal contact with Plaintiff since May 2019, excepting contact regarding the return of money she owed him and the return of his personal property. Defendant also claimed that Plaintiff was trying to sell the Hurdle Mills house without disclosing all the known problems with the property. He alleged he was therefore "in communications with the appropriate government agencies providing them with the evidence and his knowledge of these crimes."

The caption of Defendant's answer and motions to dismiss includes a "counterclaim for return of personal property, credit card charges, damages and rent of truck, and real estate investments[,]" although the body of the pleading does not clearly identify any legal basis for any counterclaims. Generally, Defendant sought to obtain his AR-15 rifle, an engagement ring, 20% of the value of the Hurdle Mills house (which he alleged was appraised at $2,000,000.00), an additional $78,000.00 for investments he had made in the home, $1,843.04 for reimbursement of Plaintiff's credit card charges, and $6,592.43 for the use of and damage to his truck. Defendant also sought compensatory and punitive damages for Plaintiff's intentional infliction of emotional distress.

The matter was brought on for hearing before the trial court on 23 March 2023. Plaintiff appeared *pro se*. Defendant did not appear but was represented by counsel. Defendant's counsel entered into a DVPO Consent Order on Defendant's behalf on 23 March 2023. The court ordered that Defendant "not assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace, or other means), or interfere with the plaintiff."

On 27 April 2023, Plaintiff filed a Motion for Order to Show Cause alleging that Defendant had made disparaging comments about her to realtors, the Triangle MLS, and the Orange County Environmental Health Agency with the intent to cause Plaintiff emotional and financial harm in violation of the 23 March 2023 DVPO Consent Order.

Defendant filed notice of appeal from the 23 March 2023 DVPO Consent Order on 22 April 2023. Defendant simultaneously filed motions to set aside the order, to dismiss the action for lack of jurisdiction, to vacate the 23 March 2023 DVPO Consent Order, and to sanction Plaintiff for violations of North Carolina General Statute Section 14-209 and

North Carolina Rule of Civil Procedure 11. Defendant also filed an answer to Plaintiff's Motion for Order to Show Cause on 12 May 2023. In this verified pleading—contrary to his prior verified answer—Defendant alleged that Plaintiff had moved to Virginia and was no longer a resident of North Carolina when she filed the complaint for the DVPO.

The matters were heard before a trial court on 29 June 2023. Plaintiff appeared *pro se*. Defendant did not appear but was represented by counsel. The trial court concluded that Defendant had not consented to the DVPO Consent Order and vacated the order by Memorandum of Judgment/Order entered on 29 June 2023. The court dismissed Defendant's remaining claims and motions due to a failure to prosecute. The court then conducted a re-hearing on Plaintiff's complaint and motion for DVPO and entered an "Amended" DVPO on 29 June 2023.[1]

In its Amended DVPO, the trial court found that Defendant had placed Plaintiff "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." The court described Defendant's conduct as contacting "numerous third parties" such as realtors and North Carolina and/or Orange County agencies, making complaints about Plaintiff's property "for the purpose of harassing . . . Plaintiff," and "also plac[ing] fraudulent liens on Plaintiff's Property." Plaintiff "suffered anxiety, sleeplessness, and suffered financial harm[.]" The court also found that Defendant had access to firearms—a Glock 19 and an AR-15.

The trial court concluded that Defendant had committed acts of domestic violence against Plaintiff, that there was danger of serious and immediate injury to Plaintiff, and that Defendant's conduct required his surrender of all firearms, ammunition, and gun permits to the sheriff for the effective period of the order. The court ordered Defendant to "not assault, threaten, abuse, follow, harass . . . , or interfere with . . . [P]laintiff"; to "not threaten a member of [P]laintiff's family or household"; and to stay away from the place where Plaintiff works and 1,000 feet from Plaintiff. The court further ordered that Defendant "shall not post about Plaintiff on any social media platform" and "shall not contact any third party regarding any property that is titled [to] Plaintiff and that he does not have title to." The Amended DVPO was to remain in effect until

---

1. Although the DVPO is entitled as an "Amended" DVPO, the order does not amend a prior order. The trial court set aside the DVPO Consent Order, and the Amended DVPO on appeal is the only DVPO in this case. The trial court may have used this title to distinguish the 29 June 2023 DVPO from the former DVPO Consent Order. We will therefore use the same title in this opinion.

29 June 2024. Defendant filed notice of appeal from the Amended DVPO filed on 29 June 2023.

II. Jurisdiction

Defendant timely filed notice of appeal from the Amended DVPO. Although Defendant included various "claims" and motions in his answer and other pleadings, the trial court entered a separate order, also filed on 29 June 2023, setting aside the DVPO Consent Order filed on 23 March 2023 and dismissing Defendant's remaining claims and motions due to a failure to prosecute. Defendant filed notice of appeal only from the Amended DVPO and did not appeal the order dismissing his other claims and motions. Since Defendant's other claims and motions were dismissed, the Amended DVPO is a final order, and this Court has jurisdiction to review the order pursuant to North Carolina General Statute Section 7A-27(b)(2). *See* N.C. Gen. Stat. § 7A-27(b)(2) (2023) (noting that appeal lies of right directly to this Court "[f]rom any final judgment of a district court in a civil action").

Though the trial court's 29 June 2023 Amended DVPO was set to expire on 29 June 2024 prior to the filing of this Opinion, we do not dismiss the appeal as moot. This Court has determined that due to the "stigma that is likely to attach to a person judicially determined to have committed domestic abuse[,]" DVPO orders that expire during the pendency of an appeal are not moot. *See Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (citation, quotation marks, and brackets omitted).

III. Issues

On appeal, Defendant argues the trial court erred by denying his motion to dismiss the complaint and motion for DVPO and granting Plaintiff's motion for DVPO.

A. Jurisdiction

[1] Defendant argues that the trial court erred by denying the motion to dismiss the complaint and motion for DVPO because the court lacked personal jurisdiction over him and lacked subject matter jurisdiction over the action. We disagree.

1. Personal Jurisdiction

In challenging the trial court's exercise of personal jurisdiction over him, Defendant contends that he has not lived in North Carolina since 2018 and that he has not engaged in any activity within the State

since then. He contends the court's exercise of personal jurisdiction violated his due process rights.

Rule 12 of our Rules of Civil Procedure governs "Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading." N.C. Gen. Stat. § 1A-1, Rule 12 (2023). Under subsection (b), "[e]very defense . . . to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading" except those designated defenses a pleader may raise by separate motion. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b). A challenge to a court's exercise of personal jurisdiction is a designated defense which may be raised by a motion separate from a responsive pleading. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). Where a party elects to raise a designated defense by separate motion, other motions may be joined. But, if a party making a motion "omits . . . any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted[.]" *See* N.C. Gen. Stat. § 1A-1, Rule 12(g). Specifically, the defense against the exercise of personal jurisdiction "is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." *See* N.C. Gen. Stat. § 1A-1, Rule 12(h)(1). *See*, *e.g.*, *Harris v. Pembaur*, 84 N.C. App. 666, 670, 353 S.E.2d 673, 676 (1987) (holding the challenge to the exercise of personal jurisdiction was waived where the "defendant never raised the defense of lack of jurisdiction over the person either by way of a pre-answer motion or by including the defense in her answer").

In response to Plaintiff's 26 October 2022 complaint and motion for DVPO, Defendant filed a consolidated answer and motions to dismiss on 12 December 2022. Defendant moved the trial court "to dismiss . . . Plaintiff's Complaint and Motion for [DVPO] per [North Carolina General Statute Section 1A-1,] Rule 12b for [C]ivil [P]rocedures [sic] because . . . Plaintiff failed to state a claim for which relief can be granted[.]" Defendant did not challenge the trial court's exercise of personal jurisdiction over him in his answer or in the motions to dismiss Plaintiff's complaint and motion of DVPO. Therefore, Defendant waived his right to challenge the court's exercise of personal jurisdiction over him. *See* N.C. Gen. Stat. § 1A-1, Rule 12(g) and (h)(1); *Harris*, 84 N.C. App. at 670, 353 S.E.2d at 676. We reject this argument.

2. Subject Matter Jurisdiction

In a challenge to the trial court's exercise of subject matter jurisdiction to address Plaintiff's complaint and motion for DVPO, Defendant

argues that "the plain language of Chapter 50B requires the Plaintiff to be a resident of North Carolina, which she is not."

"Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). "The issue of a court's subject matter jurisdiction may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *Crago v. Crago*, 268 N.C. App. 154, 162, 834 S.E.2d 700, 707 (2019) (citations and quotation marks omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *Malone-Pass v. Schultz*, 280 N.C. App. 449, 457, 868 S.E.2d 327, 336 (2021) (citations and quotation marks omitted).

"The issuance and renewal of DVPOs, the means for enforcing them, and the penalties for their violation are governed by North Carolina's Domestic Violence Act, which is codified in Chapter 50B of the North Carolina General Statutes." *Comstock v. Comstock*, 244 N.C. App. 20, 22, 780 S.E.2d 183, 185 (2015). Under Chapter 50B, "[a]ny person residing in this State may seek relief under this Chapter by filing a civil action . . . alleging acts of domestic violence against himself or herself[.]" N.C. Gen. Stat. § 50B-2(a) (2023).

Though "[t]he words 'resident,' 'residing' and 'residence' are in common usage and are found frequently in statutes, contracts and other documents of a legal or business nature[,] [t]hey have . . . no precise, technical and fixed meaning applicable to all cases." *N.C. Farm Bureau Mut. Ins. Co. v. Lowe*, 180 N.C. App. 215, 219, 636 S.E.2d 207, 209 (2006) (citation and quotation marks omitted). "When interpreting undefined words or phrases, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Matter of Oak Meadows Cmty. Ass'n*, 293 N.C. App. 92, 96, 899 S.E.2d 404, 407 (2024) (citation and quotation marks omitted). "Residing" has been defined as "1. To live in a place permanently or for a long period. 2. To be inherently present; exist. 3. To be vested, as a power or right." *Residing*, American Heritage College Dictionary (3rd ed. 1993); *see also generally Fonvielle v. S.C. Ins. Co.*, 36 N.C. App. 495, 498, 244 S.E.2d 736, 738 (1978) (observing that "'[r]esidence' has many shades of meaning – from mere temporary presence to the most permanent abode. Generally, however, it is used to denote something more than mere physical presence, in which event intent is material[]" (emphasis omitted)).

Within the complaint and motion for DVPO, Plaintiff alleged she lived in Orange County. Defendant's first verified answer did not deny

this allegation but instead alleged affirmatively that "Plaintiff is a resident of Orange County, North Carolina." Thus, Defendant made a judicial admission that Plaintiff was a resident of Orange County, North Carolina; this judicial admission is binding upon the parties and the trial court. *See Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215 (1995) ("An admission in a pleading which admits a material fact becomes a judicial admission in the case. It has the same effect as a jury finding and is conclusive upon the parties and the trial judge." (citations omitted)). Later, in his motions to vacate the DVPO Consent Order and in his answer to Plaintiff's Motion for Order to Show Cause, Defendant alleged Plaintiff was not a resident of Orange County, as she had moved to Virginia before filing the complaint seeking a DVPO.

But even if the fact of Plaintiff's residence in North Carolina is not considered judicially admitted due to Defendant's conflicting allegations, Defendant did not present any evidence before the trial court. Plaintiff's testimony showed that she owned homes in both North Carolina and Virginia and regularly spent time in North Carolina. The record reflects Plaintiff's continued presence in the State and activities implying more than a mere physical presence. Thus, Plaintiff was "residing in the State" as contemplated under North Carolina General Statute Section 50B-2. *See* N.C. Gen. Stat. § 50B-2(a); *see also Fonvielle*, 36 N.C. App. at 498, 244 S.E.2d at 738. We also note that in the findings of fact, which are unchallenged on appeal, Defendant's actions which placed Plaintiff "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress" were specifically directed against Plaintiff in relation to her North Carolina home. The trial court found Defendant had contacted a realtor, Orange County and North Carolina Agencies, the North Carolina real estate MLS, the Orange County Tax Office, and the North Carolina State Water Quality Department to make complaints regarding Plaintiff's property for the purpose of harassing her. We hold the trial court had subject matter jurisdiction over the DVPO action pursuant to North Carolina General Statute Section 50B-2(a).

We overrule Defendant's arguments challenging the trial court's subject matter jurisdiction and exercise of personal jurisdiction.

B. Grounds for Issuance of DVPO

[2] Defendant argues that the trial court erred by granting Plaintiff a DVPO. Defendant contends there were no findings of fact or evidence that his communications to third parties were directed to Plaintiff, that his emails to third parties served "no legitimate purpose," or that Defendant placed Plaintiff in fear of continued harassment such as to inflict substantial emotional distress. We disagree.

"We review both an *ex parte* DVPO and a DVPO 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." *Stancill v. Stancill*, 241 N.C. App. 529, 531, 773 S.E.2d 890, 892 (2015) (citation and quotation marks omitted). "Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Bunting v. Bunting*, 266 N.C. App. 243, 249, 832 S.E.2d 183, 188 (2019) (citation and quotation marks omitted).

Under Chapter 50B of our General Statutes,

> [d]omestic violence means the commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> . . . .
>
> (2) Placing the aggrieved party . . . in fear of . . . continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]

N.C. Gen. Stat. § 50B-1(a) (2023); *see also Keenan v. Keenan*, 285 N.C. App. 133, 138, 877 S.E.2d 97, 102 (2022) ("In other words, 'harassment, as defined in [N.C.G.S. §] 14-277.3A[,]' does not refer to the *whole* statute, as a reference to stalking would, but instead refers to an individual subpart dedicated to 'harassment' within a broader, section-wide definition of 'stalking.' " (alterations in original) (quoting N.C. Gen. Stat. § 50B-1(a)(2) (2021))). Under North Carolina General Statute Section 14-277.3A, harassment" is defined as

> [k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

N.C. Gen. Stat. § 14-277.3A(b)(2) (2023). Civil harassment under Section 14-277.3A(b)(2) is comprised of five elements: "(1) knowing conduct (2) directed at (3) a specific person (4) that torments, terrorizes, or terrifies, and (5) serves no legitimate purpose." *Durham Cnty. Dep't of Soc. Servs. v. Wallace*, 295 N.C. App. 440, 445, 907 S.E.2d 1, 6 (2024) (citation

omitted). Defendant does not address elements 1, 3, or 4, and thus, abandons any challenge based on those elements.

1. "Directed At"

Defendant contends the trial court made no findings of fact that he directed his communications to Plaintiff or that the record contains evidence to support such a finding.

The element "directed at," is not statutorily defined under North Carolina General Statute Section 14-277.3A. However, this Court has held that as used in North Carolina General Statute Section 14-277.3A, the phrase contemplates a defendant's communications to a third party to induce action against a victim. *See id.* at 447, 907 S.E.2d at 7.

In its 29 June 2023 Amended DVPO, a form order, the trial court made the finding that Defendant placed Plaintiff "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." Describing Defendant's conduct, the court found that

> [t]he Defendant has contacted numerous third parties, to include at least one realtor, Orange County NC Agencies, NC MLS, Orange County Tax Office, NC State Water Quality Department making complaints regarding [Plaintiff]'s property for the purpose of harassing the Plaintiff. Defendant has also placed fraudulent liens on Plaintiff's Property. The Plaintiff has suffered anxiety, sleeplessness, and suffered financial harm as a result.

In addition to Plaintiff's testimony presented at the hearing, Defendant's own allegations in his answer and counterclaims abundantly support the trial court's finding that his communications with various third parties were directed at Plaintiff. Defendant claimed he was trying to report "real estate fraud" by Plaintiff and to protect others from this alleged fraud. Defendant's answer to Plaintiff's Motion for Order to Show Cause, includes averments that he "contacted real estate agents, the Triangle MLS, and employees with the Orange County Environmental Health . . . to report the real estate fraud that the Plaintiff [wa]s trying to commit and protect the future buyer/victim of the real estate property from real estate fraud by the Plaintiff." During the 29 June 2023 hearing, Plaintiff testified that Defendant had made complaints about her property with the Orange County tax office and the North Carolina Water Quality Department.

The record supports the trial court's finding of fact describing Defendant's conduct and shows his intent to direct third parties to take

action regarding Plaintiff's property. This conduct comes within the meaning of "directed at" as contemplated under North Carolina General Statute Section 14-277.3A(b)(2). We overrule Defendant's contention that his communications to third parties were not directed at Plaintiff.

2. Legitimate Purpose

Defendant contends that there were no findings of fact or evidence that his emails to third parties served "no legitimate purpose." He argues that "the electronic mail [Defendant] sent to third parties was consistent in that it was expressing concern for inadequacy of the properties that [Plaintiff] was attempting to sell."

"Whether conduct served a legitimate purpose is a factual inquiry." *Bunting*, 266 N.C. App. at 250, 832 S.E.2d at 188 (citation omitted).

In his 12 December 2022 answer to Plaintiff's complaint and motion for DVPO, Defendant stated that "[i]f the Plaintiff would return to the Defendant his personal property, his 20% share of the $2,000,000 joint residence as agreed, his other investments in the joint residence, her credit card charges, rent and damages to his truck he would never communicate with her again."

In his answer to Plaintiff's Motion for Order to Show Cause alleging that Defendant had violated the trial court's 23 March 2023 DVPO Consent Order, Defendant pointed out that Plaintiff did not allege he had any contact with her. Moreover, he declared that his communications to "Plaintiff's real estate agents, the Triangle MLS, and employees with the Orange County Environmental Health" were not prohibited. Defendant contended that he had acted to prevent the following harms due to Plaintiff's conduct:

> 18. The Plaintiff is attempting to sell the former joint residence without properly disclosing all of the major issues with the property including the fact that she illegally constructed apartments without any building permits and overloaded the septic system.
>
> 19. The only purpose the Defendant contacted the real estate agents, the Triangle MLS, and employees with the Orange County Environmental Health is to report the real estate fraud that the Plaintiff is trying to commit and protect the future buyer/victim of the real estate property from real estate fraud by the Plaintiff.

Plaintiff testified that her realtor terminated their sales contract after Defendant's communication. Also, when Defendant copied her on

complaints, he filed with the Raleigh Department of Water Quality about her septic system and the Orange County building inspector about unpermitted apartments, he included commentary such as, "You are going to get in trouble. You are going to – you are going to jail for what you did."

Defendant's own allegations also support the trial court's finding of his purpose to harass Plaintiff. In addition to allegations regarding the property in Orange County, Defendant's many allegations against Plaintiff include that she "is a mentally unstable and dangerous criminal"; that she "intentionally burned down her own house" to profit from the insurance proceeds; that she "assaulted the Defendant's minor child"; that she "was very likely involved in either or both her husband's and/or ex-husband's deaths"; that Plaintiff and her family members "are involved in illegal drugs whether dealing, manufacturing, possessing, and/or abusing"; and so on, for several more pages. Defendant neither appeared before the trial court nor presented any witness with evidence to support his contentions.

The record supports the trial court's finding of fact that Defendant acted "for the purpose of harassing the Plaintiff." *See Keenan*, 285 N.C. App. at 140, 877 S.E.2d at 103 ("Whatever persuasive value [the] Defendant's characterization of the events may have—that his actions served [a] legitimate purpose . . . —they do not establish that his actions were somehow legitimate as a matter of law or negate competing interpretations of his conduct. Indeed, the ability to torment a person while ostensibly targeting a nearby object makes conduct of this type especially appealing to a passive-aggressive harasser, producing the intended effect while maintaining deniability. This very phenomenon underscores the importance of the factfinder's credibility determination . . . . [W]e will not undermine that determination by speculating over a cold Record."). We will not substitute the trial court's determination for one based on this cold record, and we overrule Defendant's contention regarding the legitimacy of his conduct.

3. Fear of Continued Harassment

Defendant contends that there is no evidence or finding of fact that he placed Plaintiff in fear of continued harassment inflicting substantial emotional distress.

Again, Defendant did not testify or present any evidence, and Plaintiff's evidence clearly demonstrated her fear of continued harassment. Plaintiff testified that Defendant had "been contacting agencies, complaining of behavior or property that's not his" since 2018 on "hundreds" of occasions. The record reflects multiple instances in which

Defendant tried to instigate an investigation of Plaintiff's property by third parties—governmental agencies or realtors—with the intent to make Plaintiff pay substantial repair costs, incur legal liability, or hamper Plaintiff's attempt to sell the property.

Overall, the record shows Plaintiff owned the home in Orange County where the parties lived while they were together, she later decided to sell the home, and Defendant wanted to force her to pay him a substantial portion of the value of the property, even if he had no legally enforceable claim against her. Defendant's email to Plaintiff's real estate agent, dated 13 October 2022, warned of defects to the property structures that "probably exceed well over $100,000; possibl[y] more than $200,000" to repair. Plaintiff testified that Defendant contacted the Orange County building inspector on 13 October 2022 alleging that Plaintiff had constructed apartments on her property without a permit and then contacted the Raleigh Department of Water Quality on 19 October 2022 claiming her septic system was overburdened. Plaintiff testified that Defendant had filed a fraudulent lien against her property in Rockingham County in 2021 and another against her property in Hurdle Mills in 2022. Due to Defendant's conduct, Plaintiff suffers a "very bad anxiety problem now"; she had "started having panic attacks" and had trouble sleeping. Also, these reports had "extremely interfered with [her] financial well-being." She testified that although Defendant was not entitled to anything from the sale of her home, she had "tried to settle with him. I was willing to settle with him. I had a check cut out for him." But he told her, "Even if we settle, I'll never leave you alone. I will never leave you alone."

Defendant's actions against Plaintiff might be more succinctly described as extortion: he sought to obtain a portion of the value of the home from her by intimidation and harassment. The record supports the trial court's finding that Plaintiff has suffered anxiety and sleeplessness due to Defendant's continuing, harassing conduct. The findings support the conclusion that Defendant's conduct constitutes "harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress." N.C. Gen. Stat. § 50B-1(a)(2). Defendant's contention is overruled.

IV. Conclusion

The record and the trial court's findings of fact support the issuance of a DVPO under North Carolina General Statute Section 50B-1(a)(2). We affirm the trial court's 29 June 2024 Amended DVPO.

AFFIRMED.

Judges CARPENTER and THOMPSON concur.

IN RE C.S.

[297 N.C. App. 317 (2024)]

IN THE MATTER OF C.S.

No. COA24-46

Filed 31 December 2024

1. Appeal and Error—petition for certiorari—notice of appeal—timeliness—juvenile delinquency case

In an appeal from adjudication and disposition orders in a juvenile delinquency case, the juvenile's petition for a writ of certiorari was allowed—out of an abundance of caution and in the interest of justice—after the juvenile conceded that, because he filed written notice of appeal after the rulings were orally rendered in court but one day before the orders memorializing those rulings were entered, his notice of appeal may have been untimely under N.C.G.S. § 7B-2602 (requiring notice of appeals in delinquency cases to be given in open court "at the time of the hearing" or within 10 days "after" entry of the order appealed from).

2. Juveniles—delinquency—communicating threat of mass violence on educational property—true threat—sufficiency of evidence

In a juvenile delinquency case, where the juvenile complained about his school's spirit week by posting a message on social media saying "IMMA SHOOT UP [the school]," the trial court erred in denying the juvenile's motion to dismiss a petition alleging the offense of communicating a threat of mass violence on educational property (N.C.G.S. § 14-277.6), because the State failed to present substantial evidence that the juvenile's post constituted a "true threat." Instead, the evidence indicated that the juvenile's comment was merely a distasteful joke given: the explicit disclaimers on the post, in which the juvenile stated that he was only joking and that he did not own a gun; the context of the post (a complaint about spirit week lasting only three days instead of five); and the lack of evidence that any student or staff member felt threatened by or notified the school of the post.

3. Juveniles—delinquency—false report of mass violence on educational property—sufficiency of evidence

In a juvenile delinquency case, where the juvenile complained about his school's three-day (instead of five-day) spirit week by posting a message on social media saying "IMMA SHOOT UP [the school]," the trial court erred in denying the juvenile's motion to dismiss a petition alleging the offense of making a false report of mass

violence on educational property (N.C.G.S. § 14-277.5). First, the State failed to show that the juvenile made a "report," since the post was not directed to anyone in particular and there was no evidence that anyone outside of law enforcement or the social media platform had seen it. Additionally, because of the post's context and self-negating language, in which the juvenile stated that he was only joking and that he did not own a gun, the State failed to show that a reasonable person would construe the post as reporting a credible threat.

Appeal by juvenile from adjudication and disposition entered 12 September 2023 by Judge Steven A. Grossman in Cabarrus County District Court. Heard in the Court of Appeals 27 August 2024.

Attorney General Joshua H. Stein, by Deputy General Counsel Tiffany Y. Lucas, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for juvenile-appellant.

MURPHY, Judge.

In an abundance of caution, in order to solidify our jurisdiction in this matter, we allow Fabian's *Petition for Writ of Certiorari*.[1]

Before a juvenile may be adjudicated as delinquent for violating N.C.G.S. § 14-277.6, the State must demonstrate that the juvenile's communication constituted a true threat outside of the protection of the First Amendment. Under our true threats jurisprudence, a true threat is an objectively threatening statement communicated with subjective intent to threaten a listener or an identifiable group. Based on the surrounding context within which Fabian's alleged threat was communicated and the self-negating language contained within the alleged threat, the State failed to present substantial evidence that he communicated an objectively threatening statement. Thus, the State failed to present substantial evidence that Fabian communicated a true threat within the meaning of N.C.G.S. § 14-277.6.

Before a juvenile may be adjudicated as delinquent for violating N.C.G.S. § 14-277.5, the State must demonstrate that the juvenile's communication constituted a report of a threat. Here, the State failed to present substantial evidence that Fabian reported a threat to someone

1. We use a pseudonym to protect the juvenile's identity and for ease of reading.

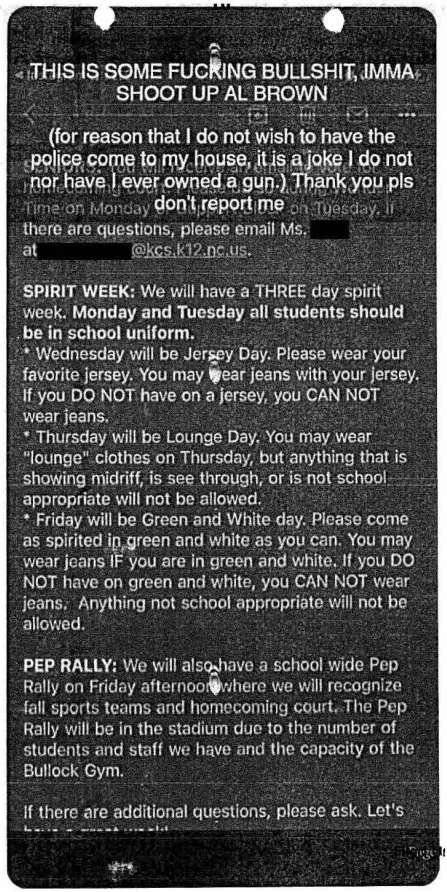
else and that Fabian's statement could be reasonably understood as a credible threat. Thus, the State failed to present substantial evidence that Fabian made a report of a threat within the meaning of N.C.G.S. § 14-277.5.

We reverse the trial court's order denying Fabian's motion to dismiss both petitions.

BACKGROUND

The record before us tends to reflect the following:

On 26 September 2022, fourteen-year-old Fabian posted a screenshot photo of an announcement made by his school, A.L. Brown, that the school would only have a three-day spirit week to the social media platform Snapchat with a superimposed message stating, in full:



> THIS IS SOME FUCKING BULLSHIT, IMMA SHOOT UP AL BROWN
>
> (for reason that I do not wish to have the police come to my house, it is a joke I do not nor have I ever owned a gun.) Thank you pls don't report me

The social media company Snapchat flagged the post as containing a threat of mass violence, and an SBI agent identified the IP address of the account that posted it as belonging to Fabian. Kannapolis Police Department received a tip from the SBI agent, informing them of the flagged post and IP address. Patrol officers made contact with Fabian and his father at their home, and they agreed to a meeting at the police department.

Fabian participated in an interview with the investigating officer and admitted that the post was made by his Snapchat account and that the superimposed text was his own, saying that it was a joke. Fabian stated that he made the post because he was disappointed that the spirit week would not be as fun as other schools' and because he had a dark sense of humor. He provided no other reasoning during the interview and continuously stated "that it was just a joke."

The State filed two juvenile petitions in connection with Fabian's Snapchat post, alleging that Fabian had committed the offenses of making a false report concerning mass violence on educational property in violation of N.C.G.S. § 14-277.5 and communicating a threat to commit an act of mass violence on educational property in violation of N.C.G.S. § 14-277.6.

On 12 September 2023, the trial court presided over a hearing on the two delinquency petitions. At the conclusion of the State's evidence, Fabian, through trial counsel, moved to dismiss both petitions for insufficient evidence, arguing that the State failed to demonstrate that Fabian's Snapchat post constituted a true threat outside of the First Amendment's protection or a false report concerning mass violence. The trial court denied these motions and rendered its order adjudicating Fabian delinquent on both petitions. The trial court proceeded with the disposition hearing and rendered its order placing Fabian on supervised probation for a term of 12 months. On the same day, Fabian filed a written notice of appeal, erroneously denoting the trial court's orders as "entered." On the next day, 13 September 2023, the trial court entered an order adjudicating Fabian delinquent on both charges and a disposition order that Fabian be placed on supervised probation for a term of 12 months. On 14 September 2023, appellate entries were filed.

ANALYSIS

On appeal from the adjudication and disposition orders, Fabian argues that the trial court erred in denying his motions to dismiss for insufficient evidence; that the trial court erred in allowing the detective to testify about Fabian's statements without first inquiring into the nature of the interrogation during which those statements were made; that the trial court committed plain error in admitting the detective's double-hearsay testimony; and that the trial court failed to make written findings of fact required by N.C.G.S. § 7B-2501(c) in its disposition order. Furthermore, Fabian argues that, even if he has failed to demonstrate that any individual alleged error caused sufficient prejudice to justify new proceedings, the cumulative effect of any combination of these errors was sufficiently prejudicial to warrant new proceedings.

A. PWC

[1] Pursuant to N.C.G.S. §§ 7B-2604 and 7B-2602, Fabian appeals as a matter of right from disposition after adjudication as a delinquent juvenile. *See* N.C.G.S. § 7B-2604(a) (2023); N.C.G.S. § 7B-2602 (2023). Pursuant to N.C.G.S. § 7B-2602, "[n]otice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order." N.C.G.S. § 7B-2602 (2023). Here, Fabian filed written notice of appeal one day prior to the order's entry, but after the order was rendered. Fabian concedes this notice may not be timely filed and seeks our review of the order in a contemporaneously filed *Petition for Writ of Certiorari*. In an abundance of caution and in the interest of justice, we allow Fabian's petition to review the orders.

B. Motion to Dismiss

On appeal from the trial court's order adjudicating Fabian delinquent for violations of N.C.G.S. §§ 14-277.5 and 14-277.6, Fabian argues that the trial court erred in denying his motion to dismiss both petitions for insufficient evidence. We review the denial of a motion to dismiss for insufficient evidence de novo, *In re T.T.E.*, 372 N.C. 413, 420 (2019), to determine

> whether there is substantial evidence of each essential element of the crime and that the [juvenile] is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every

> reasonable intendment and every reasonable inference to be drawn therefrom.

State v. Radomski, 294 N.C. App. 108, 116, 901 S.E.2d 908, 915, *disc. rev. denied*, 386 N.C. 557 (2024) (cleaned up).

1. N.C.G.S. § 14-277.6

[2] Pursuant to N.C.G.S. § 14-277.6,

> [a] person who, by any means of communication to any person or groups of persons, threatens to commit an act of mass violence on educational property or at a curricular or extracurricular activity sponsored by a school is guilty of a Class H felony.

N.C.G.S. § 14-277.6(a) (2023).

"This Court has specifically recognized the true threat analysis is applicable to this anti-threat statute to guard against the use of [N.C.G.S. §] 14-277.6 to infringe upon First Amendment rights." *In re D.R.F.*, 293 N.C. App. 544, 549 (2024) (citing *In re Z.P.*, 280 N.C. App. 442, 445 (2021)).

"*True* threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection." *Counterman v. Colorado*, 600 U.S. 66, 72 (2023) (emphasis added).

> The "true" in ["true threats"] distinguishes what is at issue from jests, "hyperbole," or other statements that when taken in context do not convey a real possibility that violence will follow (say, "I am going to kill you for showing up late"). True threats are "serious expressions" conveying that a speaker means to "commit an act of unlawful violence."

Id. at 74. "Our Supreme Court defines 'a true threat as an *objectively* threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group.' " *In re D.R.F.*, 293 N.C. App. at 549 (quoting *State v. Taylor*, 379 N.C. 589, 605 (2021)) (emphasis added).

> In order to determine whether a defendant's particular statements contain a true threat, a court must consider (1) the context in which the statement was made, (2) the nature of the language the defendant deployed, and (3) the reaction of the listeners upon hearing the statement, although no single factor is dispositive.

Id. (cleaned up).

This Court recently considered in *In re D.R.F.* whether the State presented substantial evidence to survive D.R.F.'s motion to dismiss the charge of communicating a threat to commit mass violence in violation of N.C.G.S. § 14-277.6. In holding that D.R.F.'s statement met the "objectively threatening" prong of a true threat, we noted that

> the State's evidence did provide evidence of the context in which [D.R.F.]'s alleged threat was made. The evidence showed a group of students was gathered waiting to leave their chorus class to go to lunch when [D.R.F.] made the statement that he was "going to shoot up the school." Two student-bystanders—Samantha and Gerald—testified consistent with each other that they heard the statement. Samantha was scared enough to report the threat right away. Gerald testified it made him sick to his stomach. He further testified [D.R.F.]'s tone sounded serious. Although Gerald did not see any reaction from other students, he did not hear any laughter. Indeed, to the contrary, a third bystander—Jillian—who did not hear [D.R.F.]'s statement, testified she heard another student respond that they would "bring the guns." When she told Samantha about that statement and learned of [D.R.F.]'s, she too was scared. Unlike the student-witnesses in *Z.P.*, who all heard the alleged threat to blow up the school and believed it to be a joke or were at least equivocal, the student-witnesses in this case did not testify they thought [D.R.F.] was joking or that his statement might have been perceived as a joke. To the contrary, the evidence was that [D.R.F.] sounded serious. The evidence further demonstrated [D.R.F.]'s comment elicited the further comment from a student offering to "bring the guns," which was overheard by the third student-witness and, itself, caused her alarm. Applying the factors set out in *Taylor*, the evidence tended to reflect that, in the context of a school setting, [D.R.F.] threatened to conduct a school shooting in a serious tone and students overhearing the threat took it seriously and were scared. The response to [D.R.F.]'s statement was not laughter but another student's offer to bring the guns. Thus, there was evidence that [D.R.F.]'s statement was objectively threatening.

Id. at 551 (internal citations omitted).

We contrasted the factual circumstances present in *In re D.R.F.* with those present in *In re Z.P.*, where

this Court analyzed whether a student's alleged threat "to blow up the school" objectively constituted a true threat for purposes of a delinquency petition alleging a threat of mass violence on educational property. This Court summarized the evidence in that case:

> Three of Sophie's classmates (Madison, Tyler, and Caleb) each testified to hearing Sophie threaten to blow up the school, though none of them testified that they thought she was serious when she made the threat.
>
> Madison testified that Sophie talked about bombing the school. Madison testified that she did not think Sophie was serious when making the statement, and Madison did not report the threat to any adult.
>
> Tyler testified that Sophie "said something about a bomb" and said "she was going to blow up the school." Tyler offered in a joking manner to help her build the bomb and stated that he "thought it was just a joke."
>
> Caleb also heard Sophie's threat about blowing up the school but was equivocal about his perception of Sophie's seriousness, stating that her statement was "either [ ] a joke or it could be serious."

Ultimately, this Court concluded the evidence there did not rise to sufficient objective evidence of a true threat. Instead, we determined:

> The State's evidence may create a suspicion that it would be objectively reasonable for Sophie's classmates to think Sophie was serious in making her threat. But we do not believe that the evidence is enough to create an inference to satisfy the State's burden. Indeed, none of Sophie's classmates who heard her statement believed that Sophie was serious, with most of them convinced that she was joking. She had made outlandish threats before, never carrying out any of them.

Id. at 550-51 (quoting *In re Z.P.*, 280 N.C. App. at 446). We distinguished between the State's evidence in the two cases, noting that,

> [u]nlike the student-witnesses in *Z.P.*, who all heard the alleged threat to blow up the school and believed it to be

> a joke or were at least equivocal, the student-witnesses in this case did not testify they thought [D.R.F.] was joking or that his statement might have been perceived as a joke. To the contrary, the evidence was that [D.R.F.] sounded serious. The evidence further demonstrated [D.R.F.]'s comment elicited the further comment from a student offering to "bring the guns," which was overheard by the third student-witness and, itself, caused her alarm. Applying the factors set out in *Taylor*, the evidence tended to reflect that, in the context of a school setting, [D.R.F.] threatened to conduct a school shooting in a serious tone and students overhearing the threat took it seriously and were scared. The response to [D.R.F.]'s statement was not laughter but another student's offer to bring the guns. Thus, there was evidence that [D.R.F.]'s statement was objectively threatening.

Id. at 551.

Here, Fabian's statement was communicated in a Snapchat post, rather than a message to any particular person, as text superimposed over a screenshot of the school's text-message announcement that its spirit *week* would be only three days, with students expected to "be in school uniforms" on Monday and Tuesday. Fabian referred to this screenshotted message by stating, "THIS IS SOME FUCKING BULLSHIT, IMMA SHOOT UP AL BROWN[.]" Within the very same superimposed text containing the alleged threat, Fabian explicitly disclaimed "it is a joke" and "I do not nor have I ever owned a gun." He asked that viewers not "report [him]" as he "[did] not wish to have the police come to [his] house[.]" Indeed, the investigating officer testified at trial that Fabian stated he made the post because "he was disgruntled with the [school's] [s]pirit [w]eek program[,]" which "didn't seem as fun to him as other schools' [s]pirit [w]eek[]"; and that, during the investigation, Fabian and his father each stated that Fabian "has a dark sense of humor."

At trial, the investigating officer indicated that he was made aware of the post through a tip from an SBI agent, who determined that a Snapchat account registered to Fabian made a Snapchat post that was "flagged" by the social media company as "a threat of mass violence." The record contains no evidence indicating how the social media company "flagged" the post as containing a threat and no evidence that any person outside of the social media company, SBI agent, and investigating officer was made aware of, reported, or feared the alleged threat. The investigating officer testified that he was not sure if the school was

made aware of the threat before it was brought to law enforcement's attention and, "outside of being aware and the heightened sense of being on the lookout," he was not aware of any requirement that the school "modify the schedule or make any changes to the school day as a result of [Fabian's] post."

On our de novo review, in the light most favorable to the State, the State did not present substantial evidence that Fabian's statement contained a "true threat" in violation of N.C.G.S. § 14-277.6. As in *In re Z.P.*, even if "[t]he State's evidence may create a suspicion that it would be objectively reasonable" to think Fabian was serious in making his threat, the evidence is not "enough to create an inference to satisfy the State's burden." *In re Z.P.*, 280 N.C. App. at 446. Under *Taylor*, both the context of Fabian's communication—as a post on social media indicating disapproval of the school's three-day spirit week—and the nature of his included negating language—his explicit statement that he did not then and had never before owned a gun to "shoot up" the school and the characterization of the alleged threat portion of the post as a "joke"—are factors which indicate that Fabian's communication was not "objectively threatening[,]" but a distasteful "joke." *See Counterman*, 600 U.S. at 74 ("The 'true' in ['true threats'] distinguishes what is at issue from jests, 'hyperbole,' or other statements that when taken in context do not convey a real possibility that violence will follow . . . ."). Indeed, as in *In re Z.P.*, the State presented no evidence that any student or staff member felt threatened or notified the school of the posting. The State's evidence is insufficient to persuade a rational juror that Fabian's Snapchat post was an objective "serious expression conveying that [Fabian] mean[t] to commit an act of unlawful violence." *Id.* (marks omitted); *accord In re Z.P.*, 280 N.C. App. at 446.

As we hold that the State failed to present substantial evidence that Fabian made an objectively threatening statement, we need not address whether Fabian "possesse[d] the subjective intent to threaten a listener or identifiable group[]" when he made the post to his Snapchat account and reverse the order adjudicating Fabian delinquent under N.C.G.S. § 14-277.6. *See Taylor*, 379 N.C. at 605.

2. N.C.G.S. § 14-277.5

[3] Pursuant to N.C.G.S. § 14-277.5,

> [a] person who, by any means of communication to any person or groups of persons, makes a report, knowing or having reason to know the report is false, that an act of mass violence is going to occur on educational property

> or at a curricular or extracurricular activity sponsored by a school, is guilty of a Class H felony.

N.C.G.S. § 14-277.5(b) (2023).

To survive a motion to dismiss the charge of making a false report concerning mass violence on educational property in violation of N.C.G.S. § 14-277.5, the State must demonstrate that Fabian was "making a report" when he posted to Snapchat. *See In re D.W.L.B.*, 267 N.C. App. 392, 394 (2019) (cleaned up) ("[W]e conclude that the petition . . . fails to allege a violation of [N.C.G.S. §] 14-277.5. Specifically, it fails to allege that [D.W.L.B.] was 'making a report' when he wrote the graffiti."). Here, the State failed to present substantial evidence that Fabian made a *report*; and, therefore, the trial court erred in denying Fabian's motion to dismiss the charge of making a false report concerning mass violence on educational property.

In *In re D.W.L.B.*, this Court determined that the petition charging D.W.L.B. insufficiently "allege[d] the elements of a violation of [N.C.G.S. §] 14-277.5[]" because "it fail[ed] to allege that [D.W.L.B.] was 'making a report' when he wrote" "BOMB INCOMING" with black magic marker on the wall of an elementary school boy's bathroom. *See id.* at 393-94. This Court held that the facts alleged in the petition did not constitute making a report in violation of N.C.G.S. § 14-277.5 "for two independent reasons." *Id.* at 394. First,

> the petition fail[ed] to allege that [D.W.L.B.] directed his "bomb incoming" graffiti message to anyone in particular or that anyone in particular actually saw it. Indeed, the essence of a [N.C.G.S. §] 14-277.5 violation is not so much uttering or writing a statement, but rather making a report of the statement to someone else. By way of illustration, if [D.W.L.B.] had written the "BOMB INCOMING" message and then immediately erased it, he would not be guilty of making a report as described in [N.C.G.S. §] 14-277.5. But the petition in this case, if held valid, would serve to initiate criminal proceedings for such behavior all the same.

Id. Second, the petition failed to allege a violation of N.C.G.S. § 14-277.5

> because it would not be reasonable for a person seeing the grafitti on the bathroom wall to construe said graffiti as *a report* of a credible threat. Indeed, a visitor to the bathroom seeing the grafitti would not know when the grafitti was written.

Id. at 394-95 (emphasis in original).

We vacated the adjudication and disposition orders against D.W.L.B., reasoning as follows:

> We note that our research has not revealed any case law or General Assembly official comment indicating what type of conduct constitutes the "making of a report" within the meaning of [N.C.G.S. §] 14-277.5. We construe statutory language to proscribe as a Class H felony under this Section only credible reports, that is, those that a reasonable person would believe could represent a threat. Again, by way of illustration, if a person calls in a threat that "Martians will be invading the school with heat rays this afternoon," no reasonable person would believe that she was in danger of imminent death by Martian invasion. Such a phone threat might be a crime, . . . but we do not believe that the General Assembly contemplated criminalizing such behavior as a Class H felony.
>
> In the same respect, we conclude that no one would reasonably believe that the words "BOMB INCOMING," written in a bathroom at some unknown time in the past and obviously by an elementary-school-aged student, represented a report of an actual threat that a bomb was incoming to the school. Such behavior may constitute a crime, but not a Class H felony.

Id. at 395 (emphasis omitted) (cleaned up).

Under similar reasoning, the State here failed to present substantial evidence that Fabian made a report when he posted the screenshot with superimposed text to his Snapchat account. First, the post itself was not "directed . . . to anyone in particular[.]" *Id.* at 394. Second, the record contains no indication that any person to whom the post was communicated actually saw Fabian's post. The record indicates only that the social media company's flagging system—and thereafter the law enforcement officers who were notified—saw Fabian's post. The investigating officer testified that he was not sure if the school was made aware of the threat before it was brought to law enforcement's attention. Furthermore, the investigating officer testified that law enforcement was not made aware of any statements about the post made directly to any individuals.

Alternatively, for the reasons explored more fully above, *see supra Part B.1.*, it would not be reasonable for a person seeing the Snapchat post to construe said post as a report of a credible threat, particularly

due to its self-negating nature and the context in which it was communicated. *See id.* at 394-95.

On our de novo review, in the light most favorable to the State, the State failed to present substantial evidence that Fabian made a *report* within the meaning of N.C.G.S. § 14-277.5, as the State failed to present evidence that Fabian directed the post to anyone in particular, that anyone unrelated to the investigation saw the post, or that the post contained a credible threat. We need not reach Fabian's remaining arguments, as they are now moot.

CONCLUSION

The trial court erred in denying Fabian's motion to dismiss the petitions alleging offenses of communicating a threat to commit mass violence on educational property and making a false report concerning mass violence on educational property for insufficient evidence.

REVERSED.

Judge ZACHARY concurs.

Judge GORE concurs in result only.

IN THE MATTER OF THE ESTATE OF
JOHNATHAN MATTHEW BOZEMAN, DECEASED

No. COA24-322

Filed 31 December 2024

Husband and Wife—marital abandonment—intestate succession rights—burden of proof not met—order barring inheritance reversed

In an estate proceeding, the mother of the deceased, who filed a motion to bar decedent's wife from inheriting based on abandonment (pursuant to N.C.G.S. § 31A-1(a)(3)), failed to meet her burden of showing that the wife abandoned decedent while he was alive without his consent, without an intent to renew the marital relationship, or without justification. The fact that the couple had never established a marital home—because the wife lived in Florida while the deceased lived in North Carolina—would not have precluded a determination of abandonment; however, there was evidence that the lack of visitation by the wife and communication between the spouses was due to the deceased's cruel behavior and relapse of substance abuse and that he was aware of how his behavior affected his wife. Further, several of the trial court's findings were mere recitations of evidence and did not constitute true findings regarding the couple's living situation or the circumstances as they existed at the time decedent died. Therefore, the trial court's order barring the wife from inheriting was reversed and the matter was remanded for further proceedings, including reinstating the wife's eligibility to inherit from the estate.

Judge THOMPSON concurring in result only.

Appeal by Respondent Sage C. Huddleston from order entered 16 November 2024 by Judge Joshua W. Willey in Brunswick County Superior Court. Heard in the Court of Appeals 25 September 2024.

Law Office of Jason R. Page, PLLC, by Jason R. Page, for respondent-appellant.

Ward and Smith, P.A., by Jordan M. Spanner and Mary V. Cavanagh, for petitioner-appellee.

DILLON, Chief Judge.

Johnathan Matthew Bozeman died intestate in 2022. He was survived by his mother, Petitioner Pamela Tompkins Boyd ("Mother"), and his wife, Respondent Sage C. Huddleston ("Wife").

Mother filed a motion in Mr. Bozeman's Estate proceeding pursuant to N.C.G.S. § 31A-1(a)(3) for an order declaring that Wife be barred from inheriting from her husband's Estate, alleging that Wife had abandoned him prior to his death.

After a hearing on the matter, the trial court entered an order barring Wife from inheriting from the Estate of her deceased husband. Wife appeals.

I. Introduction

The issue on appeal is whether the trial court properly determined that Wife was barred from inheriting from her deceased husband, pursuant to N.C.G.S. § 31A-1(a)(3), *based on abandonment*. This statute provides that a surviving spouse loses her rights of intestate succession in her deceased spouse's estate if two things are shown; namely, that she "[1] willfully and without just cause abandons and refuses to live with the other spouse and [2] is not living with the other spouse at the time of such spouse's death[.]" N.C.G.S. § 31A-1(a)(3). *See also Locust v. Pitt Cnty. Mem'l Hosp., Inc.*, 358 N.C. 113, 118 (2004) (recognizing that both conditions must be shown for Section 31A-1 to apply).

Wife concedes that she and Mr. Bozeman were living apart at the time of Mr. Bozeman's death. Her only arguments concern the first element: whether the trial court's findings support its conclusion that she abandoned Mr. Bozeman.

We review (1) whether the trial court's challenged findings are supported by the evidence and (2) whether the unchallenged findings and the challenged findings supported by the evidence support its conclusion that Wife had abandoned Mr. Bozeman. *See*, *e.g.*, *In re Est. of Whitaker*, 179 N.C. App. 375, 382 (2006).

In assessing whether the findings of the trial court support abandonment, we review those findings, which essentially show as follows:

Wife lives in Florida and is the "estranged wife" of Mr. Bozeman (up to his death). Mr. Bozeman, at all times relevant to our analysis, lived in North Carolina.

From 1999 to 2000, almost two decades prior to their marriage, Wife and Mr. Bozeman had cohabited in a romantic relationship. At that time,

Wife became aware of Mr. Bozeman's substance abuse problem, which included periods of sobriety and periods of relapse.

In 2018, they married and honeymooned for approximately one month in Europe. Upon their return to the United States, Mr. Bozeman continued to live in North Carolina, and Wife continued to live in Florida, "at least in part so that she could care for her nephew." She "visited" Mr. Bozeman on some weekends. Mr. Bozeman, however, never visited Wife in Florida, as he had no valid driver's license. Wife had a job which did not prevent her from living in North Carolina, as she could and did work remotely in her job. They never established a marital home.

During the marriage, Mr. Bozeman continued to struggle with substance abuse, experiencing periods of relapse, of which Wife was aware.

In July 2019, Wife stopped visiting Mr. Bozeman; and Mother "became aware [ ] that the marriage" between Mr. Bozeman and Wife "was ending based on conversations" Mother had with each of them. They never saw each other again. In any event, that same month (July 2019), Mr. Bozeman began sending Wife angry emails. However, in April 2020, he sent her an email apologizing for his conduct, though acknowledging that their marriage was coming to an end. His April 2020 email to Wife stated:

> I really am sorry things ended up this way. More importantly I'm sorry for all the mean things that I said to you in the past. I realize now that I was hurting real bad and I was only trying to make you hurt as well. Things are really slow for me right now but I would like you to know that I intend to pay you back for Europe. I hope you find some form of happiness and I'm sorry for any sadness that I've caused you.

Wife and Mr. Bozeman never divorced. They remained husband and wife for the remainder of Mr. Bozeman's life. (Though not expressly found by the trial court, the record shows that Mr. Bozeman died in January 2022. There was evidence from both Wife and Mother that Wife and Mr. Bozeman continued to communicate. Mother testified that she was aware that Wife and Mr. Bozeman spoke on at least four occasions after July 2019. Wife testified that she and Mr. Bozeman spoke on several occasions up through the latter part of 2021, including making plans to meet up in Las Vegas in late 2021, but that Mr. Bozeman never showed and then died a few months later from an overdose.)

After Mr. Bozeman's death, Wife had "lengthy conversations with a cousin of Mr. Bozeman in which she "acknowledged that she had no

contact with [Mr. Bozeman], that the marital relationship had ended, and that she was living with someone else." "Based on those conversations," Mother "believed that [Wife] was in a romantic relationship with someone else." Wife admitted to Mother that "she was in a romantic relationship with someone else after July 2019." (She testified that she had roommates during this period but no live-in paramour.)

We note that Wife challenges several findings, contending that they are not actually findings, but rather mere recitations of evidence. *See Harrison v. Gemma Power Sys., LLC*, 369 N.C. 572, 583 (2017) (holding that a trial court "fails to adequately address the necessary issue" where the finding "contains a mere recitation of the evidence rather than true findings"). We agree with many of Wife's contentions. For instance, the trial court found that *Mother believed* that Wife was in a romantic relationship and that after Mr. Bozeman's death *Wife stated to Mother and to Mr. Bozeman's cousin* that she was living with someone else and in a romantic relationship with someone else. The trial court never actually found that Wife was, indeed, in a romantic relationship with someone else prior to Mr. Bozeman's death. (We note there was conflicting evidence on this point, as Wife denied it to be the case.)

Further, the trial court made no findings regarding Mr. Bozeman's condition in 2020. Rather, the trial court found that Mr. Bozeman had a housemate in 2020 and that *this housemate stated* that he never observed any drug use, or psychotic or violent behavior by Mr. Bozeman while he was living there and that *this roommate never observed* anything to indicate that it would not be safe for Wife to live with Mr. Bozeman. Again, however, the trial court failed to make a finding on the key factual issue: It never found whether it actually would have been safe for Wife to live with Mr. Bozeman during this time.

Wife also challenges on appeal the trial court's characterization of her being the "estranged" wife of Mr. Bozeman. Wife cites to evidence that the trial court's characterization can mean that Wife was separated from and not having any real contact with Mr. Bozeman for a period of time before his death. And there is evidence showing that Wife and Mr. Bozeman never saw or spoke with each other for the two years or so leading up to his death.

II. Analysis

Our Supreme Court has defined marital abandonment as when a spouse "brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it." *Panhorst v. Panhorst*, 277 N.C. 664, 671 (1971). That Court has instructed

that whether the surviving spouse had *the intent* to abandon her spouse is a finding of fact. *See Pratt v. Bishop*, 257 N.C. 486, 501 (1962) ("Willful intent is an integral part of abandonment[,] and this is a question of fact to be determined from the evidence."). However, that Court has also instructed that whether abandonment has actually occurred based on findings is a conclusion of law. *See In re Est. of Lunsford*, 359 N.C. 382, 387–88 (2005).

Also, the elements of abandonment must be based on the conditions as they existed *at the time of Mr. Bozeman's death*. *See Locust*, 358 N.C. at 118 (stating that "the determination of spousal exclusion under N.C.G.S. § 31A-1 . . . [is] made at the time of decedent's death"). Further, the burden is on the party asserting that an abandonment has occurred to prove each and every element of abandonment. *See*, *e.g.*, *Murray v. Murray*, 296 N.C. 405, 408 (1979) (noting the burden is on the party asserting abandonment in context of alimony); *In re A.L.L.*, 376 N.C. 99, 110 (2020) (noting the burden is on the party asserting abandonment in the context of termination of parental rights). Thus, the burden is on Mother to prove each element of abandonment.

We now consider Wife's arguments, in which she contends that the findings and the uncontradicted evidence do not support the trial court's conclusion that Wife abandoned Mr. Bozeman.

A. "Brings Cohabitation to an End Without Justification"

Wife argues that it is impossible for abandonment to occur where she never actually lived with Mr. Bozeman, contending that she could not have brought her cohabitation with Mr. Bozeman "to an end" if they never actually cohabitated in the first place. We disagree.

Our Supreme Court has defined "cohabitation" as the "dwelling together continuously and habitually" and the "voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people." *Bird v. Bird*, 363 N.C. 774, 779–80 (2010).

It is true that Wife and Mr. Bozeman never "dwelled" in the same marital home. But the evidence and findings of the trial court do show that they spent a month together in Europe and then, for a period, had an arrangement where they spent many weekends together at Mr. Bozeman's North Carolina home. The trial court also found that Wife registered to vote and registered her vehicle in North Carolina for a period of time during the marriage.

However, even assuming that Wife never "cohabited" with Mr. Bozeman, we conclude that there is no requirement that spouses have

previously established a marital home as part of showing that one spouse has abandoned the other spouse. It is true that our Supreme Court in *Panhorst* and our courts in other cases have suggested "abandonment" to include *the bringing cohabitation to an end* by the abandoning spouse. But *Panhorst* involved a situation where the spouses at one time shared a marital home. *See* 227 N.C. at 666. Neither our Supreme Court nor our Court has ever held that a spouse who has never actually moved in with her spouse cannot abandon that spouse for purposes of being disqualified from inheriting.

To be sure, there are marriages where the spouses choose to live in separate residences but, otherwise, enjoy the benefits and assume the duties of a marriage. And there may be instances where a person cuts off communication with her spouse as they return from their honeymoon before establishing a marital home. In such situations, if one spouse chooses to end contact with the other spouse without the consent of the other spouse, without any justification, and without any intent on renewing the relationship, and *if* the abandoned spouse then dies, it would not be error for a trial court to order that the abandoning spouse be disqualified from inheriting from her abandoned spouse under Section 31A-1.

B. "Without the Consent of the Other Spouse"

Wife argues that the trial court's order is deficient in determining whether the paucity of contact between her and Mr. Bozeman after July 2019 was without Mr. Bozeman's consent. We agree.

The trial court found that Wife never visited Mr. Bozeman in North Carolina. However, there was evidence that she was willing to have him visit and even live with her in Florida if he became sober. And there was evidence that they had planned to see each other in Las Vegas shortly before his death but that it was him that did not show, due to a relapse.

It may be that Wife refused to live with Mr. Bozeman in North Carolina, but the trial court never made any finding regarding Mr. Bozeman's role in not traveling to see Wife in Florida or to remain sober and move to Florida. Further, the trial court never made any finding regarding Mr. Bozeman's statement in his April 2020 statement that he believed the marriage had ended.

And, here, there is no finding that, just prior to Mr. Bozeman's death, they were living apart without Mr. Bozeman's consent. Rather, their last contact mentioned by the trial court was Mr. Bozeman's April 2020 email in which he apologized for hurting her and "hope[d] [she would] find some form of happiness." This email shows his consent for them to live

apart as they sought to end their marriage. However, the marriage did not end before Mr. Bozeman died.

To be sure, Mr. Bozeman cannot be said to have consented if it was found that the separation between him and Wife was based on Wife's misconduct (leaving without justification) and that he later merely *acquiesced* to the situation. *See Sauls v. Sauls*, 288 N.C. 387, 390 (1975).

C. "Without Intent of Renewing the Marital Relationship"

Wife argues that the trial court's order is deficient regarding the "intent not to renew" element of abandonment. We agree.

Here, there is no finding that *at the time of Mr. Bozeman's death* Wife had "no intent" to continue seeking reconciliation in the marriage. The Court found that Mr. Bozeman stated in his April 2020 email that he believed the marriage to be *ending*. However, there was evidence that Mr. Bozeman sent this email during a period of sobriety and that, thereafter, they reopened communications in which they each indicated a desire to reconcile. Also, neither ever filed for divorce.

D. "Without Justification"

Finally, Wife argues that the trial court's order is deficient in determining whether *she* ended contact with Mr. Bozeman or otherwise did so without justification. We agree. Further, for the reasoning below, we conclude that Mother failed to meet her burden of producing evidence that Wife's decision to stop visiting Mr. Bozeman in North Carolina after July 2019 was without justification.

Presuming that Wife unilaterally decided to separate from Mr. Bozeman, it is not Wife's burden to show *as a defense* that she was justified in doing so. Rather, "without justification" is an affirmative element of abandonment. Accordingly, it is Mother's burden to show, not only that Wife left Mr. Bozeman but that she did so without justification. *See, e.g.*, *Gilmartin v. Gilmartin*, 263 N.C. App. 104, 110–11 (2018) (noting that the moving party must plead that the other party left "without justification" to state a claim for abandonment); *Vandiver v. Vandiver*, 50 N.C. App. 319, 327 (1981) (holding that the wife asserting abandonment must prove her husband's bad acts *and that* she had not provoked husband's behavior).[1]

1. In its order's "conclusion of law" section, the trial court determined that Wife "refused to live with Mr. Bozeman." This determination, however, is a finding of fact; and we, therefore, treat that determination as such. *See In re J.S.*, 374 N.C. 811, 818 (2020) ("We are obliged to apply the appropriate standard of review to a finding of fact or conclusion of law, regardless of the label which it is given by the trial court.").

Wife contends that she was justified in living apart from Mr. Bozeman, contending that he treated her cruelly due to his drug addiction. Indeed, our Supreme Court has held that "[w]hen the husband, by cruel treatment, renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, not hers." *Eggleston v. Eggleston*, 228 N.C. 668, 679 (1948). Again, though, it is not incumbent on Wife to show that Mr. Bozeman abandoned her. Rather, the only issue here is whether she abandoned Mr. Bozeman. And it may be that no abandonment occurred.

In her brief, Mother contends that Wife was *not* justified because Wife knew of Mr. Bozeman's on-again, off-again drug use when she married him and that her "plan of leaving him when he was using drugs and, purportedly, returning when he was sober" did not justify her "abandonment."

However, the only evidence presented at the hearing showing the reason Wife and Mr. Bozeman stopped seeing each other in July 2019 was from Wife, that the separation was due to Mr. Bozeman's cruel behavior towards her during his relapses. (Indeed, the trial court found that Mr. Bozeman had periods of relapse during the marriage prior to July 2019.) For instance, she testified that she was subjected to physical abuse when Mr. Bozeman would mix Xanax and alcohol which, if true, would exacerbate the impact of Mr. Bozeman's substance abuse and addiction. A victim of domestic violence does not commit abandonment when refusing to live with his or her assailant. Acquiescence and attempts to improve the conditions throughout the marriage do not constitute consent to future abuse and would not make her later decision to leave or her refusal to rejoin the marriage unjustified. Her testimony about Mr. Bozeman's threatening behavior was bolstered by some of Mr. Bozeman's post-July 2019 emails to her in which he threatened her, as described below.

For her part, Mother offered no evidence to show that the July 2019 separation was the unilateral choice of Wife, done "without justification." She offered no evidence showing that Mr. Bozeman had not been threatening up to July 2019. Rather, in her testimony, Mother testified that she did not know why Wife and Mr. Bozeman stopped seeing each other as of July 2019. She testified that she spoke with both Wife and Mr. Bozeman around the time of the separation but that she never asked them what exactly happened. Again, it is not necessary for Wife to prevail that the trial court believe that Mr. Bozeman was a threat to her up to July 2019. Rather, it is sufficient if Mother failed to present any evidence showing that Mr. Bozeman's bad conduct was not the reason for the separation.

There was evidence that Wife, at some later point, was in a romantic relationship with someone else (which she denies). But there is no evidence that she was in such a relationship during the marriage in or prior to July 2019. Rather, Mother testified that she believed the relationship did not start until "after" July 2019, and probably not until 2020 or 2021. In sum, the only evidence as to the reasons for the July 2019 separation came from Wife, that the separation was due to Mr. Bozeman's relapse and ill treatment of Wife.

Evidence shows that in the months following July 2019, Mr. Bozeman sent a series of cruel emails to Wife, sometimes followed by apologetic emails, before his final apology in his April 2020 email (reproduced above in Section I). In some of the emails, he physically threatened Wife, stating in one email that "when you see me next[,] it will be your last" and, in another, that "[y]ou might get what you're after! Burning down the house." The evidence further demonstrated Mr. Bozeman's ups and downs during this time as he struggled with his addiction in 2019. For example, on 2 October 2019, he sent a series of cruel emails to Wife. But three days later, on 5 October 2019, he sent an email stating that he loved her, thought she was smart, and would have loved her for the rest of their lives. He admitted in his April 2020 email that he had sent the prior cruel/threatening emails "to make [her] hurt as well." There was no evidence offered at the hearing that after April 2020 Mr. Bozeman ever sought to reconcile with Wife which was rebuffed by Wife.

In sum, assuming the separation of Wife and Mr. Bozeman was unilaterally Wife's decision, there was no evidence showing that the separation was without justification.[2] There is no evidence showing that Wife engaged in an abandonment of Mr. Bozeman after April 2020. There is no evidence that he ever sought to go see Wife or that he was rebuffed in efforts to get back with her. Accordingly, Wife was entitled to a ruling declaring her eligible to take under her deceased husband's estate, as Mother failed to present evidence showing all the elements of abandonment.

---

2. We note the trial court's conclusion that Wife "willfully and without just cause abandoned" Mr. Bozeman. Certainly, whether Wife without justification ended contact with Mr. Bozeman is a finding of fact. However, we treat the determination in the order as a conclusion, as whether an abandonment has occurred is a question of law. It is unclear from the order what the trial court meant by including the phrase "without just cause" in concluding that Wife "abandoned" Mr. Bozeman. There is no finding that Wife refused to live with Mr. Bozeman or otherwise see Mr. Bozeman without just cause or justification. And there is no finding that she refused to maintain communications with him, as there was evidence that they continued to communicate well during his periods of sobriety.

III. Conclusion

Mother failed to present evidence to meet her burden of showing that Wife abandoned Mr. Bozeman. Accordingly, we reverse the order of the trial court and remand for further proceedings consistent with this opinion, including that Wife be declared eligible to inherit as Mr. Bozeman's widow.

REVERSED AND REMANDED.

Judge MURPHY concurs.

Judge THOMPSON concurs in result only.

IN THE MATTER OF H.R.P.

No. COA24-494

Filed 31 December 2024

1. Appeal and Error—defective notice of appeal—incorrect statutory authority—intent to appeal fairly inferred—appellee not misled

In a private termination of parental rights matter, even if respondent-parents' notices of appeal were jurisdictionally defective pursuant to Appellate Rule 3.1 for citing the wrong statutory authority, dismissal of the appeals was not required where respondents' intent to appeal could be fairly inferred from the notices—including by appealing to the correct appellate court and listing the order from which appeal was taken—and where petitioner-appellee's full participation in the appeal indicated that she had not been misled by the mistake.

2. Termination of Parental Rights—neglect—failure to make reasonable progress—sufficiency of evidence and findings

In a termination of parental rights proceeding initiated by a child's aunt, the trial court's conclusions that the parents' rights should be terminated on the grounds of neglect and failure to make reasonable progress were supported by sufficient findings of fact regarding the parents' history of substance abuse, failure to attend visitation, complete lack of a relationship with their son, and failure to complete portions of their case plan. Although the appellate

court disregarded three challenged findings as being unsupported by competent evidence, the remaining challenged findings—along with unchallenged findings that were binding on appeal—were supported by clear, cogent, and convincing evidence.

Judge THOMPSON dissenting.

Appeal by respondent-parents from order entered 19 February 2024 by Judge Beth Dixon in Rowan County District Court. Heard in the Court of Appeals 6 November 2024.

Martin, Van Hoy & Raisbeck, LLP, by Cindy Ellis, for petitioner-appellee.

BJK Legal, by Benjamin J. Kull, for respondent-appellant father.

Patricia M. Propheter, for respondent-appellant mother.

FLOOD, Judge.

Respondent-Parents appeal from the trial court's order terminating their parental right as to H.R.P. ("Harry").[1] On appeal, Respondent-Parents argue the trial court erred because (A) several findings of fact are not supported by clear, cogent, and convincing evidence, and (B) grounds do not exist to terminate their parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) or (2). Upon review, we conclude the trial court's findings of fact are supported by competent evidence, and while only one ground is necessary to support the termination of parental rights, the findings of fact support the conclusion that grounds exist to terminate Respondent-Parents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) or (2). Accordingly, we affirm the trial court's order.

I. Factual and Procedural Background

Harry was born on 4 August 2020 to Respondent-Parents. At the time of Harry's birth, Rowan County Department of Social Services ("DSS") received a report that Respondent-Mother tested positive for opiates, oxycodone, and marijuana, and that Harry tested positive for oxycodone, hydrocodone, hydromorphone, and THC. On 19 February 2021, DSS filed a juvenile petition, and that same day, obtained nonsecure custody

1. A pseudonym is used to protect the juvenile's identity, pursuant to N.C. R. App. P. 42(b).

of Harry. Following a hearing on 1 April 2021, the trial court entered an order (the "Adjudication Order") adjudicating Harry a neglected juvenile, finding, *inter alia*, Respondent-Parents had substance abuse issues, failed to participate in services offered by DSS, and failed to engage in visitation with Harry. Following another hearing on 5 August 2021, the trial court entered an order (the "Permanency Planning Order") as to Petitioner, who is Harry's paternal aunt, and her husband,[2] to be granted guardianship of Harry. The Permanency Planning Order provided, *inter alia*, for Harry to have supervised visitation with Respondent-Parents "for a minimum of once a month for two hours at the Visitation Station."

On 21 February 2023, Petitioner and her husband filed a petition to terminate Respondent-Parents' parental rights as to Harry (the "Petition"), alleging grounds to terminate their parental rights existed based on neglect, willful failure to make reasonable progress, and dependency, under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6). The Petition included, attached as Exhibit B, the Permanency Planning Order. This matter came on for hearing 3 August 2023 and 2 October 2023.

At the hearing, Petitioner testified that Respondent-Parents had never visited Harry at the Visitation Station. Petitioner also testified that Respondent-Mother had last visited Harry on 25 December 2021, Christmas day, when Respondent-Parents brought presents for Harry, and that Respondent-Parents "were high[,]were there for [ten] minutes[,] and then they left." Petitioner further testified that: Respondent-Father had occasional, short visits with Harry; Respondent-Mother does not communicate with Petitioner about Harry's well-being; and Respondent-Parents do not provide any support for Harry. The trial court, upon request by Petitioner, took judicial notice of the Adjudication Order.

After Petitioner presented evidence, Respondent-Parents both moved to dismiss the Petition for insufficient evidence of grounds to terminate their parental rights. The trial court allowed the motions as to N.C. Gen. Stat. § 7B-1111(a)(6), but denied the motions as to N.C. Gen. Stat. § 7B-1111(a)(1) and (2).[3]

---

2. Petitioner's husband, who was Harry's paternal biological uncle, passed away in 2023 during the pendency of this matter.

3. The trial court noted, as to N.C. Gen. Stat. § 7B-1111(a)(2), that "the child has been in the care for guardianship and out of the home for more than [twelve] months without anything happening, nothing else coming back into the court on a motion that no contact really at all with the guardian [occurred.]" The trial court further noted, as to N.C. Gen. Stat. § 7B-1111(a)(1), "that the fact that there's been no contact since December, or in at least over a year, that the ongoing no contact could support that continued neglect."

After moving to dismiss, Respondent-Parents both testified. Respondent- Father testified as to his limited visitation with Harry, and that he had last used illegal substances in 2020. Respondent-Mother testified that she "was going to" set up visitation at the Visitation Center, but "stopped trying" when she "was told" Petitioner would not b ring Harry, and that she had attempted to facilitate public visitation with Harry, but Petitioner had refused to meet in a public place. Respondent-Mother testified that she had last visited Harry "[p]robably early 2022, maybe late 2021." Respondent-Mother also testified that she was no longer using drugs and had completed thirty-seven or thirty-eight hours of a forty-hour substance abuse treatment class but was only missing the "exit exam." Finally, Respondent-Mother testified that she "was trying to get off of all drugs completely," as of March 2022, and that the last time she "touched anything" was 7 March 2022, when she stopped using illegal substances "[o]n [her] own."

Following the hearing, the trial court entered an order on 19 February 2024, finding that grounds existed to terminate Respondent-Parents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) and (2). The trial court made, in relevant part, the following findings of fact:

> 8. Respondent[-P]arents completed none of the court ordered services offered by [DSS].
>
> 9. Respondent[-P]arents have a history of substance abuse and domestic violence, for which neither of have sought treatment.
>
> 10. Respondent[-M]other testified that she "got herself clean on her own" during a period when she and [R]espondent[-F]ather were no longer in a relationship.
>
> . . . .
>
> 12. Respondent[-F]ather has never parented any of his children. All his children reside with [] Petitioner.
>
> 13. Respondent[-Mother] has never parented this minor child, her only child.
>
> 14. Respondent[-P]arents have no relationship with the minor child.
>
> 15. Respondent[-P]arents have not attempted to reach out to [] Petitioner.
>
> 16. [] Petitioner has had the same phone number since prior to the birth of the minor child and has never blocked either parent from calling or texting her.

> 17. Both [R]espondent[-P]arents testified to having maintained gainful employment but could not afford the cost of gasoline to exercise visitation with the minor child in a supervised setting.
>
> . . . .
>
> 19. Respondent[-F]ather never contacted the supervised visitation resource to complete orientation for his visits to begin.
>
> 20. Respondent[-M]other testified that she was planning to complete orientation but then stopped trying.
>
> 21. Respondent[-Mother] has made no attempt to visit the minor child in over a year.
>
> . . . .
>
> 23. No attempts have been made by [R]espondent[-Parents] to seek a relationship with the minor child.

Respondent-Parents both filed notices of appeal; Respondent-Mother cited to statutory authority under N.C. Gen. Stat. § 7B-1001(a)(4), and Respondent-Father cited to statutory authority under N.C. Gen. Stat. § 7B-1001(a1)(a).

II. Jurisdiction

[1] "Any party entitled to an appeal . . . may take appeal by filing notice of appeal with the clerk of superior court in the time and manner set out in" N.C. Gen. Stat. § 7B-1001(b) and (c) (2023). N.C. R. App. P. 3.1(b). "Compliance with the requirements for entry of notice of appeal is jurisdictional." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012). Failure to comply with the requirements of Rule 3.1(b) is, therefore, a jurisdictional defect requiring dismissal. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 193–94, 197, 657 S.E.2d 361, 362–63, 365 (2008) ("A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal.").

> [A] mistake in designating the judgment, [however,] or in designating the part appealed from if only a part is designated, 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.

Evans v. Evans, 169 N.C. App. 358, 363, 610 S.E.2d 264, 269 (2005) (citation omitted and emphasis in original); *see also In re W.K.*, 376

N.C. 269, 272, 852 S.E.2d 83, 87 n. 4 (2020) (reviewing the merits of the respondent-father's appeal where the parties, in part, "fully participated in the appeal," and the "[r]espondent-father's inclusion of the correct lower-court numbers and his characterization of the order at issue as terminating his parental rights ma[d]e sufficiently clear his intent to appeal the orders").

Here, Respondent-Parents each cited to incorrect statutory authority in their notices of appeal; Respondent-Mother cited to N.C. Gen. Stat. § 7B-1001(a)(4), which concerns appeals from orders that change the "legal custody of a juvenile[,]" and Respondent-Father cited to N.C. Gen. Stat. § 7B-1001(a1)(a), which was repealed on 1 July 2021, and when effective, permitted appeal from an order terminating a parent's rights directly to the North Carolina Supreme Court. *See* N.C. Gen. Stat. § 7B-1001(a)(4); N.C. Gen. Stat. § 7B-1001(a1) (repealed 2021). Respondent-Parents, however, both correctly appealed to the North Carolina Court of Appeals, and both notices of appeal correctly indicated the order terminating their parental rights, entered 19 February 2024.

Although Rule 3.1 does not specifically require citation to a statutory authority, *see* N.C. R. App. P. 3.1(b), even if Respondent-Parents' notices of appeal are jurisdictionally defective, the intent to appeal from the order to terminate Respondent-Parents' parental rights "can be *fairly inferred* from the notice[s,]" and Petitioner was not misled by the mistake, particularly because Petitioner has "fully participated in the appeal[.]" *See Evans*, 169 N.C. App. at 363, 610 S.E.2d at 269; *In re W.K.*, 376 N.C. at 272, 852 S.E.2d at 87 n. 4. Accordingly, Respondent-Parents' notices of appeal will not result in a "loss of the appeal[,]" and we therefore review Respondent-Parents' claims on the merits. *See Evans*, 169 N.C. App. at 363, 610 S.E.2d at 269; *see also In re W.K.*, 376 N.C. at 272, 852 S.E.2d at 87 n. 4.

III. Standard of Review

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (2004) (citation omitted). "A trial court's findings of fact are binding on appeal if supported by competent evidence. Unchallenged findings of fact are also binding on appeal." *Durham Hosiery Mill Ltd. v. Morris*, 217 N.C. App. 590, 592, 720 S.E.2d 426, 427 (2011). The trial court's "judgment will not be disturbed on appeal . . . even though the evidence might sustain findings to the contrary." *Markham v. Markham*, 53 N.C. App. 18, 22, 279 S.E.2d 905, 908 (1981). "[R]ecitations of the testimony of each

witness do not constitute findings of fact by the trial judge absent an indication concerning whether the trial court deemed the relevant portion of the testimony credible." *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (citation omitted) (cleaned up).

"Conclusions of law made by the trial court are reviewable de novo on appeal." *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022). "Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* at 64, 868 S.E.2d at 4 (citation omitted) (cleaned up).

IV. Analysis

[2] On appeal, Respondent-Parents argue the trial court erred because (A) several findings of fact are not supported by clear, cogent, and convincing evidence, and (B) grounds do not exist to terminate their parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) or (2). We address each argument, in turn.

A. Findings of Fact

Respondent-Parents first argue that several findings of fact are not supported by clear, cogent, and convincing evidence. Respondent-Father challenges Findings of Fact 8, 9, 10, 12, 15, 17, 20, and 23. Respondent-Mother challenges only Finding of Fact 7, which is a conclusion of law that we review de novo. *See In re K.J.M.*, 288 N.C. App. 332, 339, 886 S.E.2d 589, 595 (2023) ("As a general rule, the labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review because if the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion de novo." (citation omitted) (cleaned up)). Except for Findings of Fact 10, 17, and 20, which will be disregarded, we disagree that the challenged Findings of Fact are not supported by competent evidence.

First, we address Finding of Fact 8, that "Respondent[-P]arents completed none of the court ordered services offered by [DSS]"; there is competent Record evidence that Respondent-Father had not completed an "Adult Holistic Assessment[,]" and that Respondent-Parents had "not participated in any recommended services or treatment" prior to entry of the Permanency Planning Order. Respondent-Father presented no evidence he had completed any court ordered services offered by DSS since entry of the Permanency Planning Order. To the extent that Respondent-Mother testified that she completed thirty-seven or thirty-eight hours of a forty-hour substance abuse treatment class but was only missing the "exit exam[,]" such evidence further supports

Finding of Fact 8 that Respondent-Mother had not "completed" any of the court ordered services offered by DSS. Respondent-Mother did testify that she completed the parenting program and had a "certificate for it"; however, the certificate is not in the Record on appeal. *See* N.C. R. App. P. 9(a) ("In appeals from the trial division . . . review is solely upon the record on appeal."). Finding of Fact 8 is therefore supported by competent Record evidence, and is binding on appeal. *See Morris*, 217 N.C. App. at 592, 720 S.E.2d at 427.

Next, as to Finding of Fact 9, that "Respondent[-P]arents have a history of substance abuse and domestic violence, for which neither of have sought treatment[,]" competent Record evidence was presented to the trial court that Respondent-Parents both repeatedly used illegal substances, and that Respondent-Parents were under the influence of drugs when visiting Harry in 2021. When Harry was born, both Harry and Respondent-Mother tested positive for drugs. Although Respondent-Mother testified that "[she] was trying to get off of drugs completely" as of March 2022, and that the last time she "touched anything" was on 7 March 2022, when she stopped using substances "on [her] own[,]" such evidence does not demonstrate Respondent-Mother "sought treatment" for her substance abuse issues. As stated above, Respondent-Mother completed a substantial portion of her substance abuse treatment program, yet did not complete the program; furthermore, the Record indicates Respondent-Mother sought substance abuse treatment only "while DSS had legal custody of [Harry]." Finally, Respondent-Mother testified that she had not "received any professional substance abuse treatment" besides the classes she took.

To the extent Respondent-Parents testified that they no longer used illegal substances, and their testimonies contradict competent Record evidence of their substance abuse issues, the trial court's "judgment will not be disturbed on appeal . . . even though the evidence might sustain findings to the contrary." *See Markham*, 53 N.C. App. at 22, 279 S.E.2d at 908. While the Record does not demonstrate a history of domestic violence, there is competent Record evidence that Respondent-Parents had a history of substance abuse and did not seek treatment; the portion of Finding of Fact 9 concerning substance abuse is therefore binding on appeal. *See Morris*, 217 N.C. App. at 592, 720 S.E.2d at 427.

Next, as to Finding of Fact 15, that "Respondent[-P]arents have not attempted to reach out to [] Petitioner[,]" Petitioner testified that Respondent-Mother had not called or texted her, or communicated about Harry's well-being. Although competent Record evidence indicates Respondent-Father occasionally visited Harry, Petitioner testified

that Respondent-Father did not reach out to communicate about Harry's well-being. Again, to the extent that Respondent-Parents' testimonies conflict with Petitioner's testimony, such as Respondent-Mother's testimony that she repeatedly but unsuccessfully tried to communicate with Petitioner, the existence of contrary evidence is insufficient to overcome the trial court's judgment. *See Markham*, 53 N.C. App. at 22, 279 S.E.2d at 908. Additionally, Finding of Fact 16, that "Petitioner has had the same phone number since prior to the birth of the minor child and has never blocked either parent from calling or texting her[,]" is not challenged on appeal by Respondent-Parents, and is thus binding on appeal. *See Morris*, 217 N.C. App. at 592, 720 S.E.2d at 427. There is competent Record evidence that Respondent-Parents had not attempted to reach out to Petitioner, and Finding of Fact 15 is therefore binding on appeal. *See id.* at 592, 720 S.E.2d at 427.

As to challenged Findings of Fact 12 and 23—that "Respondent [-F]ather has never parented any of his children. All his children reside with Petitioner[,]" and "[n]o attempts have been made by[R]espondent [-Parents] to seek a relationship with the minor child"—Respondent-Father testified that he has two other children besides Harry who reside with Petitioner. Competent Record evidence was presented to the trial court that Respondent-Parents made "no attempt to maintain a bond with [Harry] through visitation[,]" and that Respondent-Father did not engage in services to reunify with his other children. Moreover, evidence was presented that Respondent-Parents failed to engage in regular visitation with Harry, and that Respondent-Father did not make himself available "to develop a visitation plan."

Although the Record indicates Respondent-Father occasionally visited Harry since 2021, again, the existence of contrary evidence is insufficient to overcome the trial court's judgment. *See Markham*, 53 N.C. App. at 22, 279 S.E.2d at 908. Further, Finding of Fact 14, that "Respondent[-P]arents have no relationship with the minor child[,]" suggests Respondent-Parents did not attempt to seek a relationship with Harry, and because Finding of Fact 14 is not challenged on appeal by Respondent-Parents, it is binding on appeal. *See Morris*, 217 N.C. App. at 592, 720 S.E.2d at 427. Finding of Facts 12 and 23 are, therefore, supported by competent Record evidence, and are binding on appeal. *See id.* at 592, 720 S.E.2d at 427.

As to challenged Findings of Fact 10, 17, and 20, they only recite Respondent-Parents' testimonies without an "indication concerning whether the trial court deemed the relevant portion of the testimony credible." *See In re A.E.*, 379 N.C. at 185, 864 S.E.2d at 495 (citation

omitted) (cleaned up). Because these Findings of Fact are mere recitations of testimony, they will be disregarded "in evaluating the validity of the trial court's termination order." *See id.* at 185, 864 S.E.2d at 495.

Accordingly, disregarding Findings of Fact 10, 17, and 20, the challenged Findings of Fact, along with the remaining unchallenged findings of fact, are supported by competent Record evidence, and are thus binding on appeal. *See Morris*, 217 N.C. App. at 592, 720 S.E.2d at 427.

B. Conclusions of Law

Respondent-Parents next argue the findings of fact do not support the trial court's conclusions of law that grounds exist to terminate Respondent-Parents' rights under N.C. Gen. Stat. § 7B-1111(a)(1) or (2). We disagree.

1. Grounds under N.C. Gen. Stat. § 7B-1111(a)(1)

Grounds exist to terminate parental rights when "[t]he parent has abused or neglected the juvenile." N.C. Gen. Stat. § 7B-1111(a)(1) (2023). "[W]hen a child has been separated from their parent for a long period of time, the petitioner must prove (1) prior neglect of the child by the parent and (2) a likelihood of future neglect of the child by the parent." *In re D.W.P.*, 373 N.C. 327, 339, 838 S.E.2d 396, 405 (2020). The trial court may consider a prior adjudication of neglect in a proceeding to terminate parental rights, but "the trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re A.E.*, 379 N.C. at 200, 864 S.E.2d at 505 (citation omitted) (cleaned up). 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).

"A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re R.L.R.*, 381 N.C. 863, 869, 874 S.E.2d 579, 586 (2022) (citation omitted). "[A] parent's compliance with his or her case plan[, however,] does not preclude a finding of neglect." *Id.* at 869, 874 S.E.2d at 586 (citation omitted). Further, "[n]eglect . . . can include the total failure to provide love, support, affection, and personal contact." *In re D.J.D.*, 171 N.C. App. 230, 239–40, 615 S.E.2d 26, 33 (2005).

In *In re M.Y.P.*, the trial court terminated the respondent-father's rights to the minor child pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), concluding "that there was a high probability of repetition of neglect should [the minor child] be returned to [the respondent-father's] care and

custody." 378 N.C. 667, 677–78, 862 S.E.2d 773, 781 (2021). On appeal, the North Carolina Supreme Court found that, where the respondent-father, in part, failed to complete his case plan, failed to consistently visit the minor child, and failed to address substance abuse issues, grounds existed to terminate the respondent-father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). *Id.* at 677–78, 862 S.E.2d at 781.

Here, the findings of fact demonstrate there is a likelihood of future neglect by both Respondent-Parents. First, Respondent-Parents do not challenge the trial court's Findings of Fact 19 and 21, which describe Respondent-Parents' failures to visit Harry; these Findings of Fact are therefore binding on appeal. *See Morris*, 217 N.C. App. at 592, 720 S.E.2d at 427. Next, just as the respondent-father in *In re M.Y.P.* failed to complete his case plan, failed to address substance abuse issues, and failed to consistently visit the minor child, so here do the findings of fact demonstrate Respondent-Parents failed to complete the court ordered services offered by DSS, did not seek treatment for their substance abuse issues, and failed to either set up visitation with, or failed to visit, Harry in at least one year. *See* 378 N.C. at 677-78, 862 S.E.2d at 781; *see also In re R.L.R.*, 381 N.C. at 869, 874 S.E.2d at 586. Just as our Supreme Court concluded the existence of these factors supported the trial court's determination that there was a "high probability of repetition of neglect[,]" so here do we find the trial court's findings of fact support a determination of future neglect by Respondent-Parents. *See In re M.Y.P.*, 378 N.C. at 677–78, 862 S.E.2d at 781.

The trial court's findings of fact also demonstrate a complete lack of a relationship by Respondent-Parents with Harry: the binding findings of fact show Respondent-Father never parented Harry, and Respondent-Parents never sought out a relationship with Harry; the unchallenged findings of fact show Respondent-Mother has never parented Harry, and Respondent-Parents have no relationship with Harry. The trial court made ample findings of fact that demonstrate Respondent-Parents did not provide "love, support, affection [to], and personal contact [with,]" Harry, and this complete lack of a relationship further supports a finding of a likelihood of future neglect. *See In re D.J.D.*, 171 N.C. App. at 240–41, 615 S.E.2d at 33 ("The evidence supports the findings of a lack of a relationship between the children and their father, and the likelihood of future neglect.").

Finally, the trial court considered Respondent-Parents' circumstances not just from the time of the Adjudication Order, but also from the time of the Permanency Planning Order, and from subsequent testimony presented at the termination of parental rights' hearing. The trial

court therefore considered changed circumstances "occurring between the period of past neglect and the time of the termination hearing." *See In re R.L.D.*, 375 N.C. at 841, 851 S.E.2d at 20; *see also In re A.E.*, 379 N.C. at 200, 864 S.E.2d at 505. Accordingly, because there is a showing of prior neglect, and the trial court's binding findings of fact support a likelihood of future neglect, grounds exist to terminate Respondent-Parents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). *See In re D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405.

2. Grounds under N.C. Gen. Stat. § 7B-1111(a)(2)

Grounds also exist to terminate parental rights when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2). The trial court must determine "whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child." *In re Z.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001). "[T]he nature and extent of the parent's *reasonable progress* [] is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citation omitted).

Here, Respondent-Parents' failure to complete their court ordered services offered by DSS, and failure to visit Harry for at least one year prior to the termination of parental rights hearing, despite having the ability to call or text Petitioner, support the trial court's conclusion that Respondent-Parents had willfully left Harry in a placement outside the home for over twelve months without making reasonable progress to correct the conditions that led to Harry's removal. *See In re Z.A.M.*, 374 N.C. at 95, 839 S.E.2d at 797; *see also In re McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175 (concluding that the respondent-mother's failure to comply with her case plan to be reunified with the minor child, and her failure to visit the minor child for eighteen months prior to the termination hearing, supported the trial court's finding that the respondent-mother had willfully left the minor child in foster care). Respondent-Parents' failures to parent or seek a relationship with Harry also demonstrate Respondent-Parents were "unwilling to make the

effort" to make progress on the conditions that led to Harry's removal. *See In re McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175; *see also In re Z.A.M.*, 374 N.C. at 95, 839 S.E.2d at 797.

The trial court's binding findings of fact demonstrate Respondent-Parents' actions were willful in that they had the ability to make reasonable progress and correct the conditions that led to Harry's removal but were "unwilling to make the effort." *See In re McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175; *see also In re Z.A.M.*, 374 N.C. at 95, 839 S.E.2d at 797.

Accordingly, because Respondent-Parents willfully left Harry with Petitioner and have not made reasonable progress under the circumstances, grounds exist to terminate Respondent-Parents' rights under N.C. Gen. Stat. § 7B-1111(a)(2). *See In re Z.A.M.*, 374 N.C. at 95, 839 S.E.2d at 797. We conclude, therefore, that while "a finding of only one ground is necessary to support a termination of parental rights," the findings of fact support the conclusion that grounds exist to terminate Respondent-Parents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) or (2). *See In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019).

V. Conclusion

Upon review, we conclude the trial court's findings of fact are supported by competent evidence, and while only one ground is necessary to support the termination of parental rights, the findings of fact support the conclusion that grounds exist to terminate Respondent-Parents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) or (2). Accordingly, we affirm the trial court's order terminating Respondent-Parents' parental rights.

AFFIRMED.

Judge GORE concurs.

Judge THOMPSON dissents in separate opinion.

THOMPSON, Judge, dissenting.

The majority's determination that "the trial court's findings of fact are supported by competent evidence, and the findings of fact support the conclusion that grounds exist to terminate Respondent-Parents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) and (2)" is erroneous, and also ignores the mandatory considerations imposed on the trial

court when terminating parental rights in circumstances—such as this case—where a minor child has been outside of the custody of their parents for a long period of time in *In re D.W.P.*, 373 N.C. 327, 838 S.E.2d 396 (2020), and *In re Z.A.M.*, 374 N.C. 88, 839 S.E.2d 792 (2020).

Upon my careful review, I would conclude that the trial court's determination that the aforementioned grounds exist to terminate respondent-parents' parental rights was not supported by competent evidence; the findings of fact are unsupported by competent evidence; therefore, the conclusions of law are erroneous. The trial court's findings of fact are entirely unsupported by competent evidence, and the findings of fact *do not* support the conclusions of law that grounds exist to terminate respondent-parents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) and (2).[1] The majority's holding is contrary to well-established North Carolina juvenile law, and is an egregious encroachment on the constitutionally protected status of a parent in North Carolina. For this reason, I dissent.

A. N.C. Gen. Stat. § 7B-1111(a)(1)

N.C. Gen. Stat. § 7B-1111(a)(1) allows for termination of parental rights when "[t]he parent has abused or neglected the juvenile." N.C. Gen. Stat. § 7B-1111(a)(1) (2023). However, in circumstances where "a child has been separated from their parent for a long period of time, the petitioner *must* prove (1) prior neglect of the child by the parent *and* (2) a *likelihood of future neglect of the child by the parent*." *D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405 (emphases added).

"When determining whether 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." *Z.A.M.*, 374 N.C. at 95, 839 S.E.2d at 797 (emphasis added). Our Supreme Court "has recognized that a termination of parental rights for neglect *cannot be based solely on past conditions that no longer exist*." *D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405 (emphasis added). "At the adjudication stage, *the petitioner bears the burden* of proving by clear, cogent, and convincing evidence that one or more grounds for termination exist under [N.C. Gen. Stat.] § 7B-1111(a)." *In re R.D.*, 376 N.C. 244, 248, 852 S.E.2d 117, 122 (2020) (emphasis added). Finally, it is critical, fundamental even, that, "[*e*]*vidence must* support findings; findings *must* support

1. As will be illustrated in detail below, the trial court *first* erred in denying respondents' motion to dismiss the termination of parental rights petition due to insufficiency of the evidence.

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." *In re B.F.N.*, 381 N.C. 372, 376, 873 S.E.2d 291, 295 (2022) (emphases added). Each link in the chain did not appear in this case.

Here, at the termination hearing, when considering respondents' motion to dismiss due to insufficiency of the evidence, the trial court acknowledged that "*there was no information presented as to the current circumstances of the parents* . . . ." (Emphasis added). As respondent-father notes, petitioner "presented no evidence regarding the current circumstances of *either* parent[,] . . . no evidence tending to show that [r]espondent-[f]ather continued to have any issues with drugs or drug use[,]" and petitioner even acknowledged at the termination hearing that she had "no idea" about respondent-father's "current sobriety."

Indeed, petitioner presented *no evidence* whatsoever that could be construed as evidence of a likelihood of future neglect by respondent-mother or respondent-father, despite binding precedent from our Supreme Court that, when "a child has been separated from their parent for a long period of time, the petitioner must prove (1) prior neglect of the child by the parent and (2) a *likelihood of future neglect of the child by the parent*." *D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405 (emphasis added). While petitioner presented evidence of *prior* neglect of Harry, based upon respondents' *past* drug use, petitioner presented *no evidence* of a likelihood of future neglect of Harry by respondents.[2]

Specifically, the trial court heard no evidence whatsoever to suggest that respondents *were still using drugs*, although drug use by

---

2. The majority takes issue with the fact that respondents did not have contact with Harry for over a year, asserting that this continued distance could support a finding of future neglect. However, this simply disregards *the only competent evidence presented on the matter*, testimony from respondent-mother that she had attempted to visit with Harry at the visitation center, "but then [respondent-mother] was told that [petitioner] would not even bring him, so I stopped trying." Respondent-mother also testified that she "tried to text and call [petitioner] on numerous occasions" to no avail, and that petitioner had blocked respondent on social media. Respondent-mother further testified that she "left [petitioner] alone since [petitioner Timothy Bradburn] died because I know there's no hope." When asked whether there had "ever been any effort [made] to you or have you made any effort to try to meet in a public place[,] to meet at a park or a restaurant or anything like that[,]" respondent-mother replied, "[y]es, I've tried and [petitioner] refused." Because petitioner would not "let [respondent-mother] see [Harry]" respondent-mother actually "filed a motion, a formal motion in court asking for increased visitation . . . ." Finding of Fact Twenty-One—like Findings of Fact Fifteen, Sixteen, and Twenty-Three—is simply not supported by competent evidence. In fact, it contradicts the only competent evidence proffered.

respondents *was the condition* that led to Harry's removal from their custody. Our Supreme Court has held that, "termination of parental rights for neglect cannot be based solely on past conditions that no longer exist[,]" *D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405, and there is simply no evidence presented to support the trial court's conclusion of law that Harry's past neglect, *is likely to continue in the future*.

Moreover, when determining whether 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." *Z.A.M.*, 374 N.C. at 95, 839 S.E.2d at 797 (emphasis added). The trial court did not, therefore, *I* will conduct this *mandatory c*onsideration of changed circumstances. Specifically, as to changed circumstances between the period of Harry's neglect and the time of the termination hearing, respondent-mother offered testimony that she had completed forty hours of outpatient drug treatment, maintained a stable residence and employment, and critically, that she had not used drugs since 6 March 2022.

It is *entirely* unclear how the trial court could have conducted the *mandatory* consideration of changed circumstances—as necessary to terminate parental rights based upon the ground of neglect when a minor child has been separated from the parent for a long period of time—absent *any* showing of *what the current circumstances of the respondent-parents are*. Therefore, I would conclude that petitioner's evidence was insufficient to carry petitioner's burden of proving by clear, cogent, and convincing evidence, that grounds existed to terminate respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

B. N.C. Gen. Stat. § 7B-1111(a)(2)

A trial court may terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) in situations where "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2). Again, "[a]t the adjudication stage, *the petitioner bears the burden* of proving by clear, cogent, and convincing evidence that one or more grounds for termination exist under [N.C. Gen. Stat.] § 7B-1111(a)." *R.D.*, 376 N.C. at 248, 852 S.E.2d at 122 (emphasis added).

Here, as discussed at length above, petitioner made *no showing* whatsoever that respondent-mother had not made reasonable progress in correcting the conditions that led to Harry's removal. In fact, as noted above, respondent-mother *had* made progress in correcting the

condition that led to Harry's removal from her care—her drug use. The trial court's conclusion of law that respondent-mother has not made reasonable progress in correcting the conditions that led to Harry's removal was wholly unsupported by clear, cogent, or convincing evidence based upon the evidentiary record before our Court. In fact, it is *entirely inconsistent* with the *only competent evidence* presented to the trial court on this ground, respondent-mother's testimony. The majority's assertion, based upon the trial court's Finding of Fact Nine, that respondent parents "did not seek treatment for their substance abuse issues" is simply not correct; respondent-mother did.

Moreover, as to respondent-father, Rowan County DSS became involved with the family due to respondent-father and respondent-mother's drug use. As discussed at length above, petitioner presented no evidence *whatsoever* about respondent-father's drug use—the condition that led to the removal of Harry—at the termination of parental rights hearing. In fact, petitioner testified that she had "no idea" about respondent-father's "current sobriety."

Absent *any showing* regarding respondent-father's progress, or lack thereof, in correcting the conditions that led to the removal of Harry—respondent-father's drug use—the trial court simply *could not* have made the *mandatory* consideration of whether respondent-father had made "reasonable progress under the circumstances" in correcting the conditions that led to the removal of Harry, as is *required* by our caselaw.

This is an egregious misapplication of the law, with profound consequences for the relationship between a young child and his biological parents. The right to parent is constitutionally protected, and petitioner fell drastically short of meeting her burden of proving that grounds exist to terminate parental rights by clear, cogent, and convincing evidence. This termination of parental rights *should not* have happened.

For the aforementioned reasons, I would conclude that the trial court erred in terminating respondents' parental rights because the trial court erred in denying respondents' motion to dismiss due to insufficiency of the evidence; the trial court heard no competent evidence regarding the current conditions of respondents, as is necessary to terminate parental rights on the alleged grounds in this case. None of the findings of fact are supported by competent evidence regarding the status of respondent-parents' *at the termination hearing*, and for this reason, I dissent.

AMY STALLINGS KEITH, PLAINTIFF
v.
CHRISTOPHER DARRELL KEITH, DEFENDANT

No. COA24-364

Filed 31 December 2024

1. Child Custody and Support—permanent child support order—imputed income—no abuse of discretion

In a child custody and support proceeding between divorced parents, the trial court did not abuse its discretion in imputing income to defendant for child support purposes where the court's: (1) findings of fact supported its determination that defendant had acted in bad faith to suppress his income, and defendant only challenged weight and credibility determinations made by the court (and critiqued the court's failure to make different and additional findings that he would have preferred), matters left to the discretion of the trial court; and (2) calculation of the amount of income to be imputed followed the framework provided by the North Carolina Child Support Guidelines and was based on evidence of defendant's past income, his employment potential, and earning levels in the community, as demonstrated by the income of a plumber and a plumber's assistant in defendant's employ—a reasonable response to the opacity of defendant's financial circumstances given his refusal to provide documentation thereof.

2. Child Custody and Support—permanent child support order—past-prospective child support—effective date—remanded for findings

In a child custody and support proceeding between divorced parents, where the trial court set an effective date in July 2019 for past-prospective child support, a date after plaintiff filed her complaint for child support in August 2017, deviating from the pertinent directive in the North Carolina Child Support Guidelines—that such payments should begin on the date a complaint is filed unless a trial court finds, based upon evidence in the record, that it would be unjust or inappropriate to do so—the matter was remanded because the court left implicit the rationale for its past-prospective child support award, rather than making the explicit findings and conclusions required.

3. Child Custody and Support—child support—reimbursement for extraordinary expenses—remanded for findings

A child support order in a proceeding between divorced parents was remanded where the trial court left implicit its basis for ordering that defendant reimburse plaintiff for half of prior camp expenses—a permitted expense under the North Carolina Child Support Guidelines "if the court determines the expenses are reasonable, necessary, and in the child's best interest."

Appeal by defendant from order entered 10 August 2023 by Judge Jimmy L. Love, Jr., in Johnston County District Court. Heard in the Court of Appeals 22 October 2024.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for plaintiff-appellee.

New Direction Family Law, by Christopher R. Hicks, for defendant-appellant.

ZACHARY, Judge.

Defendant Christopher Darrell Keith appeals from the trial court's permanent child support order. After careful review, we affirm in part and remand for additional findings of fact.

I. Background

In this case, the facts are not disputed on appeal. Accordingly, we recite the pertinent facts as found by the trial court.

Plaintiff Amy Stallings Keith and Defendant married in June 2004, separated in May 2017, and divorced in June 2018. Two children were born of the marriage, the first in February 2009 and the second in December 2010.

On 23 August 2017, Plaintiff filed a complaint against Defendant seeking child custody and child support. This matter came on for hearing in Johnston County District Court over four days between 12 May 2022 and 14 June 2023.

On 10 August 2023, the trial court entered a permanent child support order. In its order, the court made the following findings of fact pertinent to the issue of child support:[1]

1. The numbering in the trial court's order inadvertently reverts from finding of fact #38 to #31. We have reproduced the findings of fact as originally written.

7. Plaintiff is employed with the Johnston County Department of Social Services as a Supervisor for the Foster Home Licensing. She earns $5,333.33 gross income per month.

8. Plaintiff pays $450.00 per month for the health insurance of the two minor children.

9. Plaintiff pays $43.76 per month for the dental insurance of the two minor children.

10. Plaintiff pays $50.00 per week per child for the 42 weeks for their after-school care. Plaintiff pays an additional $100.00 as a registration fee for the after-school care program. Plaintiff pays $220.00 per week for 10 weeks for childcare during the summer.

11. During the marriage [one of] the parties' minor child[ren] . . . attended Camp Don Lee and/or Camp Seafarer during the summer vacation from school. Since the parties separated, she has attended Camp Don Lee twice, and Camp Seafarer twice at a total cost of $12,000.00. Defendant paid approximately $1,250 of the $12,000 (total costs for camp) for half of [the child]'s camp in 2017.

12. After the parties separated, Plaintiff would submit the minor children's uninsured medical bills to Defendant, and he would reimburse Plaintiff for his one-half share. Plaintiff last submitted the minor children's uninsured medical bills to Defendant in 2019 because Defendant quit reimbursing her. Between 16 July 2019 and 9 January 2023 Plaintiff paid $11,523.89 in uninsured medical bills on behalf of the minor children. Defendant has failed to reimburse Plaintiff for his one-half share.

13. Defendant has been involved in the construction business as a trim carpenter during the entire marriage of the parties.

14. When the parties married, Defendant did interior trim work for Trim Works. He made approximately $18.00 - $20.00 per hour.

15. In 2004, Defendant started Elite Custom Builders, LLC (Elite). He later incorporated Elite as an S Corp.

During the parties' marriage and prior to their separation, Defendant (through Elite) worked almost exclusively as a trim work subcontractor with Plaintiff's father's business, Mutual Builder's Inc.

16. Defendant's income was approximately $116,026.00 in 2015 and approximately $144,598.00 in 2016.

17. Defendant's (Elite) last job with Mutual Builder's was started prior to the parties' separation and finished in December 2017.

18. Defendant (Elite) did not perform any new jobs for Plaintiff's father's business, Mutual Builder's Inc., after the parties separated on 8 May 2017.

19. Defendant made no effort to obtain [any more] work as a trim worker through Mutual or anyone else (company or contractor) after the date of separation.

20. After November 2017 Defendant decided to start building houses. Defendant registered Dewitt Keith's (Defendant's brother) residential general contracting license for Elite even though Dewitt Keith was not employed by Elite.

21. Defendant claimed to have started pursuing his General Contractor's license but never followed through with it.

22. In 2018 Defendant purchased a vacant lot located at 16 Tupelo Trail, Four Oaks, N.C. Elite completed construction of a home on this lot in October 2018 and sold it in October 2019 for $313,500.00.

23. In 2018, Defendant purchased another vacant lot at 874 Riverwood Drive Clayton, N.C. Elite did not start construction on a house on this lot until 2022.

24. In 2018 Defendant purchased another vacant lot at 1048 Dixon Rd., Willow Springs, N.C. Elite constructed a house on the lot and sold it in May 2020. Elite received approximately $50,000.00 from the sale of this property.

25. In 2018 Defendant performed renovation work on a warehouse in Beulaville, N.C.

26. From date of separation until January 2022 Defendant ran Elite as his full-time employment.

27. In April 2022 Elite merged with Diamond Renovations (Diamond) to become Riverside Custom Builders, Inc. (RCB), a general contracting residential construction and remodeling business. Diamond was owned and operated by Defendant's brother, Dewitt Keith.

28. Defendant and Dewitt Keith are 50–50 owners of RCB, with Dewitt Keith as the President and Defendant as the Vice President. Defendant and his brother each invested $200,000.00 into RCB. Defendant invested his truck, tools, trailer, the lot at 874 Riverwood Dr. (Riverwood), Clayton, N.C. and $74,079.69 in cash.

29. RCB traded in Defendant's truck for a 2022 Silverado truck valued at approximately $80,000.00. Defendant drives this truck most of the time.

30. RCB started construction on the Riverwood lot in January 2022, and completed construction on it in December 2022. The house is listed for sale at $698,000.00.

31. In 2022 RCB purchased a lot at 185 Riverglade Dr., Clayton, N.C. for $83,000.00 cash.

32. In 2022 RCB purchased 3 additional lots. Two of the lots are at Oak Island, N.C., and the other lot is located at Boiling Springs, N.C. RCB is building houses on these lots. The Oak Island homes will be listed for sale at approximately $750,000.00 to $775,000.00 each.

33. Since the RCB deposition on 28 September 2022, RCB purchased a lot in Southport located at 5359 Glenfield Circle. RCB is currently building a residential home on this lot and plans to list it for sale at approximately $400,000 in 2023. RCB purchased the lot for $57,500 without financing.

34. Since the RCB deposition in September 2022, RCB purchased a lot in Clayton located at 32 Hickory Ridge Lane in the Middle Creek West subdivision. RCB plans to build a residential home on this lot in 2023 after selling another home.

35. Defendant does approximately all the onsite labor for RCB, and all the remodeling jobs for RCB. Defendant's brother, Dewitt Keith, handles RCB's finances.

36. Dewitt Keith is not aware of any jobs done through RCB that have been a "loss" for the business.

37. Defendant and Dewitt Keith both stated they do not use any software or other form of accounting system to track their expenses for each project.

38. Defendant and Dewitt Keith do not keep a written record of who their customers are.

31. Defendant and his brother, Dewitt Keith, decided on Defendant's current salary. Defendant earns $2,000.00 per month from RCB. Defendant and his brother will review Defendant's salary every year. Defendant provided no documentation that Defendant and his brother relied on to select his salary.

32. In September 2022 Defendant, his brother, Dewitt Keith, and John Perry started Elite Custom Plumbing (ECP), each as one-third owners. RCB plans to use ECP for all its plumbing jobs in its residential construction. Defendant invested approximately $10,000.00-$15,000.00 into ECP initially. John Perry, who is the plumber, contributed his tools and plumbing license, but no money. John Perry earns approximately $1,100.00 per week from ECP.

33. Defendant, Dewitt Keith, and John Perry as ECP agreed to pay Robert Thomas $15.00 per hour as a plumber's helper.

34. In 2019 Defendant listed his business on Angie Leads. Angie Leads works by connecting consumers with local companies for the type of work the consumer is seeking. Defendant had to pay every time he got a lead. Defendant connected with 92% of his leads and gave his quote for the work. Defendant did not provide any documentation of which leads led to jobs and how much he made performing those jobs.

35. Since the parties' separation, Defendant has done construction and renovation work for Lynn Daniels,

Carrie Parker, Charlie Hansen, Charles Hansen, Matthew Childress, Dewitt Keith, Diane Ross, and Chester Simmons. Defendant did not charge for some of the jobs, but Defendant did not produce records or documentation of any of the paid jobs.

36. Defendant's monthly living expenses are $2,500.00-$2,600.00.

37. On 11 November 2022 Defendant remarried. Defendant's new wife has 4 children, of which 3 live with Defendant and his new wife. Defendant claimed his new wife assists him in paying his monthly living expenses, but provided no documentation.

38. Defendant's claim of his current salary being $2,000.00 gross income per month equals $11.54 per hour.

    $2,000.00 x 12 = $24,000.00

    $24,000.00 ÷ 52 = $461.54

    $461.54 ÷ 40 = $11.54

39. Defendant made a minimum of $18.00-$20.00 per hour during the entire marriage.

40. Defendant realized a gain from the sale of Nottingham Place and a gain from the sale of Second Street.

41. Defendant has not paid Plaintiff any child support since July 2019 because he believes Plaintiff makes sufficiently more income than him, and he keeps the children the same amount of time as Plaintiff, which is not true.

42. The parties never struggled to financially support the children during the marriage.

43. Defendant has acted in bad faith in that he has failed to exercise reasonable capacity to earn, has acted in deliberate disregard for his support obligations, and is intentionally depressing his income to an artificial low, in that:

    (a) Defendant has failed to seek employment as a trim subcontractor with a business that could pay more than $2,000.00 per month;

(b) Defendant has consistently earned more than $2,000.00 per month during the marriage;

(c) Defendant has control over his income, in that Defendant and his brother arbitrarily selected Defendant's gross income of $2,000.00 per month from ECP. There was no documentation as to how they arrived at that amount, and Defendant has testified that he doesn't feel like he should have to pay Plaintiff child support because she earns more income than him.

(d) Defendant has control over his income, in that like ECB, Defendant, Defendant's brother, and John Perry formed ECP, each as one-third owners, and is paying Mr. Perry $1,100.00 per week. There was no documentation as to how they arrived at that amount.

44. Due to Defendant's bad faith, Defendant's income will be imputed for child support.

45. Defendant's income will be imputed to $4,766.66 per month. The basis for the amount imputed is that when the parties got married, Defendant was earning $18.00 -$20.00 per hour. When Defendant started Elite and was working exclusively for Plaintiff's father, he was making a gross income in excess of $100,000.00 per year. Defendant agreed to pay a plumber $1,100.00 per week in the new start up business, Elite Custom Plumbing, which will be doing all the plumbing work for Riverside Custom Builders. Defendant should be able to earn the same as John Perry, a person whose work Defendant will be overseeing. Defendant should also be paid more than ECP plumber's helper, who will earn approximately $2,275.00 per month. ($15.00 per hour at average of 35 hours per week).

Based on these findings of fact, the trial court concluded in relevant part:

2. The provisions of child support as set forth herein are reasonable, given the reasonable needs of the minor

children, the relative ability of the parties to provide support, and in accordance with the North Carolina Child Support Guidelines.

3. Defendant has the present ability to pay or can take necessary steps to pay the child support as hereinafter set forth.

4. Plaintiff is in need of child support.

5. Defendant has failed to exercise reasonable capacity to earn, has acted in deliberate disregard for his support obligations, and intentionally depressed his income to an artificial low, in order to avoid his duty of support to his minor children.

6. Defendant acted in bad faith such that income may be imputed to him.

The trial court ordered Defendant to pay child support to Plaintiff in the amount of $692.80 per month beginning on 1 June 2023, and to "reimburse Plaintiff $32,561.60 for retroactive child support from July 2019 through May 2023 by paying $307.20 per month until arrears are paid in full." The court also ordered Defendant to "reimburse Plaintiff $5,761.95 for his one-half share of the children's medical/dental costs paid by Plaintiff between 16 July 2019 and 9 January 2023" and to "reimburse Plaintiff $4,750 ($12,000 / 2 = $6,000 - $1,250 = $4,750) for his remaining half of [their child]'s fee for Camp Don Lee/Camp Seafare."

Defendant timely filed notice of appeal.

II. Discussion

On appeal, Defendant first argues that "the trial court fail[ed] to find facts sufficient to determine [that he] acted in 'bad faith' in order to impute income for child support purposes[.]" Defendant also argues that the trial court erred or abused its discretion in determining the amounts of (1) imputed income, (2) past-prospective child support, and (3) extraordinary expenses.

A. Standard of Review

"When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy." *Taylor v. Taylor*, 128 N.C. App. 180, 182, 493 S.E.2d 819, 820 (1997). Because "[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts[,] . . . our review is limited to a determination of whether there

was a clear abuse of discretion." *Jonna v. Yaramada*, 273 N.C. App. 93, 100, 848 S.E.2d 33, 41 (2020) (citation omitted). "Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

"Further, to ensure the trial court correctly exercised its function to find the facts and apply the law thereto, we ensure evidence supports findings; findings support conclusions; and conclusions support the judgment." *Cash v. Cash*, 286 N.C. App. 196, 202, 880 S.E.2d 718, 724 (2022) (cleaned up). "A trial court must make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *McKyer v. McKyer*, 179 N.C. App. 132, 148, 632 S.E.2d 828, 837 (2006) (cleaned up), *disc. review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007). "Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence." *Craven Cty. ex rel. Wooten v. Hageb*, 277 N.C. App. 586, 589, 861 S.E.2d 571, 574 (2021) (citation omitted).

"[T]his Court is bound by the trial court's findings where there is competent evidence to support them." *Cash*, 286 N.C. App. at 202, 880 S.E.2d at 725 (citation omitted). In particular, "evidentiary issues concerning credibility, contradictions, and discrepancies are for the trial court—as the fact-finder—to resolve and, therefore, the trial court's findings of fact are conclusive on appeal if there is competent evidence to support them despite the existence of evidence that might support a contrary finding." *Sergeef v. Sergeef*, 250 N.C. App. 404, 406–07, 792 S.E.2d 192, 194 (2016) (cleaned up). Finally, "[w]hen an appellant does not challenge the trial court's findings of fact on appeal, they are binding." *Cash*, 286 N.C. App. at 202, 880 S.E.2d at 725.

B. Imputed Income

[1] "The calculation of child support is governed by North Carolina Child Support Guidelines established by the Conference of Chief District Court Judges." *Hageb*, 277 N.C. App. at 589, 861 S.E.2d at 574 (citation omitted). "Normally, a party's ability to pay child support is determined by that party's income at the time the award is made." *Cash*, 286 N.C. App. at 200, 880 S.E.2d at 723 (citation omitted). In appropriate circumstances, the trial court may base child support upon a party's earning capacity:

> However, capacity to earn may be the basis for an award where the party deliberately depressed his income or

> deliberately acted in disregard of his obligation to provide support. Before earning capacity may be used as the basis of an award, there must be a showing that the actions which reduced the party's income were taken in bad faith, to avoid family responsibilities.

Id. (citation omitted); *see also* N.C. Child Support Guidelines, at 3 (2023) ("If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income."). "This Court also refers to the use of earning capacity to determine a party's child support obligation as 'imputation of income.' " *Cash*, 286 N.C. App. at 201, 880 S.E.2d at 724.

When considering whether to impute income to a party, several factors may support a court's determination that the party acted in bad faith, such as:

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.

Id. at 208, 880 S.E.2d at 728 (citation omitted).

These factors are not exclusive, and "the dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations." *Id.* at 211–12, 880 S.E.2d at 730 (cleaned up). A party's motivation or intent is a mental state, which "must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred. Further, a determination of bad faith in conjunction with suppression of income is best made on a case-by-case basis." *Roberts v. McAllister*, 174 N.C. App. 369, 378–79, 621 S.E.2d 191, 198 (2005) (cleaned up).

1. Findings of Fact

Defendant first asserts that the trial court did not make sufficient findings of fact to support its determination that he acted in bad faith for the purpose of imputing income to him. Defendant posits that "[w]hile

[Plaintiff] may desire that [Defendant] had more income at the time of trial, there was not sufficient evidence that he was acting in bad faith to avoid his obligation, and it was error for the trial court to so find."

However, Defendant only challenges finding of fact #43, which restates and summarizes the other findings to explain the court's reasoning for determining that Defendant acted in bad faith, but which is composed solely of facts established in the other unchallenged findings. Consequently, rather than challenging the substance of the findings of fact, Defendant ultimately challenges the weight to which the court assigned certain findings and critiques the court's failure to make findings that he would have preferred.

For example, Defendant observes that the trial court "seem[ed] to place a significant emphasis on [his] earnings during the course of the marriage," and "seem[ed] to rely heavily on its finding that [he] does not feel like he should have to pay child support because he earns less than [Plaintiff] in its determination of bad faith." Defendant asserts that the findings that he "failed to seek employment as a trim contractor with a business that could pay more than $2,000.00 per month" and also that "he earned more than that amount during the marriage are not, on their own, sufficient to support use of the earning capacity rule."

Defendant does not challenge the evidentiary basis for these findings—rendering them binding on appeal, *see Cash*, 286 N.C. App. at 202, 880 S.E.2d at 725—but instead claims that "[n]o evidence was presented, and the court made no findings, that any prevailing job opportunities as a 'trim contractor' were available to" him. Defendant further complains that the trial court made "no findings as to the needs for such services in the community or what [he] could be expected to earn in a position not supplied by his ex-wife's father."

In addition to challenging the trial court's weighing of the evidence, Defendant directs us to testimony from the hearing below that he posits would either contradict the court's findings or support hypothetical, alternative findings that the court chose not to make. For instance, Defendant notes that there was "both evidence and testimony that [he] made voluntary payments for two years after the parties' separation in excess of what the trial court found his prospective child support obligation to be." Defendant maintains that "[t]his negates any supposition that he acted with naive indifference or deliberate disregard of his support obligations."

In making this and similar arguments, Defendant essentially asserts "that the trial court erred by overlooking evidence that he presented at

trial, or by making a credibility determination with which he disagrees. These arguments go to the weight to be given to the evidence, and to evaluations of credibility which are within the discretion of the trial court." *Jonna*, 273 N.C. App. at 121, 848 S.E.2d at 53–54. Therefore, we decline Defendant's invitation to revisit the issue of imputed income and instead focus on the sufficiency of those findings of fact that the trial court actually made. *See id.* at 121, 848 S.E.2d at 54 ("Where the trial court's findings of fact are supported by competent evidence, and the findings of fact, in turn, support the trial court's conclusions of law, the decision of the trial court will be affirmed. *This Court will not reweigh the evidence.*" (cleaned up)).

The trial court's findings of fact are deemed supported by competent evidence because Defendant has not challenged their evidentiary basis, and are therefore binding. *See Cash*, 286 N.C. App. at 202, 880 S.E.2d at 725. We are similarly bound by the court's determinations—as reflected in the trial court's unchallenged findings—regarding the credibility of witnesses and the weight to be afforded to the evidence, despite Defendant's invocation of evidence that could have supported alternative findings. *See Jonna*, 273 N.C. App. at 121, 848 S.E.2d at 53–54.

"In turn, these [unchallenged] findings provide ample support for the trial court's decision to impute income to" Defendant. *McKyer*, 179 N.C. App. at 147, 632 S.E.2d at 837. The court's findings sufficiently paint a picture of Defendant intentionally leaving his employment to start his own business—into which he invested significant assets and which has been successful enough that Defendant's brother was unaware of any jobs that have resulted in a "loss" for the business—while disregarding his child-support obligations and refusing to seek compensation commensurate with his experience and income potential. For example, during the time that Defendant was receiving a salary that failed to cover his monthly living expenses, he nevertheless obtained an $80,000 truck from RCB, which the court found he "drives . . . most of the time."

Defendant has not demonstrated that the trial court's determination that he acted in bad faith, such that income may be imputed to him, "was so arbitrary that it could not have been the result of a reasoned decision." *Jonna*, 273 N.C. App. at 100, 848 S.E.2d at 41 (citation omitted). Accordingly, Defendant's first argument is overruled.

2. Calculation of Imputed Income

Defendant next argues that the trial court abused its discretion in calculating the amount of income to impute to him for child-support purposes. The North Carolina Child Support Guidelines provide a framework for this calculation:

> The amount of potential income imputed to a parent must be based on the parent's assets, residence, employment potential and probable earnings level, based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community and other relevant background factors relating to the parent's actual earning potential. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 35-hour work week.

N.C. Child Support Guidelines, at 3.

Defendant likens this case to *McKyer*, in which this Court determined that the trial court's findings of fact were "insufficient to support the trial court's determination of *the amount of income* that should be imputed[.]" 179 N.C. App. at 147–48, 632 S.E.2d at 837. In that case, the court imputed "a modest additional amount of income to [the defendant]: five days a week . . . rather than one day, at $7.50/hour, for a total of $1300/month rather than the $260/month he actually earn[ed]." *Id.* at 147, 632 S.E.2d at 837. The basis for the trial court's calculation of the defendant's imputed income "was only that [the defendant's] employer . . . was 'very flexible.' " *Id.* at 148, 632 S.E.2d at 837. "The court made no finding that this employer would permit [the defendant] to work five days per week, at $7.50 per hour, rather than the one day per week he had been working prior to trial." *Id.* "Rather, the court found that no evidence was presented that [the defendant] could not work more hours at this employment. This finding [wa]s not sufficient to support the amount imputed." *Id.* (cleaned up).

Here, the trial court determined that "Defendant's income will be imputed to $4,766.66 per month." The court explained that this amount was based on Defendant's past income, his employment potential, and earning levels in the community, as demonstrated by the income of a plumber and the plumber's assistant in Defendant's employ:

> The basis for the amount imputed is that when the parties got married, Defendant was earning $18.00-$20.00 per hour. When Defendant started Elite and was working exclusively for Plaintiff's father, he was making a gross income in excess of $100,000.00 per year. Defendant agreed to pay a plumber $1,100.00 per week in the new start up business, Elite Custom Plumbing, which will be doing all the plumbing work for Riverside Custom Builders. Defendant should be able to earn the same as John Perry, a person

> whose work Defendant will be overseeing. Defendant should also be paid more than ECP plumber's helper, who will earn approximately $2,275.00 per month. ($15.00 per hour at average of 35 hours per week).

The trial court's unchallenged findings of fact—which are extensive and thorough—support the figures used by the court in this calculation; the imputed-income amount of $4,766.66 is equivalent to the $1,100.00 weekly salary of the plumber. This distinguishes the case at bar from *McKyer*, in which the *sole* basis for the trial court's calculation of imputed income was a finding that the defendant's employer was "very flexible[,]" from which the court—without making any supporting findings of fact—speculated that the defendant "could move from a very limited, one day per week part-time job to full-time employment[.]" *Id.*; *see also Respess v. Respess*, 232 N.C. App. 611, 631, 754 S.E.2d 691, 704–05 (2014) (remanding order for additional findings of fact detailing the calculation of the amount of imputed income where "the findings d[id] not establish any basis for the court's imputation in 2011 of half of what he earned in 2005, as opposed to some other fraction or amount").

The trial court's use of the plumber's salary as an illustrative proxy for Defendant's earning capacity was a reasoned response to the opacity of Defendant's financial circumstances. This is especially true in that the court's unchallenged findings establish that Defendant neglected to produce the sort of documentation that might have assisted it in making a more direct calculation of his earning capacity. As the trial court found: "Defendant provided no documentation that Defendant and his brother relied on to select his salary" of $2,000.00 per month. Indeed, Defendant and his brother, who manages RCB's finances, contend that they "do not use any software or other form of accounting system to track their expenses for each project" and "do not keep a written record of who their customers are." Despite this lack of recorded accounting, the court noted that "RCB traded in Defendant's truck for a 2022 Silverado truck valued at approximately $80,000.00[,]" which "Defendant drives . . . most of the time[,]" and that Defendant's brother was "not aware of any jobs done through RCB that have been a 'loss' for the business."

These findings of fact—along with the finding that Defendant "believes Plaintiff makes sufficiently more income than him, and he keeps the children the same amount of time as Plaintiff, which is not true"—amply demonstrate that the court found Defendant not to be credible, a determination we will not revisit on appeal. "Although a party may disagree with the trial court's credibility and weight determinations, those determinations are solely within the province of the trial court." *Jonna*, 273 N.C. App. at 119–20, 848 S.E.2d at 53 (citation omitted).

Consequently, the trial court made a reasoned decision as to Defendant's earning capacity based on factors identified by the Guidelines, given the evidence presented. Defendant thus fails to persuade that the trial court's calculation "was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 100, 848 S.E.2d at 41 (citation omitted).

C. Past-Prospective Child Support

[2] Defendant next argues that the trial court erred in ordering him to "reimburse Plaintiff $32,561.60 for retroactive child support from July 2019 through May 2023 by paying $307.20 per month until arrears are paid in full." Defendant contends that the court abused its discretion because it "utilized a child support amount predicated upon [his] imputed income from his business that was created in April 2022 and applied it retroactively to a time period well before, as far back as July 2019."

Defendant correctly observes that this reimbursement—which the trial court described as "retroactive child support"—is more appropriately considered "past-prospective child support." *See*, *e.g.*, *Miller v. Miller*, 153 N.C. App. 40, 48, 568 S.E.2d 914, 919 (2002) ("[O]ur Court has previously held that child support which is awarded from the time a party files a complaint for child support to the date of trial is not retroactive child support, but is in the nature of prospective child support representing that period from the time a complaint seeking child support is filed to the date of trial." (cleaned up)).

In this case, the trial court set an effective date of July 2019 for past-prospective child support, a date after Plaintiff filed her complaint for child support on 23 August 2017. The court thus deviated from the Guidelines. *See State ex rel. Miller v. Hinton*, 147 N.C. App. 700, 706, 556 S.E.2d 634, 639 (2001) ("Unless the trial court finds that beginning the prospective child support payments on the date the complaint was filed would be 'unjust or inappropriate' and there is evidence in the record to support this finding, it is error to order prospective support to begin at any other time.").

The trial court's decision to deviate from the Guidelines is properly informed by the Guidelines themselves:

> The court upon its own motion or upon motion of a party may deviate from the [G]uidelines if, after hearing evidence and making findings regarding the reasonable needs of the child for support and the relative ability of each parent to provide support, it finds by the greater weight of the

> evidence that application of the [G]uidelines would not meet, or would exceed, the reasonable needs of the child considering the relative ability of each parent to provide support, or would otherwise be unjust or inappropriate.

N.C. Child Support Guidelines, at 1.

If the trial court decides to deviate from the Guidelines, it must make written findings of fact

> (1) stating the amount of the supporting parent's presumptive child support obligation determined pursuant to these [G]uidelines, (2) determining the reasonable needs of the child and the relative ability of each parent to provide support, (3) supporting the court's conclusion that the presumptive amount of child support determined under the [G]uidelines is inadequate or excessive or that application of the [G]uidelines is otherwise unjust or inappropriate, and (4) stating the basis on which the court determined the amount of child support ordered.

Id.

Additionally, if the trial court deviates from the Guidelines to award past-prospective child support based upon a variation in a parent's income over time, the court must make appropriate findings of fact regarding this variation. *See Simms v. Bolger*, 264 N.C. App. 442, 453, 826 S.E.2d 522, 531 (2019) (reversing past-prospective child support award where "the trial court made no findings providing a rationale for using [the d]efendant's income for each individual year rather than using his current income to calculate child support owed back to the filing of [the p]laintiff's motion"). Although "this Court has recognized such an approach is permissible where the income is highly variable or seasonal, or where the evidence of income is unreliable[,]" the *Simms* Court explained that "[w]hat matters in these circumstances is the reason *why* the trial court examines past income; the court's findings must show that the court used this evidence to accurately assess current monthly gross income." *Id.* at 453, 826 S.E.2d at 530 (citation omitted).

In the instant case, the trial court presumably based its July 2019 effective date for past-prospective child support upon the fact that Defendant paid Plaintiff child support until July 2019. As Defendant notes in his appellate brief, while the court was not explicit in its order, the $32,561.60 award "was seemingly reached by applying the ordered amount of $692.80 prospective support for the 47-month period between July 2019 and the conclusion of the trial." It therefore appears

that the trial court deviated from the Guidelines by bifurcating the past-prospective child support to reflect two different time periods: a sum of $0 representing the period from the filing of Plaintiff's complaint until July 2019, and then a sum of $32,561.60 representing the period from July 2019 until the conclusion of the hearing.

Notwithstanding Defendant's contention that "the use of [the imputed-income] figure to calculate past prospective support for the time period before May 2022 is improper[,]" we reiterate that the trial court "has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy." *Taylor*, 128 N.C. App. at 182, 493 S.E.2d at 820. We also reiterate that this Court has recognized that deviating from the Guidelines by using historical income to calculate past-prospective child support may be permissible in certain cases where the findings of fact suggest that a parent's income was "highly variable" or "the evidence of income is unreliable." *Simms*, 264 N.C. App. at 453, 826 S.E.2d at 530 (citation omitted).

However, in order to properly deviate from the Guidelines, the trial court must make specific "findings providing a rationale" for its decision, consistent with both the Guidelines and our precedents. *Id.* at 453, 826 S.E.2d at 531. Although the order from which Defendant appeals is thorough and detailed, the court nevertheless left implicit the rationale for its past-prospective child support award, rather than making the explicit findings and conclusions required. Accordingly, we must remand this matter to the trial court. *See id.*

If, on remand, the trial court determines that deviating from the Guidelines would be appropriate to meet the reasonable needs of the children and the parents' relative abilities to pay, and that the presumptive amount of child support under the Guidelines would be inadequate, excessive, or otherwise unjust or inappropriate, then the court shall make the concordant findings required by the Guidelines. *See id.*; *see also* N.C. Child Support Guidelines, at 1.

D. Extraordinary Expenses

[3] Finally, Defendant argues that the trial court erred by ordering him "to reimburse [Plaintiff] the amount of $4,750.00 'for his remaining half of [their child]'s fee for Camp Don Lee/Camp Seafarer.' "

The Guidelines allow the trial court to add extraordinary child-related expenses to the parties' basic child-support obligation, to be paid by the parents "in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest." N.C. Child Support Guidelines, at 5; *see Klein v. Klein*, 290 N.C.

App. 570, 597, 892 S.E.2d 894, 915 (2023). It is undisputed that a child's camp fees may fall within the category of extraordinary expenses with respect to child support. *See*, *e.g.*, *Wadsworth v. Wadsworth*, 281 N.C. App. 201, 207, 868 S.E.2d 636, 641 (2021); *Balawejder v. Balawejder*, 216 N.C. App. 301, 317, 721 S.E.2d 679, 688–89 (2011); *Mackins v. Mackins*, 114 N.C. App. 538, 550, 442 S.E.2d 352, 359, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994).

Defendant alleges that "the trial court's determination that [he] owed 'half' of the prior camp expenses was made without any findings that they were reasonable, necessary, and in the child's best interest." Defendant also contends that "the trial court clearly did not assign this expense to the parties 'in proportion to their respective incomes.' "

Here, as with the past-prospective child support award, the trial court left implicit its basis for ordering that Defendant reimburse Plaintiff for half of the prior camp expenses. On remand, "if the court determines the expenses are reasonable, necessary, and in the child's best interest[,]" N.C. Child Support Guidelines, at 5, the trial court shall make findings of fact reflecting that determination and prorate this extraordinary expense based on the parties' incomes absent a request to deviate from the Guidelines.

III. Conclusion

For the foregoing reasons, the trial court's determination that Defendant acted in bad faith, such that income may be imputed to him for the purposes of child support, is affirmed. In that Defendant is unable to show that the court abused its discretion in calculating the amount of imputed income, this determination is also affirmed.

However, we remand to the trial court for additional findings of fact regarding the past-prospective child support awarded to Plaintiff and the reimbursement to Plaintiff of a portion of one of the children's camp expenses. "On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575 (cleaned up).

AFFIRMED IN PART; REMANDED FOR ADDITIONAL FINDINGS OF FACT.

Judges ARROWOOD and GRIFFIN concur.

NO LIMIT GAMES, LLC, PLAINTIFF
v.
SHERIFF OF ROBESON COUNTY, NORTH CAROLINA, BURNIS WILKINS, IN HIS OFFICIAL CAPACITY; SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, EDDIE M. BUFFALOE JR., IN HIS OFFICIAL CAPACITY; DIRECTOR OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION, BOB SCHURMEIER, IN HIS OFFICIAL CAPACITY; DIRECTOR OF THE ALCOHOL LAW ENFORCEMENT BRANCH OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, BRYAN HOUSE, IN HIS OFFICIAL CAPACITY; TOWN OF PEMBROKE AND COUNTY OF ROBESON, DEFENDANTS

No. COA24-12

Filed 31 December 2024

1. Declaratory Judgments—standing—property interest—potentially adverse effect of statute

Plaintiff, a North Carolina company holding itself out as selling consumer merchandise through a website, had standing to bring a declaratory judgment action regarding whether its operation, use, and sale of promotional video sweepstakes was legal under a statute that prohibits promoting or conducting sweepstakes through the use of an "entertaining display" (N.C.G.S. § 14-306.4) by virtue of having a property interest which could be adversely affected by the statute, without any need to show that the statute conferred a cause of action.

2. Injunctions—preliminary injunction—removal of sweepstakes kiosks—likelihood of success not shown

In a declaratory judgment action, the trial court erred in issuing a preliminary injunction in favor of plaintiff enjoining defendants (including several State government officials in their official capacities) from forcing or compelling the removal of plaintiff's video sweepstakes kiosks from businesses or facilities and from prosecuting persons in possession of plaintiff's video sweepstakes kiosks where plaintiff did not show a likelihood of success on the merits of its case because the determinative issue was whether chance or skill predominated in the sweepstakes game in question, and, in plaintiff's video sweepstakes, as in other games that have previously been held to violate the statute, chance could override or thwart the exercise of skill.

Judge GRIFFIN dissenting.

Appeal by Defendants from Order entered 20 June 2023 by Judge Michael A. Stone in Robeson County Superior Court. Heard in the Court of Appeals 12 June 2024.

Rossabi Law Partners, by Gavin J. Reardon and Amiel J. Rossabi, for Plaintiff-Appellee.

Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett, Special Deputy Attorney General Tamika L. Henderson, and Special Deputy Attorney General Michael Bulleri, for Defendants-Appellants.

HAMPSON, Judge.

Factual and Procedural Background

The Secretary of the North Carolina Department of Public Safety, the Director of the North Carolina State Bureau of Investigation, and the Director of the Alcohol Law Enforcement Branch of the North Carolina Department of Public Safety (collectively State Defendants),[1] each in their official capacity, appeal from an Order on Motion for Preliminary Injunction entered in favor of No Limit Games, LLC (Plaintiff) enjoining the State Defendants, the Sheriff of Robeson County in his official capacity, the Town of Pembroke, and the County of Robeson (collectively, Defendants) from forcing or compelling removal of Plaintiff's video sweepstakes kiosks from businesses or facilities and from prosecuting persons in possession of Plaintiff's video sweepstakes kiosks. The Record before us tends to reflect the following:

Plaintiff is a North Carolina company holding itself out as selling consumer merchandise through its website "Youbux.com." As part of its business plan, Plaintiff operates, uses, and sells promotional video sweepstakes. These video sweepstakes utilize computer kiosks, generally placed in retail establishments owned by third parties. Plaintiff either operated or seeks to operate its video sweepstakes kiosks in locations in Robeson County.

On 9 May 2023, Plaintiff filed a Complaint in Robeson County Superior Court under the Declaratory Judgment Act against the State Defendants. On 19 May 2023, Plaintiff filed an Amended Complaint naming all Defendants. The Amended Complaint alleged Defendants

1. The Sheriff of Robeson County, in his official capacity, along with the Town of Pembroke and the County of Robeson, are not parties to this appeal.

had threatened enforcement action against Plaintiff's business. Plaintiff sought a Declaratory Judgment declaring its video sweepstakes is not a prohibited gambling, lottery, or gaming product. Plaintiff also sought preliminary and permanent injunctive relief enjoining Defendants from removing Plaintiff's kiosks or prosecuting any person in possession of them.

The trial court held a hearing on Plaintiff's Motion for Preliminary Injunction, where Plaintiff presented as evidence two reports. The first is titled "Review and analysis of the NLG Skill System with Black Clover Terminal version 1.0.0.0 developed by No Limit Games, LLC," and describes the operation of the kiosks and games. The second report was prepared by Dr. Neil Mulligan and includes studies performed on game participants that analyze whether skill was involved in playing the games. Defendants presented the testimony of Agent Christopher Poole of the Alcohol Law Enforcement division of the Department of Public Safety, who was qualified as an expert and opined that chance predominated over skill in Plaintiff's games.

On 20 June 2023, the trial court issued its Order on Motion for Preliminary Injunction. In its Order, the trial court concluded Plaintiff had established a likelihood of success on the merits of its claim, that it would suffer irreparable harm if Defendants were permitted to take enforcement action against it, and that the equities favored a preliminary injunction. On the likelihood of Plaintiff's success on the merits, the trial court observed:

> [a]lthough the actual prize is determined by chance as is required for a sweepstakes, the actual prize is embedded in the sweepstakes entry itself, i.e., prior to any game play. As a result, the "vagaries of chance" are neither created nor determined by the game. The participant would be eligible for the same prize regardless [of] whether they redeemed it without game play . . . or with game play . . . .

The trial court concluded that Plaintiff's video sweepstakes did not violate N.C. Gen. Stat. § 14-306.4. In turn, the trial court granted Plaintiff a preliminary injunction prohibiting Defendants from forcing the removal of Plaintiff's kiosks from retail or other facilities, issuing warnings to facilities for using Plaintiff's systems, attempting to coerce any establishment into removing Plaintiff's kiosks, or prosecuting any person in possession of the kiosks.

On 27 June 2023, State Defendants filed Notice of Appeal. The State Defendants also moved the trial court to stay its preliminary injunction

pending their appeal. The trial court denied the State Defendants' Motion to Stay on 1 August 2023. Defendants subsequently filed a Petition for Writ of Supersedeas in this Court requesting a stay of the Preliminary Injunction pending appeal. This Court issued the Writ of Supersedeas staying the trial court's Order pending appeal.

Appellate Jurisdiction

This Court has jurisdiction to review interlocutory trial court orders granting "temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly." N.C. Gen. Stat. § 7A-27(b)(3)(f) (2023).

Issues

The issues in this case are: (I) whether Plaintiff has standing to seek declaratory and injunctive relief; and (II) whether the trial court erred in granting a Preliminary Injunction in favor of Plaintiff on the basis Plaintiff's video sweepstakes game was predominantly a game of skill rather than chance.

Analysis

[1] In 2006, the General Assembly banned the operation of video poker and slot machines. N.C. Gen. Stat. § 14-306.1A (2023). Subsequently, businesses began to modify their machines to involve "sweepstakes," rather than direct betting, but using similar video gambling interfaces. *See Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 291, 749 S.E.2d 429, 431 (2012). In response, the General Assembly passed additional legislation in 2008 and 2010. Section 14-306.3 criminalizes "server-based electronic game promotion[s]," and Section 14-306.4, the statute at issue in this case, more broadly prohibits promoting or conducting sweepstakes through the use of an "entertaining display:"

> Notwithstanding any other provision of this Part, it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following:
>
> (1) Conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize.
>
> (2) Promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.

N.C. Gen. Stat. § 14-306.4(b).

Sweepstakes operators have mounted a series of challenges to Section 14-306.4 in our courts, first challenging the statute as an unconstitutional limitation on speech. *Sandhill Amusements v. State*, 219 N.C. App. 362, 724 S.E.2d 614, *rev'd*, 366 N.C. 323, 734 S.E.2d 570 (2012). Our Supreme Court held Section 14-306.14 regulates conduct, with only incidental burdens on speech, and the legislature had a rational basis for enacting the statute. *Hest Techs., Inc.*, 366 N.C. at 303, 749 S.E.2d at 439.

Following this, operators began modifying their products in attempts to avoid the prohibition of Section 14-306.4(b) and contesting its application to their games. So far, these challenges have been unsuccessful in our appellate courts. Before addressing the specific parameters of Plaintiff's game, it is helpful to review this line of cases as context for the present challenge.

The first of these challenges came in *State v. Spruill*, 237 N.C. App. 383, 765 S.E.2d 84, *disc. rev. denied*, 368 N.C. 258, 771 S.E.2d 326 (2015). In that case, the defendants were charged under Section 14-306.4(b) for operating a sweepstakes that used an entertaining display. Defendants offered computers with access to internet games with names such as "Keno" and "Lucky's Loot." *Id.* at 384, 765 S.E.2d at 86. Patrons, rather than purchasing tokens or paying money into the games, purchased "computer time." *Id.* at 385, 765 S.E.2d at 86. The games used a "pre-reveal" system, which displayed the amount of the prize a patron won prior to playing the game. *Id.* Upon completion of the game, the prize amount would be displayed again. *Id.* The defendants argued that, because the prize was displayed before the game was played, it did not violate the statute's prohibition on revealing prizes through the use of an entertaining display. *Id.* at 386, 765 S.E.2d at 87. We rejected this argument, holding that entry and participation in the sweepstakes was a prerequisite to playing the video game, and the fact that the sweepstakes was conducted at the beginning of the game versus its end made no meaningful difference. *Id.* at 387, 765 S.E.2d at 87. The game was still a game of chance, attached to a video game display "which entices the patron to play." *Id.* We also noted that the pre-reveal feature had been added to the game specifically in an attempt to evade Section 14-306.4. *Id.* at 386, 765 S.E.2d at 87.

Sweepstakes operators continued to refine their products, adapting them to the language in our courts' decisions. Some of these operators, like Plaintiff in this case, filed claims under our Declaratory Judgment Act seeking a determination that their games were legal under Section 14-306.4.

We reviewed the first of these actions for declaratory judgment in *Sandhill Amusements, Inc. v. Sheriff of Onslow County*, 236 N.C. App.

340, 762 S.E.2d 666, *rev'd*, 368 N.C. 91, 773 S.E.2d 55 (2015). The plaintiffs in that case, after their equipment was seized, sought a declaratory judgment holding their kiosks and marketing system were not prohibited by law. 236 N.C. App. at 344, 762 S.E.2d at 671. The plaintiffs provided electronic kiosks in which players received sweepstakes entries with the purchase of gift certificates and revealed whether they had won a prize via a display similar to a slot machine, with three "reels" of symbols. *Id.* at 343, 762 S.E.2d at 670. The screen would then display either a losing combination or a combination which required players to "nudge" a symbol from the top or bottom row into the middle in order to win a prize. This Court's majority opinion declined to address the 14-306.4 issue, but on appeal our Supreme Court reversed the majority and adopted Judge Ervin's dissent, which set forth the "predominance" test that determines whether a video game machine violates Section 14-306.4. 368 N.C. 91, 773 S.E.2d 55 (2015). Judge Ervin determined that, because the plaintiffs' equipment "involve[d] the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize," the only way for them to avoid running afoul of 14-306.4(b) was if the game involved was dependent on skill or dexterity. 236 N.C. App. at 365, 762 S.E.2d at 683 (Ervin, J, dissenting). "[T]he essential difference between a game of skill and a game of chance for purposes of our gambling statutes, including N.C. Gen. Stat. 14-306.4, is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill." *Id.* at 369, 762 S.E.2d at 685 (citing *Collins Coin Music Co. of N.C., Inc. v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 409, 451 S.E.2d 306, 308 (1994)). Even assuming that "nudging" involved skill or dexterity, whether or not the player even had the opportunity to nudge depended entirely on chance. He noted that the pool of winners could be exhausted before a player played the game, giving them no opportunity to win a prize regardless of their skill or dexterity. *Id.* at 369, 762 S.E.2d at 685-86. Accordingly, the element of chance dominated the element of skill in the operation of the plaintiffs' machines. *Id.* at 370, 762 S.E.2d at 686.

In *Crazie Overstock Promotions, LLC v. State*, the plaintiff sold discount goods through its website and maintained computers in retail establishments which allowed customers to place orders. 377 N.C. 391, 392, 858 S.E.2d 581, 582 (2021). Customers could purchase gift certificates at these retail establishments, and also received 100 "Game Points" per dollar spent on gift certificates. *Id.* at 393, 858 S.E.2d at 582. Game Points could be used at the plaintiff's computers to play reel-spinning games, similar to a slot machine, in which the patron

received a number of "Reward Points" determined by chance. *Id* at 393, 858 S.E.2d at 583. Rather than the "nudging" game from *Sandhill*, players then were required to play a "Dexterity Test" to convert Reward Points into "Dexterity Points" that could be exchanged for cash. *Id*. at 394, 858 S.E.3d at 583. The Dexterity Test involved the use of a simulated stopwatch counting from 0 to 1,000, which players attempted to stop as close to 1,000 as possible. *Id*. A player's score in the Dexterity Test determined which percentage of their reward points would be converted to Dexterity Points. Although the Dexterity Game viewed in isolation involved purely skill or dexterity, the amount of money a customer could win was determined entirely by the outcome of the Reward Game, a game of chance. *Id*. at 404, 858 S.E.2d at 589. Accordingly, the Court held "luck is so 'inherent in the nature of Crazie Overstock's games' that chance necessarily predominates over the exercise of skill and dexterity" and they were therefore prohibited under Section 14-306.4. *Id*. at 404, 858 S.E.2d at 590 (citing *State v. Gupton*, 30 N.C. 271, 274 (1848). The Court emphasized that the inquiry is not solely whether skill or dexterity is involved in the game, but "whether skill or dexterity *actually* give the player the ability to control the extent to which he or she receives a prize and the value of the prize that he or she wins rather than merely reflecting whether the player bests the odds of winning in a game of chance." 377 N.C. at 403, 858 S.E.2d at 589.

In *Gift Surplus, LLC v. Cooper*, the *Sandhill* plaintiffs returned to the Supreme Court. 380 N.C. 1, 868 S.E.2d 20 (2022). After the Court in *Sandhill* reversed the order granting their preliminary injunction, the plaintiffs modified their games and the trial court declared their products as modified did not violate Section 14-306.4 and were lawful. 380 N.C. at 5, 868 S.E.2d at 22. The plaintiffs had made two changes to their reel-spinning games. First, they attempted to address Judge Ervin's observation that players could play the game even after the prizes had been exhausted by adding a "winner-every-time" modification. *Id*. With this feature, on the 75% of spins where players formerly would not win any prize, they were now awarded a nominal prize of a few cents. *Id*. Second, they attempted to increase the dexterity involved in the game with a "double nudge" feature that required players to nudge two symbols into place rather than one. *Id*.

Our Supreme Court rejected the plaintiffs' arguments that these modifications rendered the game legal under Section 14-306.4. It held the "winner-every-time" feature did not alter the game such that skill or dexterity predominates over skill, because chance still determined how much a player was playing for on each spin, and the prize available did not depend on skill or dexterity. *Id*. The Court also held that the

"nudging" aspect of the game also did not make skill predominate. The skill required to nudge a reel up or down is *de minimis* and, even assuming a meaningful level of skill or dexterity was involved, chance would always predominate because chance determines the relative winnings for which a player can play, making it "override or thwart the exercise of skill." *Id.* at 14, 868 S.E.2d at 29 (citing *Sandhill*, 236 N.C. App. at 369, 762 S.E.2d at 685). When viewed in its entirety, the results of the game varied primarily with the vagaries of chance rather than the player's skill and dexterity. *Id.* at 15, 868 S.E.2d at 30. Accordingly, the game violated Section 14-306.4(a)'s prohibition on video sweepstakes. *Id.*

I. Standing

Defendants argue Plaintiff lacked standing to bring this action. As discussed above, this Court and our Supreme Court have reviewed several cases under identical postures: declaratory judgment actions seeking to enjoin enforcement of Section 14-306.4. *See, e.g.*, *Crazie Overstock*, 377 N.C. 391, 858 S.E.2d 581; *Gift Surplus, LLC*, 380 N.C. 1, 868 S.E.2d 20. While Defendants note that standing was not at issue in those cases, standing is an aspect of subject matter jurisdiction and may be raised at any stage of a case, including *sua sponte* by a reviewing court. *Transcon. Gas Pipe Line Corp. v. Calco Enterprises*, 132 N.C. App. 237, 241, 511 S.E.2d 671, 675 (1999).

"When a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an[] action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights." *Jernigan v. State*, 279 N.C. 556, 561, 184 S.E.2d 259, 264 (1971). Accordingly, our courts have reviewed numerous actions in which purveyors of gaming equipment sought declaratory judgments declaring their products legal, both under Section 14-306.4 and other gambling statutes. *See, e.g.*, *Am. Treasures, Inc. v. State*, 173 N.C. App. 170, 176, 617 S.E.2d 346, 350 (2005) (holding trial court's exercise of jurisdiction in issuing declaratory judgment determining whether the plaintiff's phone card scheme was an illegal gambling arrangement was a proper exception to general rule against invoking equity to interfere with criminal prosecutions). Defendants, however, argue that our Supreme Court's decision in *Comm. to Elect Dan Forest v. Emp. Pol. Action Comm.*, 376 N.C. 558, 853 S.E.2d 698 (2021), requires Plaintiff show that a relevant statute confers a cause of action and Plaintiff failed to do so.

Defendants' argument misreads the Court's language in *Comm. to Elect Dan Forest*, which broadens our recognition of standing rather than narrowing it. In that case, the Court held, under the North

Carolina Constitution, a plaintiff may assert a claim without showing that he suffered the type of "injury-in-fact" required by the United States Constitution. 376 N.C. at 609, 853 S.E.2d at 734. A legal injury on its own is sufficient. *Id.* at 608, 853 S.E.2d at 733. Our Supreme Court explained that in claims like the one at issue in that case, where the legislature has created a cause of action, the plaintiff only needs to show "a relevant statute confers a cause of action" and that "the plaintiff satisfies the requirements to bring a claim under that statute." *Id.* at 599, 853 S.E.2d at 727. Defendants attempt to broaden this rule to create additional pleading requirements for all lawsuits "where statutory issues . . . are at issue."

Comm. to Elect Dan Forest does not address this type of case, and our Supreme Court has decided multiple cases in an identical posture to this case following that decision. *See Gift Surplus, LLC*, 380 N.C. 1, 868 S.E.2d 20; *Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 858 S.E.2d 681 (2021). Plaintiff has standing to bring this action.

II. Legality of Plaintiff's game under Section 14-306.4

[2] A preliminary injunction "will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Inv., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). We review orders granting preliminary injunctions *de novo*, but because the trial court's ruling is presumed to be correct, the party challenging the order bears the burden of showing it was erroneous. *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003). In this case, the question is whether Plaintiff is likely to succeed in its claim for a declaratory judgment declaring that its products do not violate N.C. Gen. Stat. § 14-306.4.

In determining whether a game violates Section 14-306.4, we look to whether chance or skill predominates the other in determining the result of the game:

> [T]he relevant test for use in determining whether the operation of an electronic gaming device does or does not violate N.C.G.S. § 14-306.4(a) is whether, viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity.

Gift Surplus, LLC, 380 N.C. at 10, 868 S.E.2d at 26-27 (citing *Crazie Overstock*, 377 N.C. 391, 858 S.E.2d 581). Plaintiff argues that the trial court made extensive findings that the games are games of skill and that Defendants have not challenged that finding. However, the determination of whether chance or skill predominates in a game is a mixed question of law and fact that we review *de novo* when there is no factual dispute about how the game is played. *Gift Surplus, LLC*, 380 N.C. at 11, 868 S.E.2d at 27.[2]

In order to play Plaintiff's game, players purchase "YouBux" gift certificates and, for each dollar spent, they receive 100 sweepstakes entries that may be redeemed at Plaintiff's kiosks. These sweepstakes entries are, upon purchase, associated with a specific outcome: either the entry is a "loser" or is associated with a specific cash prize. However, the player must "reveal" the outcome of their winning entries in order to receive the associated prize.

To reveal their Sweepstakes Entries, players select one of eleven "Art Themes," or games, with names such as "Lucky Leprechaun," "Welcome to Vegas Royale," or "Emerald 7's." Players also select how many Sweepstakes Entries they wish to redeem. If the redeemed sweepstakes entries contained any winning outcomes, players may reveal those outcomes in one of two ways.

Under the first method, players play a graphical game similar to that in *Crazie Overstock* and *Gift Surplus*, in which three reels of symbols spin and then stop, displaying three rows of symbols. Players must "nudge" one symbol into place in order to create a winning combination. Players have five seconds to complete this nudging task or they forfeit their winning entry.

Alternatively, players may elect to use an "instant reveal" function to immediately show if any of their sweepstakes entries are winners and what prizes they award. This method does not involve gameplay: players simply select the number of sweepstakes entries they wish to reveal,

---

2. Plaintiff argues that Defendants mischaracterize the gameplay in multiple ways that are at odds with the factual findings of the trial court. However, "on appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *Ridge Cmty. Inv., Inc.*, 293 N.C. at 701, 239 S.E.2d at 574. More importantly, none of the distinctions drawn by Plaintiff are relevant to our analysis of whether chance predominates over skill in determining the outcome of the game, and our analysis remains the same adopting the trial court's factual findings as our own.

and then are shown if and what they won. Players who elect to use the Instant Revealer are not required to perform any nudging task.

If there were no winning outcomes among the sweepstakes entries redeemed, the player is given the option to play "Follow-Me." This is a memory matching game involving eight colored buttons that light up in a random sequence. The player must repeat the sequence for fourteen rounds, with the first round involving one button and each subsequent round adding another button to the sequence. Successful completion of all fourteen rounds of the Follow-Me game rewards the player with a number of new sweepstakes entries equivalent to the number redeemed.

Plaintiff's game involves a sweepstakes whose results are revealed via an entertaining display. Accordingly, the only remaining inquiry to determine its legality under Section 14-306.4 is whether chance or skill predominate in determining the results of the game:

> As a result, given that the equipment and activities protected by the preliminary injunction clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis upon which Plaintiffs' equipment and activities can avoid running afoul of N.C. Gen. Stat. § 14-306.4(b) is in the event that the game or simulated game involved is 'dependent on skill or dexterity.'

Sandhill, 236 N.C. App. at 365, 762 S.E.2d at 683 (Ervin, J., dissenting).

In this case, the game appears to be identical in many respects to those held by our Supreme Court in *Gift Surplus* and other cases to be illegal under Section 14-306.4: a player enters the game, their prize is determined by chance, and they must perform a dexterity task to receive the prize. Although dexterity and skill may be involved in a portion of the game, "when chance determines the relative winnings for which a player is able to play, chance can override or thwart the exercise of skill." *Gift Surplus, LLC*, 380 N.C. at 14, 868 S.E.2d at 29. Plaintiff argues that certain specific attributes of its game distinguish it from those previously held illegal under Section 14-306.4. We disagree.

First, Plaintiff argues that its game is not prohibited under Section 14-306.4 because the prize available to the player is determined prior to any video gameplay, and therefore playing the game does not determine whether a player has a winning or losing entry. Plaintiff's argument ignores the plain text of the statute: Section 14-306.4(b) not only proscribes the use of an entertaining display to enter the sweepstakes and determine the result, but it also prohibits the use of such a display

for the "reveal of a prize." N.C. Gen. Stat. § 14-306.4(b)(1). The fact that the available prize is determined upon the purchase of Youbux and receipt of the accompanying sweepstakes entries does not change the fact that it is revealed via an entertaining display. No matter when the results are determined, use of an entertaining display to reveal the prize is prohibited.

Nor does the existence of the "instant reveal" feature change our analysis. Plaintiff argues that the instant reveal function does not make use of an entertaining display because it involves no video gameplay and the instant reveal is unadorned. While Defendants argue that displaying sweepstakes results on a video monitor is by definition an entertaining display, we need not make this determination. Even assuming the instant reveal feature does not make use of an entertaining display and is legal under Section 14-306.4, that option does not thereby render legal the other option available at the kiosk, which does use such an entertaining display to reveal prizes. The feature of the product by which sweepstakes prizes are revealed through an entertaining display remains illegal and prohibited by statute.

Plaintiff also argues that the "nudging" aspect of its game makes skill and dexterity predominate over chance. The game at issue in *Gift Surplus* involved a nearly identical nudging feature, which did not prevent our Supreme Court from holding that chance predominated skill. 380 N.C. at 15, 868 S.E.2d at 30. Regardless of how skilled at the nudging game a player is, chance always control the amount of money the player is playing for. Plaintiff attempts to distinguish its game by noting that players have only five seconds to "nudge" the symbols to create a winning combination, rendering the task more difficult. However, this argument ignores a crucial part of the decision in *Gift Surplus*: although the Court observed that the skill and dexterity required to "nudge" a reel up or down was *de minimis*, the holding did not depend on this:

> More fundamentally, even assuming there was a meaningful level of skill or dexterity involved in the game, chance would always predominate because, when chance determines the relative winnings for which a player is able to play, chance "can override or thwart the exercise of skill." As in *Crazie Overstock, LLC*, "the extent to which a customer is able to win more than a minimal amount of money is controlled by the outcome of Plaintiffs' games' initial real spin regardless of the level of skill and dexterity that the player displays while participating in nudging the reels."

Gift Surplus, LLC, 380 N.C. at 14, 868 S.E.2d at 29. Because chance determined the prize for which a player was playing for on each spin, chance predominated over skill in the game, even assuming the nudging game required a significant level of skill. The modifications to the nudging game presented by Plaintiff do not allow it to escape this paradigm, as the prize available to the player via a successful nudge is always determined by chance. Plaintiff briefly attempts to argue that the symbols "do not appear at random" because they symbols are determined at the time the sweepstakes entries are issued, and not by playing the game. This is a distinction without a difference, as the critical question is whether the result is determined by chance, not when that determination is made. We note as well that players in *Gift Surplus*, when a winning combination was available, successfully completed the nudging game between 86% and 90% of the time. 380 N.C. at 14, 868 S.E.2d at 29. The evidence provided by Plaintiffs in this case indicates that players succeeded 86% of the time. This evidences a similarly *de minimis* impact of skill or dexterity upon the results of the game.

The most prominent difference between Plaintiff's game and those at issue in earlier appellate decisions is the incorporation of the "Follow-Me" game. As described above, when a player plays a round of Plaintiff's game and no prize is revealed, they are given the opportunity to play a pattern matching game which, if successfully played, rewards them with a refund of the sweepstakes entries wagered that round. This appears to be an attempt to address the observation, first made by Judge Ervin in *Sandhill*, that in similar games chance entirely determined whether players even received the opportunity to make use of their skill or dexterity. 236 N.C. App. at 369, 762 S.E.2d at 686 (Ervin, J., dissenting). Unlike in *Sandhill*, Plaintiff's game incorporates a dexterity element in each round a player plays.

However, this does not automatically render the game one in which skill or dexterity predominate over chance. For one, it is unclear that the task presented by the Follow-Me game is reasonably possible, even for a skilled individual. Research presented by Plaintiff showed that, on average, players completed 6.7 rounds of the game. Each subsequent round is progressively more difficult than the last, and a single error in any of the fourteen rounds causes a player to fail. The game cannot measure gradations of skill: either a player completes all fourteen rounds or they fail and receive no reward, regardless of how many rounds they completed. The final round of the Follow-Me game is over twice as long as the average round completed by players. While the research conducted by Dr. Mulligan included data about how often players successfully

completed the nudging game, it notably did not include information as to how many, if any, participants managed to complete all fourteen rounds of Follow-Me. Giving players the option to complete an impossible task to receive an advantage in a game is effectively the same as having no dexterity element, because no amount of skill will make a difference in the outcome of the game. Plaintiff has therefore not provided evidence that skill or dexterity, via the Follow-Me feature, predominate over chance in determining the results of the game.

Even assuming that Follow-Me is possible for players of sufficient skill, Plaintiff has not shown that skill or dexterity predominate chance as a result. The only prize players are playing for is a refund of the sweepstakes entries redeemed in that round of the game: effectively, an opportunity to play another round, in which the available prize is determined at random. While a player expressing a high amount of skill may receive a number of additional plays, the prizes a player can win each time always depends entirely on chance.

No amount of skill applied to the Nudge or Follow-Me portions of Plaintiff's game overrides this fundamental aspect: that, with each round played, "the relative amount of the player's winnings or losses varies primarily with the vagaries of chance." *Crazie Overstock*, 377 N.C. at 391, 858 S.E.2d at 581. In its Order, the trial court reasoned:

> Because: (a) unredeemed winning entries remain in the finite prize pool but (b) losing entries are removed from the sweepstakes pool as they are redeemed, at the beginning of each sweepstakes every participant is, in actual effect, able to compete for the top prize. That is, a participant who consistently employed the necessary level of skill throughout both scenarios would, eventually, eliminate all losing entries.

It is true that a player who was consistently successful at both the Nudge and Follow-Me games could, eventually, exchange a sweepstakes entry for each prize available in the sweepstakes pool. This would require the redemption of a significant number of sweepstakes entries obtained from the purchase of Youbux, due to the nature of Plaintiff's game: even perfect play of the Follow-Me game does not refund all the losing entries a player reveals, because Follow-Me-is not available on every round. Players redeem multiple sweepstakes entries at a time: during each round of the game, players reveal the prize for a minimum of 25 and a maximum of 500 sweepstakes entries. If a single one of the revealed entries is associated with a prize, the player is unable to play Follow-Me, and each of the losing entries is therefore forfeited. A player

who purchases $5.00 worth of Youbux and then redeems their 500 sweepstakes entries and receives any prize, no matter how small, cannot continue playing without purchasing more Youbux and receiving additional sweepstakes entries. Optimal play of the Follow-Me and Nudge portions of the game thus creates an effect similar to the "winner-every-time" feature in *Gift Surplus*: the player receives a prize on each spin, but the amount of that prize is always determined by chance. 380 N.C. at 5, 868 S.E.2d at 22.

Although a player could eventually exhaust the finite prize pool and with perfect play exchange sweepstakes entries for each of the available prizes, this does not nullify the role of chance in the playing of the game. This is for two primary reasons. First, beginning a game generates a pool of one million game outcomes. Players may exchange up to 500 sweepstakes entries at one time, requiring a minimum of two thousand spins to exhaust the prize pool. Second, the total number of sweepstakes entries that must be redeemed to exhaust the prize pool varies based on the distribution of prizes. This is because the Follow-Me game is only available when none of the sweepstakes entries award a prize. This means that for the player, an ideal distribution of prizes would consist of each spin revealing either (1) a result indicating that all sweepstakes entries redeemed on that spin were winners, or (2) no prizes, allowing them to play Follow-Me and refund their sweepstakes entries. The further from this ideal distribution the results of the game are, the more sweepstakes entries from YouBux purchases must be redeemed in order to exhaust the pool.[3]

Plaintiff's game is exactly the type of electronic sweepstakes the legislature intended to prohibit by enacting Section 14-306.4: "[c]ompanies have developed electronic machines and devices to gamble through pretextual sweepstakes relationships with Internet service, telephone cards, and office supplies, among other products . . . such electronic sweepstakes systems utilizing video poker machines and other similar simulated game play create the same encouragement of vice and dissipation as other forms of gambling . . . by encouraging repeated play, even when allegedly used as a marketing technique." 2009 N.C. Sess.

3. For example, assume there are 1,000 winning entries in the pool of 1,000,000 results and a player chooses to reveal the maximum of 500 sweepstakes entries at a time. Under ideal results, and with 100% success at the Nudge and Follow-Me games, the player will exchange a total of 1,000 sweepstakes entries, obtained with the purchase of $10 worth of Youbux, for all available prizes. Under the least desirable prize distribution, in which each winning spin reveals only one winning entry, the player will ultimately exchange 500,000 sweepstakes entries, obtained with the purchase of $5,000 worth of Youbux, for the same prizes.

Laws, 408. None of Plaintiff's attempts to distinguish its game from the similar games previously held by our courts to be illegal change the fact that chance is core to the game and always determines the amount a player can win.

Thus, chance predominates skill or dexterity in determining the outcome of Plaintiff's game. Therefore, Plaintiff has not shown a likelihood of success in its claim for declaratory judgment. Consequently, the trial court erred in granting Plaintiff's motion for a preliminary injunction.

Conclusion

Accordingly, for the foregoing reasons, we reverse the Order of the trial court granting Plaintiff's Motion for Preliminary Injunction and remand this case to the trial court for further proceedings.

REVERSED AND REMANDED.

Judge WOOD concurs.

Judge GRIFFIN dissents by separate opinion.

GRIFFIN, Judge, dissenting.

I agree with the majority that Plaintiff has standing to seek declaratory and injunctive relief. However, I would affirm the trial court's order granting Plaintiff's Motion for a Preliminary Injunction and hold Plaintiff's sweepstakes system complies with section 14-306.4 of the North Carolina General Statutes.

I. Standard of Review

As a threshold matter, I would give deference to the trial court's finding that skill predominates over chance. Plaintiff's understanding and presentation of their game materially differs from that of Defendants in ways fundamental to the analysis. In fact, Plaintiff lists four material mischaracterizations, two of which I believe alter the analysis:

1. The instant reveal function does not use an entertaining display because it does not take the form of actual or simulated gameplay;
2. There is never a time when the entry pool has no winning entries remaining[.]

The majority holds these differences are irrelevant to the analysis. I disagree because the first difference, whether the instant reveal function uses an entertaining display, if true, undermines the legality of Plaintiff's system. *See* N.C. Gen. Stat. § 14-306.4(b)(1) (2023). The second difference, whether there is ever a time the entry pool contains no winning entries, is material because it directly impacts the role that chance plays in determining which prize a participant may win.

As de novo review is only appropriate "when there is no factual dispute about how a game is played," I would hold the material disputes above warrant reviewing the trial court's order to determine whether the factfinder's determination that skill or dexterity dominate over chance was supported by competent evidence. *See Gift Surplus, LLC. v. State ex rel. Cooper*, 380 N.C. 1, 10–11, 868 S.E.2d 20, 27 (2022) (citations and internal marks omitted).

II. Analysis

Having established the correct standard of review is whether the trial court's findings were supported by competent evidence, I now address Plaintiff's argument that the trial court properly granted the preliminary injunction.

A preliminary injunction should be issued only "'(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during [] litigation.' " *Providence Volunteer Fire Dep't v. Town of Weddington*, 253 N.C. App. 126, 140, 800 S.E.2d 425, 435 (2017) (quoting *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). Generally, we are "'not bound by the [trial court's] findings, but may review and weigh the evidence and find facts for [ourselves].' " *Id.* at 140, 800 S.E.2d at 435 (quoting *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983)). However, as the determination of whether chance or skill predominates in a game subject to section 14-306.4 is a mixed question of law and fact, we only review "de novo when there is no factual dispute about how a game is played." *Gift Surplus, LLC.*, 380 N.C. at 11, 868 S.E.2d at 27 (citation omitted). Thus, where there is a factual dispute about how the game is played, de novo review is inappropriate and deference ought to be given to the trial court's findings.

The dispositive question which necessarily determines whether Plaintiff is likely to succeed on the merits of its claim is whether skill or chance predominates in their sweepstakes system. *Id.* at 10, 868 S.E.2d

at 27 ("We reaffirm that the predominant-factor test is the applicable test for determining whether a video sweepstakes is conducted through a game of chance as prohibited under N.C.G.S. § 14-306.4.").

Section 14-306.4 "prohibits sweepstakes conducted through electronic machines using video games of chance." *Id.* at 7, 868 S.E.2d at 25. To determine whether a game is one of chance, as opposed to one of skill or dexterity, we look at:

> [W]hether, viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity.

Id. at 10, 868 S.E.2d at 26–27 (quoting *Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 403, 858 S.E.2d 581, 589 (2021)). Thus, sweepstakes are prohibited if they are "conducted through the use of an entertaining display, but only when the electronic display takes the form of actual game play, or simulated game play where the game in question is not dependent on skill or dexterity." *Id.* at 9, 868 S.E.2d at 26 (citations and internal marks omitted). For section 14-304.6 to sweep Plaintiff's system within its scope, there must be some element of chance necessarily involved in the system. N.C. Gen. Stat. § 14-306.4(a)(5) (" 'Sweepstakes' means any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance.").

The trial court, after receiving witness testimony and expert affidavits, found from competent evidence that:

> 99. Farley's analysis established that there was no "element of chance" in either task that would "thwart" the participant's "exercise of skill or judgment." On the system as configured, a participant who consistently successfully completed all tasks would be able to eliminate losing entries until he had an opportunity to compete for all remaining available prizes.

This finding, and the legal conclusion that Plaintiff's sweepstakes is lawful, was bolstered by additional expert testimony in that "Dr. Mulligan's extensive statistical and analytical data to support his conclusions establishes that skill predominates with regard to both the Nudge challenge and the Follow Me challenge, and that the system exhibits no element of chance that would serve to thwart a participant's exercise of skill." Both

findings were supported by affidavits of expert witnesses who completed in-depth studies and analysis of Plaintiff's sweepstakes system.

I would hold these findings sufficient to support the legal conclusion that Plaintiff established a likelihood of success on the merits. This is because the only aspect of Plaintiff's sweepstakes system in which chance is present is during the initial entry, i.e., whether a specific entry is associated with a prize. The trial court hits the nail on the head in concluding that, at this point in the system, "the actual prize is determined by chance as is required for a sweepstakes, the actual prize is embedded in the sweepstakes entry itself, i.e., prior to any game play." *See* N.C. Gen. Stat. § 14-306.4(a)(5) (" 'Sweepstakes' means any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance."). Where gameplay is present in Plaintiff's sweepstakes, skill allows the participant to control their fortune because, if a participant is skilled enough, they may successfully complete the Nudge challenge and win any associated prizes as well as the cash bonus.

Again, if skilled enough, a participant may earn additional sweepstakes entries through the Follow Me challenge if their initial entries were not associated with a prize. If a player utilizes the appropriate level of skill during the Follow Me challenge, they will be able to win a prize every time they play by exhausting the losing entries and limiting the pool to only prizes which they can earn through the exercise of skill in the Nudge challenge. This feature of Plaintiff's system distinguishes it from other systems held unlawful because it, in effect, rewards skilled participants with a prize every time they play.

The majority recognizes this: "It is true that a player who was consistently successful at both the Nudge and Follow Me games could, eventually, exchange a sweepstakes entry each prize available in the sweepstakes game." However, they determine this outcome is undermined by the fact that a participant would need to redeem a significant number of entries to exhaust all losing entries to eventually claim each prize. They conclude from this that "[o]ptimal play of the Follow Me and Nudge portions of the game thus creates an effect similar to the 'winner-every-time' feature in *Gift Surplus*: the player receives a prize on each spin but the amount of that prize is always determined by chance." While correct in that our Supreme Court held "[i]f chance determines the prize for which players may play, then, as in the case of traditional slot machines, 'the return to the player is . . . dependent on . . . chance[,]' " *Gift Surplus, LLC*, 380 N.C. at 13, 868 S.E.2d at 28 (citation

omitted). I would hold the finite prize pool and the Follow Me challenge nullify the role of chance in determining the prize a participant plays for, or at the least minimize the extent that chance predominates over skill. This is because, as the majority states, "a player who was consistently successful at both the Nudge and Follow Me games could, eventually, claim each prize available in the sweepstakes game." The *de minimis* level of chance present is necessary for the system to fall into the definition of sweepstakes. Under this scheme, I would hold skill predominates over the amount of chance necessarily present in a sweepstakes.

I would also hold Plaintiff's system does not offend the plain language of section 14-306.4(b)(1). Section 14-306.4(b)(1) states that it shall be unlawful to "[c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize." N.C. Gen. Stat. § 14-306.4(b)(1). Plaintiff's system does not violate this prohibition as it does not necessarily require the use of an entertaining display to reveal a prize if the participant opts to use the instant reveal function. Thus, an entertaining display is one aspect of the system that a participant may choose to engage with, but is not required to use. Plaintiff's system, by providing participants with the option to go through the entire sweepstakes process without using an entertaining display and only using an entertaining display to provide participants with an opportunity to win an additional prize, does not offend the statute.

We acknowledge the legislature intended to cast a wide net in regulating electronic sweepstakes. N.C. Gen. Stat. § 14-306.4(c) ("It is the intent of this section to prohibit any mechanism that seeks to avoid application of this section through the use of any subterfuge or pretense whatsoever."). However, where, as here, a plaintiff is able to design a system which ultimately elevates skill over the chance inherent in a sweepstakes, I would hold they have complied with the law. To this end, I would also affirm the trial court's conclusion of law asserting the balance of equities tilts in Plaintiff's favor—thus warranting an injunction to prevent harm to Plaintiff and its business.

III. Conclusion

Because the legislative scheme requires the presence of chance in a sweepstakes, I would hold Plaintiff's entire system elevates skill over chance by utilizing a finite prize pool from which losing entries are exhausted and potentially returned to a participant through the adequate exercise of skill. Thus, Plaintiff's sweepstakes provides the participant with the ability to win every time and therefore does not offend section 14-306.4.

SESSOMS v. TOYOTA MOTOR SALES, U.S.A., INC.

[297 N.C. App. 395 (2024)]

SHEILA MARTIN SESSOMS, Administratrix of the ESTATE OF MATTHEW GIBSON SESSOMS, Plaintiff

v.

TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA MOTOR CORPORATION, TOYOTA MOTOR NORTH AMERICA, INC., TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA, INC., SUBARU OF AMERICA, INC., SUBARU CORPORATION, SUBARU CORPORATION, f/k/a FUJI HEAVY INDUSTRIES, LTD., NATIONAL CAR AND TRUCK SALES LLC, JC SOLES, JR., in his Individual Capacity, JEREMY G. REGISTER, in his Individual Capacity, and BARRY W. GELEZINSKY, in his Individual Capacity, Defendants

No. COA24-265

Filed 31 December 2024

Discovery—order compelling discovery—translations of already-produced documents—Rule 26—no duty to create new documents

In a case involving the death of plaintiff's son in a traffic accident, where plaintiff (as administratrix of her son's estate) alleged that the faulty design of her son's vehicle contributed to his death, the trial court neither abused its discretion nor committed reversible error in most aspects of its order compelling discovery from defendants—the car manufacturers who designed the vehicle. However, the court did err in requiring defendants to produce English translations of documents originally written and produced in Japanese where, although the production of such translations would have been required if they had already existed in the normal course of business, Civil Procedure Rule 26 did not require defendants to create new documents. The portion of the discovery order requiring the English translations was reversed, the court's order imposing sanctions on defendants for noncompliance with the discovery order was vacated, the matter was remanded, and the portion of defendants' appeal challenging the location of certain Rule 30(b)(6) depositions the trial court had ordered was dismissed.

Appeal by defendants from Toyota Motor Sales, U.S.A., Inc., and Subaru Corporation from orders entered 10 August 2023 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 25 September 2024.

Abrams & Abrams, P.A., by Noah B. Abrams, and Musselwhite, Musselwhite, Branch & Grantham, P.A., by J. William Owen, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jennifer K. Van Zant, Jim W. Phillips, Jr., Andrew L. Rodenbough, and Graham F. Whittington, and Bowman and Brooke LLP, by Patrick J. Cleary and Annie C. Warren, for defendant-appellants Toyota Motor Sales, U.S.A., Inc., and Subaru Corporation.

PER CURIAM.

This action arises from the death of Matthew Gibson Sessoms, who died in a traffic accident. This appeal is from two interlocutory orders in which the trial court (1) compelled certain defendants to supplement their discovery responses (the "Discovery Order") and (2) sanctioned said defendants for not adequately responding to discovery requests (the "Sanctions Order").

I. Background

In July 2021, Mr. Sessoms died in a traffic accident in which a dump truck allegedly ran a stop sign and collided with a 2013 Toyota Scion FR-S he was driving. Mr. Sessoms' passenger exited the Toyota immediately after the collision; but Mr. Sessoms remained in his vehicle, pinned by its steel bumper. At some point while Mr. Sessoms remained pinned inside his vehicle, the engine area caught fire, with the fire breaching into the passenger area. Rescue efforts to extricate Mr. Sessoms were unsuccessful, and he died at the scene.

Mr. Sessoms' vehicle was designed and developed jointly by Toyota Motor Company ("TMC") and Subaru Corporation ("Subaru"), hereinafter referred to as the "Toyota Defendants."

Mr. Sessoms' mother, Sheila Martin Sessoms, is the administratrix of his estate. She brought this action seeking damages arising from her son's death. She added the Toyota Defendants as defendants, alleging that her son's death was caused in part by the faulty design of her son's vehicle which caused it to catch fire with the fire breaching into the passenger area.

In April 2023, after the Toyota Defendants had already answered certain discovery requests and objected to other discovery requests by Plaintiff, Plaintiff noticed depositions pursuant to Rule 30(b)(6) of our Rules of Civil Procedure, which included document requests. Two months later, in June 2023, Plaintiff deposed the witnesses designated by the Toyota Defendants, all outside of North Carolina.

In July 2023, shortly after the last Rule 30(b)(6) deposition, Plaintiff moved to compel discovery, specifically to provide fuller responses to

her prior written requests, to produce more documents (including English translations of certain documents that are currently in Japanese), and further to submit to additional Rule 30(b)(6) depositions. The Toyota Defendants opposed Plaintiff's motion.

In August 2023, after a hearing on the matter, the trial court entered the Discovery Order, directing the Toyota Defendants to provide further responses to Plaintiff's discovery requests. Specifically, the trial court ordered the Toyota Defendants to supplement its answers to certain interrogatories. The trial court ordered the Toyota Defendants to supplement certain requests for production of documents, including providing English translations of documents produced in the Japanese language, and to provide logs identifying those documents responsive to the request but which have been destroyed, or no longer in the possession of the Toyota Defendants or otherwise to which the Toyota Defendants claim a privilege. The trial court also required the Toyota Defendants to provide witnesses for Rule 30(b)(6) depositions and that those depositions take place in Robeson County. The trial court also gave the Toyota Defendants deadlines by which to comply.

Plaintiff, however, moved for sanctions and to compel further discovery, contending that the Toyota Defendants did not comply with the Discovery Order, including, in part, a failure to cause documents previously provided or supplemental documents in their original form in the Japanese language to be recreated in the English language. In December 2023, after another hearing on the matter, the trial court entered the Sanctions Order, sanctioning the Toyota Defendants. In the Sanctions Order, the trial court found that the Toyota Defendants did not timely comply with its Discovery Order.

In the Sanctions Order, the trial court sanctioned the Toyota Defendants, in relevant part, as follows: The Toyota Defendants were deemed to have admitted that they were jointly obligated in the design of Mr. Sessoms' Scion; that the engine compartment, firewall, and side structure of the Scion were defectively designed and manufactured; that they had constructive notice of these defects; and that a safer, alternative design was reasonably available to them. (Note that the trial court did not deem the Toyota Defendants liable for Mr. Sessoms' death. Rather, the burden remains with Plaintiff to prove that any defects deemed admitted were a proximate cause of Mr. Sessoms' death.) The Toyota Defendants were also deemed to have admitted certain paragraphs of Plaintiff's complaint and certain paragraphs in their answer were deemed stricken. The trial court further ordered the Toyota Defendants to comply with its prior Discovery Order.

The Toyota Defendants noticed an appeal and filed a petition for a writ of *certiorari* for review of the Discovery Order and the Sanctions Order, both being interlocutory in nature. The Toyota Defendants argue that the orders being appealed affect substantial rights, thereby invoking our appellate jurisdiction. We are compelled by precedent to conclude that the Toyota Defendants' appeal concerning the trial court's ordering Rule 30(b)(6) depositions to be conducted in Robeson County does not affect a substantial right. *See K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 718–19 (2011). And, in our discretion, we do not review that issue. To the extent that the Toyota Defendants do not have an immediate appeal of right to review of other issues concerning the Discovery Order and the Sanctions Order, in our discretion we grant *certiorari* in the aid of our jurisdiction. *See* N.C.G.S. § 7A-32(c).

II. Analysis

"[O]ur review of a trial court's discovery order is quite deferential." *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410 (2006). Such orders are typically reviewed for an abuse of discretion. *See*, *e.g.*, *Sessions v. Sloane*, 248 N.C. App. 370, 381 (2016). However, where statutory interpretation is involved, we review such issues *de novo*. *See*, *e.g.*, *In re E.D.H.*, 381 N.C. 395, 398 (2022).

Regarding the Discovery Order (and the portions of the Sanctions Order directing the Toyota Defendants to comply with the Discovery Order), we conclude that the trial court did not abuse its discretion, commit reversible error, or the Toyota Defendants have otherwise waived any argument by not timely objecting *except that* we conclude the trial court erred by requiring the Toyota Defendants to create new documents in English of documents already provided that are in the Japanese language. Rule 26 of our Rules of Civil Procedure allow a party to seek documents in the possession of the adverse party; it does not generally require the adverse party to pay for any said documents to be translated into the English language. *See* N.C. R. Civ. P. 26. In other words, there is no duty to produce documents that do not exist. *See*, *e.g.*, *Electrolysis Prevention Sols. LLC v. Daimler Truck N. Am. LLC*, 2023 WL 4750822 at *5 (W.D.N.C. 2023) (refusing to order a party to produce documents that do not exist). Of course, if the Toyota Defendants *already have* English translations of the Japanese-language documents in the normal course of their business or they create English summaries of these documents for any purpose, such documents should be provided as being within the scope of the Rule. *See*, *e.g.*, *Contreras v. Isuzu Motors, Ltd. of Japan*, 1999 WL 33290667 at *2–3 (W.D. Tex. 1999).

We note Plaintiff's citation to a federal case in Georgia where the judge compelled a foreign defendant doing business in the United States to create English translations of certain documents. *See Stapleton v. Kawasaki Heavy Indus., Ltd.*, 69 F.R.D. 489, 490 (N.D. Ga. 1975). However, we are persuaded by what we perceive to be the greater weight of authority in the United States that a party producing documents is not required to create new documents consisting of English translations of documents already provided. *See, e.g.*, *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501 (1st Cir. 1982); *E. Bos. Ecumenical Cmty. Council, Inc. v. Mastrorillo*, 124 F.R.D. 14, 15 (D. Mass. 1989); *Cook v. Volkswagen of Am., Inc.*, 101 F.R.D. 92, 92 (S.D. W. Va. 1984) (rejecting *Stapleton* and relying on the reasoning of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974), that each party is to bear the "ordinary burden of financing [their] own suit"); *Fujitsu, Ltd. v. Tellabs, Inc.*, 2009 U.S. Dist. LEXIS 133853 at *12 (N.D. Ill. 2009) (listing cases); *Toyo Tire & Rubber Co. v. CIA Wheel Grp.*, 2016 U.S. Dist. LEXIS 153771 at *6 (C.D. Cal. 2016) (rejecting *Stapleton* analysis); *Mills v. Kia Motors Am., Inc.*, 2010 U.S. Dist. LEXIS 157274 at *4 (M.D. Ga. 2010) (same); *Ex parte Maple Chase Co.*, 840 So.2d 147, 150 (Ala. 2002).

III. Conclusion

Having concluded the trial court erred in requiring the Toyota Defendants *to create* and then produce English translations of certain discoverable documents, we reverse the portions of the Discovery Order and the Sanctions Order requiring the Toyota Defendants to do so. We, otherwise, dismiss the appeal of the issue relating to the Rule 30(b)(6) depositions being held in Robeson County. And we affirm the Discovery Order.

However, we vacate the Sanctions Order and remand the matter to the trial court to reconsider its Sanctions Order by exercising its discretion in fashioning an appropriate sanction, if it still deems sanctions to be appropriate. Said sanctions may include those sanctions contained in the Sanctions Order (except the requirement to create English translations of discoverable documents). On remand, should the trial court invoke sanctions requiring that certain facts be deemed admitted by the Toyota Defendants, the trial court shall consider arguments that may be raised as to whether the deemed admissions render certain discovery requests by Plaintiff irrelevant to any matter still at issue.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, DISMISSED IN PART, REMANDED.

Panel consisting of Chief Judge DILLON and Judges MURPHY and THOMPSON.

STATE OF NORTH CAROLINA
v.
BRIAN CRISP, DEFENDANT

No. COA24-2

Filed 31 December 2024

1. Constitutional Law—right to speedy trial—nearly seven-year delay—Barker factors

The six-and-a-half-year delay between defendant's arrest and trial for murder did not violate his constitutional right to a speedy trial, where consideration of the four factors in *Barker v. Wingo*, 407 U.S. 514 (1972), revealed that: (1) similarly long delays had been upheld in other cases; (2) although part of the delay was attributable to the State (from its late submission of evidence for testing, to the Assistant District Attorney's scheduling limitations and the district's congested court docket), part of the delay was attributable to defendant's actions, such as his changes in counsel, drawn-out trial preparation, and request for a continuance for trial, and the parties agreed that the one-year period of delay caused by shutdowns during the COVID-19 pandemic was justified; (3) the delay neither impaired defendant's ability to mount a defense nor caused him to experience abnormal anxiety or oppressive pretrial incarceration; and (4) defendant formally asserted his right to a speedy trial only one month before the trial began.

2. Criminal Law—motion for mistrial—photograph of murder scene—showing bloodstains from unrelated incident—prejudice analysis—curative instruction

The trial court in a murder case did not abuse its discretion in denying defendant's motion for a mistrial based on the admission of a photograph taken inside defendant's home—where the murder occurred—which depicted blood-stained areas from an unrelated incident that had taken place years earlier. The photograph did not prejudice defendant where, although it may have suggested that a previous bloody incident had occurred at defendant's residence, it did not suggest that he had been arrested, tried, or convicted of committing a previous crime, or even that defendant had previously committed a violent act. Further, the trial court sufficiently cured any potential prejudice by striking the photograph and related testimony from the record, instructing the jury to disregard that evidence entirely, and asking all jurors if they could comply with the instruction, to which all jurors replied that they could.

Appeal by defendant from judgment entered 15 February 2023 by Judge Steve R. Warren in Cherokee County Superior Court. Heard in the Court of Appeals 29 October 2024.

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

Law Office of Lisa Miles, by Lisa Miles, for defendant-appellant.

DILLON, Chief Judge.

In this case, we consider a criminal defendant's right to a speedy trial and the introduction of potentially prejudicial evidence to a jury.

I. Background

Defendant Brian Crisp was arrested on 10 May 2016 and charged with first-degree murder of Kenneth "Ryan" Jones. Defendant's trial began almost seven years later, on 30 January 2023. It was uncontested that Defendant shot Ryan. The only issue at trial was whether the shooting was intentional or accidental. The jury found Defendant guilty of second-degree murder. Defendant timely appealed.

II. Analysis

Defendant presents two issues on appeal, which we address in turn.

A. Right to Speedy Trial

[1] Before his 2023 trial began, Defendant moved to dismiss on speedy trial grounds, which the trial court denied. Defendant argues this was error.

We review the order to determine if competent evidence supports the trial court's findings and if those findings support its conclusions of law. *See State v. Cooke*, 306 N.C. 132, 134 (1982). Uncontested findings are binding on appeal. *See State v. Cobb*, 381 N.C. 161, 165 (2022). "The denial of a motion to dismiss on speedy trial grounds presents a constitutional question of law [the ultimate conclusion of law] subject to de novo review." *State v. Farook*, 381 N.C. 170, 178 (2022).

Criminal defendants are guaranteed the right to a speedy trial under both the Sixth Amendment of the Constitution of the United States (applicable to the states through the Fourteenth Amendment) and Article I, Section 18 of the North Carolina Constitution. *See* U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial[.]"); U.S. Const. Amend. XIV; N.C. Const. art. I, § 18 ("[J]ustice shall be administered without favor, denial, or delay.").

A delay exceeding one year generally "signal[s] the point at which courts deem the delay unreasonable enough to trigger the *Barker* calculus," wherein we analyze factors to determine whether a defendant's right to a speedy trial has been violated. *Farook*, 381 N.C. at 178–79 (referencing the federal speedy trial analysis devised by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972)). Here, the post-accusation delay (May 2016 to January 2023) was approximately six-and-a-half years, thus triggering the *Barker* analysis.

Under the *Barker* analysis, we weigh the following four factors: (1) length of the delay, (2) reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant. *See Barker*, 407 U.S. at 530. *See also State v. Grooms*, 353 N.C. 50, 62 (2000) (recognizing that we employ the *Barker* analysis in reviewing speedy trial motions under the North Carolina constitution). None of the four *Barker* factors are "either a necessary or sufficient condition" to finding whether a defendant was deprived of his right to a speedy trial. Rather, we "engage in a difficult and sensitive balancing process" of weighing these factors and other relevant circumstances. *Barker*, 407 U.S. at 533. We examine each factor below.

1. Length of Time

First, we address the length of time between Defendant's arrest and trial. While the length of time triggers the *Barker* analysis, it is also an independent factor to be considered in the analysis. *See Barker*, 407 U.S. at 533; *Farook*, 381 N.C. at 178. But "mere length of delay, standing alone, does not establish that the delay was unreasonable or prejudicial[.]" *State v. Groves*, 324 N.C. 360, 366 (1989). We note other cases where our Court concluded a defendant's speedy trial right was not violated, despite a lengthy delay. *See State v. Spinks*, 277 N.C. App. 554, 563 (2021) (approximately seven-year delay); *State v. Carvahlo*, 243 N.C. App. 394, 400 (2015) (nearly nine-year delay).

Here, the delay was long, being almost seven years. But this delay does not *per se* mandate a determination concluding Defendant's right to a speedy trial was violated.

2. Reasons for Delay

Next, we consider the reasons for the trial's delay. "[The] defendant has the burden of showing that the delay was caused by the *neglect* or

willfulness of the prosecution." *State v. Spivey*, 357 N.C. 114, 119 (2003). A delay approaching one year "is generally recognized as long enough to 'create a prima facie showing that the delay was caused by the negligence of the prosecutor' . . . sufficient to shift the burden of proof to the State 'to rebut and offer explanations for the delay.' " *Farook*, 381 N.C. at 179 (quoting *State v. Wilkerson*, 257 N.C. App. 927, 930 (2018)). Here, the length of the delay creates a *prima facie* showing the delay was caused by the prosecution's negligence, thus shifting the burden of proof onto the State to explain the delay.

"[D]ifferent weights should be assigned to different reasons." *Barker*, 407 U.S. at 531.

> [D]eliberate delay is weighted heavily against the State. . . . A more neutral reason such as negligent delay or a valid administrative reason such as the complexity of the case or a congested court docket is weighted less heavily against the State than is a deliberate delay. . . . A valid reason for delay, such as delay caused by difficulty in locating witnesses, serves to justify appropriate delay. Finally, delays occasioned by acts of the defendant or on his or her behalf are heavily counted against the defendant and will generally defeat his or her speedy trial claim.

Farook, 381 N.C. at 180 (cleaned up).

Based on the trial court's unchallenged findings and the findings supported by competent evidence, we divide this case's history into four distinct periods.

a. Period 1: May 2016 to March 2019

Defendant was arrested in May 2016. From May 2016 to June 2017, Defendant was represented and incurred multiple changes in counsel. Defendant was presumably not ready to go to trial until at least 5 March 2019, when defense counsel e-mailed the prosecution and requested to set a trial date. Defendant also did not file notice of his affirmative defenses (self-defense and accident) until March 2019, further suggesting he was not prepared for trial until this time.

This period of the delay can be attributed to Defendant's change in counsel and preparation for trial, which weighs against Defendant's speedy trial claim. *See State v. Johnson*, 275 N.C. 264, 269 (1969) ("A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice.").

b. Period 2: March 2019 to March 2020

In late March 2019, defense counsel discovered the State never sent certain evidence to the lab for testing. Defense counsel notified the State *via* e-mail on 2 April 2019 that the evidence had not been tested. The State delivered the evidence to the lab the next day. And the State submitted a rush request on 1 May 2019.

Defendant's case was first calendared for trial in July 2019. But his case was only placed on the alphabetical trial calendar. Multiple dates were unavailable for trial due to the assigned Assistant District Attorney's ("ADA") trial schedule: the ADA was trying a first-degree murder case in Swain County (2014 indictment date) from 5 August 2019 to 16 September 2019; the ADA married and went on his honeymoon from 20 September 2019 to 25 September 2019; and the ADA was ordered to active military duty from 8 October 2019 to 11 October 2019. And defense counsel was unavailable for trial from 29 July 2019 to 9 August 2019.

Defendant's trial was scheduled to begin 12 November 2019. However, defense counsel moved for a continuance because he had received a voluminous amount of discovery days before the trial's scheduled start date. A portion of the discovery had been in the possession of various Tennessee law enforcement agencies. The ADA met with Tennessee law enforcement personnel to acquire discovery materials before Defendant's trial, and the ADA turned over those materials to Defendant as soon as they were available to him the week before the scheduled trial in November 2019.

This portion of the delay can be attributed to both Defendant and the State. The State's delay in sending the evidence to the lab and the ADA's scheduling limitations/the district's congested court docket weigh against the State—though less heavily than a deliberate delay. But while the State may have been neglectful in failing to send evidence for testing, that neglect resulted in only a portion of the delay. Moreover, the State took immediately steps to rectify this, quickly delivering the evidence to the lab and filing a rush request. The State scheduled the trial for November 2019—approximately seven months after Defendant first requested a trial date. Notably, a significant portion of this part of the delay was due to Defendant's decision to move to continue the trial until a later date, which weighs heavily against Defendant's speedy trial claim.

c. Period 3: March 2020 to March 2021

Defendant's case was continued to the May 2020 calendar. However, from March 2020 to March 2021, Cherokee County Superior Court was

effectively shut down due to the COVID-19 pandemic. Both parties agree this one-year period of delay was fully justified. *See*, *e.g.*, *State v. Smith*, 1 N.C. 1 (1778) ("no [court] business was done" during a scheduled term of court due to "the smallpox raging then in New Bern").

d. Period 4: March 2021 to January 2023

Beginning in March 2021, the District Attorney and the ADAs of the 43rd prosecutorial district traveled the district to address the felony backlog caused by the COVID-19 shutdown. The prosecution focused on holding trials "more conducive" to be tried with the remaining COVID-19 restrictions. For example, school gyms were used as alternative venues for trials to allow for required distancing and spacing. There was a "genuine concern" cases would end in mistrial if individuals involved in the trial (including jurors) caught COVID-19. Accordingly, the prosecution "was hesitant to calendar major cases such as homicides because of the risk of mistrial."

However, Cherokee County held at least ten sessions of superior court from the court's re-opening in March 2021 to Defendant's trial in January 2023. Only one matter tried during that period was older than Defendant's case, a case indicted in 2014. All other trial calendars listed matters with indictment dates between 2017 and 2021, whereas Defendant's indictment date was in 2016.

Defendant was placed second on the trial calendar for 10 May 2022. He was placed behind a defendant with a 2019 indictment date. However, that defendant had filed a speedy trial motion, whereas Defendant had not.

Defendant's case was placed on the 2 August 2022 trial calendar, but the ADA and defense counsel agreed Defendant's case could not be tried at that time because the ADA and defense counsel were both preparing for a capital murder trial scheduled later that month. Defendant's case was placed first on the 30 January 2023 trial calendar.

Like the delay in Period 2, this portion of the delay can be attributed to both Defendant and the State. The State was coping with valid administrative complications caused by the courts' yearlong shutdown (notably, a very congested case docket) and fears about potential mistrials, which weighs less heavily against the State than a deliberate delay. Additionally, the State decided to calendar other cases before Defendant's, even though Defendant's case had been indicted first. However, the State has prosecutorial discretion in deciding the order in which to try cases. *See*, *e.g.*, *Spivey*, 357 N.C. at 120–21. This is especially important to consider where the State may have felt it was necessary to

schedule other trials first, even though Defendant was indicted later, because other defendants had asserted their right to a speedy trial. Moreover, Defendant (through his counsel) acquiesced in part of the delay, where defense counsel agreed Defendant could not be tried due to another scheduled trial. *See Vermont v. Brillon*, 556 U.S. 81, 91 (2009) ("[D]elay caused by the defendant's counsel is also charged against the defendant.").

3. Prejudice

We next address the prejudice factor. Our Supreme Court has instructed as follows with respect to this factor:

> To assess whether the defendant has suffered prejudice from the delay in bringing his case to trial, courts should analyze three interests identified by the *Barker* Court that are affected by an unreasonable delay: (1) oppressive pre-trial incarceration; (2) the social, financial, and emotional strain and anxiety to the accused of living under a cloud of suspicion; and (3) impairment of the ability to mount a defense to the charges pending against the defendant.

Farook, 381 N.C. at 189. The third interest—whether the delay impaired the defendant's ability to mount his defense—is the most serious component of the prejudice factor. *Barker*, 407 U.S. at 532.

"[A] criminal defendant may establish prejudice for purposes of his speedy trial claim through proof of either actual prejudice or presumptive prejudice." *Farook*, 381 N.C. at 190 (citing *Doggett v. United States*, 505 U.S. 647, 655 (1992)).[1] Defendant argues he was prejudiced in multiple ways.

Regarding the first interest (oppressive pre-trial incarceration), Defendant disputes the trial court's finding that Defendant's pre-trial incarceration was not oppressive. We conclude the trial court's finding and all other findings discussed below on the "prejudice" factor are supported by competent evidence.

---

1. In its order, the trial court cited to previous cases by our Supreme Court which required a defendant to show "actual, substantial prejudice" caused by the trial's delay. *See Spivey*, 357 N.C. at 122; *Farmer*, 376 N.C. at 412. However, our Supreme Court in a more recent case (*Farook*) held that a defendant can show actual prejudice *or presumptive prejudice*. *Farook*, 381 N.C. at 190. Accordingly, we analyze Defendant's argument in this case under the more lenient standard stated in *Farook*. *See id.* Even when analyzed under the more lenient standard, we agree with the trial court's conclusion that Defendant was not prejudiced by the delay.

Regarding the second interest (social, financial, and emotional strain and anxiety), Defendant presented evidence concerning his anxiety, and the trial court found that it

> does not . . . believe the defendant has suffered anxiety and concern above what would ordinarily be the baseline level of such conditions of anyone charged with a murder. In this regard, the Court finds nowhere in the medical records where the defendant ever complained of nor received treatment for anxiety or any other disorder associated with anxiety.

Defendant disputes this finding, asserting a medical diagnosis is not required to show Defendant had suffered anxiety. However, the trial court did not state that a medical diagnosis is required—it merely used the lack of a diagnosis as one piece of evidence in determining Defendant did not suffer from abnormal anxiety. Defendant further asserts the trial court failed to acknowledge Defendant's other health issues experienced during the delay, including a hiatal hernia, weight gain, and changes in speech patterns. However, we accord "great deference" to the trial court's findings of fact because the trial court has the ability to view and hear witnesses' testimony, weigh the evidence presented, and resolve conflicts in the evidence. *See State v. Williams*, 366 N.C. 110, 114 (2012).

Regarding the final and most important interest (ability to mount a defense), Defendant has not shown his defense was impaired by the delay. Regarding the evidence that was not available until November 2019, the trial court found "there was no showing that the results of those tests would have been any different had they been tested on the day of the alleged murder on May 10, 2016" and "[t]he seizures in Tennessee [evidence from law enforcement pertaining to Defendant's arrest] were ultimately fully examined by the State lab and processed without any suggestion that the results would not have been exactly the same had they been processed the day of the murder." Regarding the lay witnesses who testified at trial, the trial court found "the length of time awaiting trial, if anything, has benefitted the Defendant regarding the memories of these lay witnesses." The primary question at trial was Defendant's *mens rea* when he shot the victim, and no evidence tends to show Defendant was precluded from presenting evidence at trial about his *mens rea* on the day of the crime.

Accordingly, the trial court's findings do not show that Defendant suffered actual or presumptive prejudice due to the delay.

4. Assertion of Right to Speedy Trial

Third, we address whether Defendant asserted his right to a speedy trial.

> The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531–32.

It is more difficult for a defendant to show a speedy trial violation when the case goes to trial soon after the filing of a formal speedy trial motion. *See State v. Farmer*, 376 N.C. 407, 417 (2020). In *Farmer*, our Supreme Court held that the defendant's failure to assert his speedy trial right weighed more heavily against him because his case went to trial only four months and eleven days after he had filed his formal speedy trial motion. *See id.*

Here, Defendant's case went to trial only one month and twelve days after Defendant filed his speedy trial motion. Moreover, Defendant's case was already scheduled for trial to start the next month when he filed his motion. Accordingly, this weighs heavily against Defendant.

Defendant argues he *informally* moved for dismissal based on speedy trial grounds before filing his formal motion in December 2022. Defendant cites *State v. Washington*, 192 N.C. App. 277 (2008), in support of this argument. In *Washington*, the defendant did not formally assert a motion for dismissal based on speedy trial grounds until three years after his arrest. *See id.* at 290. However, our Court found the defendant had *informally* asserted his right when he repeatedly moved to expedite SBI testing of evidence, beginning just a few months after his arrest. *See id.* at 291.

In this case, Defendant argues he informally asserted his right through (1) a request for the production of discovery/motion to compel filed on 18 September 2017 and a motion to compel discovery production filed on 21 September 2018; (2) his demand that evidence be sent for testing after learning that evidence had not been sent to the lab; and (3) his request to set a trial date. *Washington* is distinguishable from Defendant's case.

Motions to compel discovery and requests to set a trial date are standard procedures in criminal cases. As such, we do not view them as informal assertions of Defendant's right to a speedy trial. And regarding Defendant's demand for the evidence to be tested, defense counsel merely e-mailed the prosecutor to inform him the evidence had not been sent to the lab. In contrast, the defendant in *Washington* twice filed with the trial court a formal motion to compel SBI testing, and the trial court then ordered the testing. *See id.* at 280. Defendant's e-mail is not on par with formal motions to compel testing; thus, we do not consider Defendant's e-mail demand for evidence testing as an informal assertion of his speedy trial right.

5. Balancing of the Barker *Factors*

After balancing the four *Barker* factors set forth above, we conclude that Defendant's speedy trial right was not violated to warrant dismissal of the murder charge against Defendant. While the six-and-a-half-year delay was notably long and a portion of the delay can be attributed to the State, these factors are counterbalanced by Defendant's failure to show that his defense was impaired by the delay, his failure to assert his speedy trial right until approximately one month before the trial was scheduled to start, and his contribution to the delay. Accordingly, the trial court did not err in denying Defendant's motion to dismiss on speedy trial grounds.

B. Prejudicial Evidence

[2] The second issue presented is whether the trial court erred in denying Defendant's motion for mistrial due to an allegedly prejudicial photograph which the State was allowed to offer into evidence. The photograph which Defendant claims was prejudicial depicted blood-stained areas around the same home where the murder occurred in this case. The photograph, however, was from an unrelated event which occurred years before in 2007. Defendant claims the photograph was unfairly prejudicial to him because, from it, the jury could form a belief that Defendant had committed another violent act. Defendant further claims the curative instruction provided to the jury was insufficient.

This Court reviews a trial court's denial of a motion for mistrial under an abuse of discretion standard. *State v. Simmons*, 191 N.C. App. 224, 227 (2008). The trial court "may declare a mistrial at any time during the trial," but the court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (2023). "[T]he decision as to whether substantial

and irreparable prejudice has occurred lies within the sound discretion of the trial judge and that his decision will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Williamson*, 333 N.C. 128, 138 (1992) (citation omitted). To declare a mistrial, two things must be shown: (1) the evidence provided at trial was prejudicial *and* (2) the prejudicial evidence could not be cured by a curative instruction. *See State v. McDougald*, 279 N.C. App. 25, 28 (2021).

1. Prejudicial Nature of Photograph

In determining the prejudicial effect of evidence, our Court looks at "the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict." *State v. Aycoth*, 270 N.C. 270, 272 (1967). " '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. DeLeonardo*, 315 N.C. 762, 772 (1986) (quoting N.C.G.S. § 8C–1, Rule 403 commentary (Supp.1985)).

Here, Defendant contends the photograph was prejudicial because it indicated other bloody incidents occurred at Defendant's residence in addition to this event. On appeal, Defendant argues that this case is analogous to *Aycoth*. We disagree.

In *Aycoth*, our Supreme Court reversed the denial of the motion for mistrial and held it is prejudicial for the State to offer evidence "tending to show that the accused has committed another distinct, independent, or separate offense." 270 N.C. at 272 (citation omitted). There was explicit testimony which was intentionally used to prejudice the defendant by claiming he had been indicted for murder. That is not the case in the case *sub judice*.

The present case is more analogous to the facts in *State v. Moore*, 276 N.C. 142 (1970). In *Moore*, a witness testified that the defendant had previously killed someone. *Id*. at 149. However, our Supreme Court held his testimony was not prejudicial because it did not suggest he was arrested, tried, or convicted of committing a previous crime. *Id*. Similarly, here, a photograph may have suggested a previous "bloody" incident had occurred at Defendant's residence, but the photograph did not suggest Defendant had previously been arrested, tried, or convicted of a previous crime, or even that Defendant had previously committed a violent act. Therefore, Defendant was not prejudiced by the photograph.

2. Curative Nature of Jury Instruction

Notwithstanding our holding regarding the non-prejudicial nature of the photograph, we address the trial court's curative instruction to the

jury. "When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200 (1991). There is a long-standing presumption that jurors are capable of understanding and complying with instructions. "[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Self*, 280 N.C. 665, 672 (1972) (internal citations and quotations omitted).

In the case before us, a witness for the State was asked on cross-examination about "red smears" in various places around the home. On redirect, the prosecutor published a photograph to the jury and asked the witness to speak on his opinion about the blood smears at the location. After the photograph was published, the State, on its own initiative, explained to the court that the photograph did not pertain to the incident being tried and struck the exhibit from the record. The trial court provided the jury with the following curative instruction:

> Ladies and Gentlemen, I instruct you that through inadvertence the photographs that were referred to, including the photograph which was . . . admitted into evidence in this case were not, I repeat not, photographs which in any way related to the events of May 10, 2016. Through inadvertence they were both referred to, and one of those photographs, 5031, was introduced into evidence.
>
> The testimonial responses to the line of questioning regarding the appearance of blood stains on the deck stairs leading to the porch, the stains on the walk, the stains on the driveway and other areas are hereby stricken from the record in this case. The photograph, 5031, is hereby stricken from the record in this case.
>
> [You are] not, I repeat not, to consider the responses to those questions or the photographs in this case. [You are] not, I repeat not, to consider those questions or the photographs or the photograph that was introduced into evidence in your deliberations in this case. You are to completely and utterly disregard this evidence. You are to follow these instructions to the letter.

The trial court then asked all jurors if they could comply with the instruction, and all jurors agreed they could comply.

Defendant contends that the curative instruction was insufficient and may have "made things worse," arguing that the jury would likely have acquitted Defendant had the photograph of another bloody incident which occurred in the same residence not been published. We disagree.

Defendant has not provided anything in the record tending to show the jury was incapable of disregarding the photograph or the testimony pertaining to it. We hold the court's curative instruction was sufficiently clear and cured the jury from any purported prejudice the photograph may have caused. Additionally, "we must respect the presumption the jurors both understood and complied with those instructions[,]" unless we are provided with portions of the record to rebut the presumption. *McDougald*, 279 N.C. App. at 30.

III. Conclusion

We conclude that Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges TYSON and MURPHY concur.

STATE OF NORTH CAROLINA
v.
KHALIL ABDUL FAROOK, DEFENDANT

No. COA23-1161

Filed 31 December 2024

1. Constitutional Law—right to speedy trial—six-year delay—Barker factors—no violation shown

On remand from the Supreme Court for a speedy trial hearing on the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, assertion of the right, and prejudice) where defendant was indicted on charges arising from a June 2012 incident—in which defendant walked away from the scene after his vehicle crossed the center line and collided with a motorcycle (killing a husband and wife)—but only proceeded to trial (resulting in convictions including two counts of second-degree murder) in October 2018, the trial court properly denied defendant's motion

to dismiss. While the extraordinary length of the delay weighed in favor of defendant's position, it was only one of four factors to be considered: as to the reason for delay, the State and defendant both contributed, with this factor weighing slightly in favor of defendant; assertion of the right was a neutral factor with defendant timely filing a federal action and writing to the state court judge, but delaying his filing of a formal speedy trial motion; and the State rebutted the presumptive prejudice of the lengthy delay because there was no showing that it compromised defendant's trial defense.

2. Homicide—second-degree murder—malice—sufficiency of evidence

In a prosecution resulting in defendant's conviction on charges including two counts of second-degree murder, arising from an incident in which he walked away from the scene after his vehicle crossed the center line and collided with a motorcycle (killing a husband and wife), the trial court did not err in denying defendant's motion to dismiss the homicide offenses for insufficient evidence of malice—an essential element of second-degree murder. Specifically, taken in the light most favorable to the State, the evidence was sufficient that defendant acted "so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty" where, despite the absence of evidence that he was legally impaired at the time of the crash, defendant (1) drove with a license revoked for impaired driving, (2) drove left of the center line, (3) left the scene after checking on the victims but without attempting to render aid, (4) lied to investigating officers about his identity to avoid responsibility, and (5) slurred his words and smelled of alcohol when arrested.

3. Constitutional Law—effective assistance of counsel—per se error—remand for evidentiary hearing

In a prosecution on charges including two counts of second-degree murder, defendant established error pursuant to *State v. Harbison*, 315 N.C. 175 (1985)—a per se violation of the Sixth Amendment right to effective assistance of counsel occurring when a criminal defendant's counsel admits the defendant's guilt without the defendant's knowing consent—where, during closing arguments, his trial counsel admitted defendant's guilt of the lesser included offense of misdemeanor death by motor vehicle, although defendant, during an earlier *Harbison* hearing and through stipulations had only clearly consented to the admission of certain elements of that misdemeanor. Moreover, even assuming

that defendant consented to admit all elements, there was no showing that defendant understood the potential consequences of such admissions. Although the admission was to a lesser-included offense of the charges for which defendant was ultimately convicted, defendant was nonetheless entitled to remand to the trial court for an evidentiary hearing determining whether he knowingly consented in advance to his counsel's admission of his guilt of misdemeanor death by vehicle.

Appeal by defendant from judgments entered 10 October 2018 by Judge Anna Mills Wagoner and order entered 9 March 2023 by Judge Michael D. Duncan in Superior Court, Rowan County. Heard in the Court of Appeals 11 June 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Sarah Holladay for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments convicting him of felony hit and run inflicting serious injury or death, two counts of second-degree murder, and attaining violent habitual felon status, contending there was insufficient evidence of malice to support the second-degree murder convictions. Defendant further argues the charges against him should have been dismissed since his constitutional right to a speedy trial was violated. Finally, Defendant contends he received ineffective assistance of counsel when his trial attorney conceded his guilt to some of the charges without Defendant's consent. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

The State's evidence tended to show that on 17 June 2012, Defendant was driving his car in Rowan County, North Carolina when he "crossed the center line and collided with a motorcycle driven by Tommy Jones with passenger Suzette Jones." Both Tommy and Suzette Jones died as a result of this collision. Miguel Palacios was driving his car when he witnessed the aftermath of the collision and pulled over to attempt to render aid. Mr. Palacios testified that Tommy Jones was already dead when he first saw him after the crash but Suzette Jones was still breathing. Mr. Palacios stated Defendant got out of his car, looked at the two bodies,

got back in his car, and then started walking away from the scene of the crash. Mr. Palacios attempted to follow Defendant but eventually lost him.

Deputy Ashley Goodman with the Rowan County Sheriff's Office responded to the scene of the crash and was informed Defendant fled on foot; Deputy Goodman started to canvas the area to locate Defendant. Deputy Goodman had Defendant's name and description.[1] Deputy Goodman was heading toward an address that may have belonged to Defendant when he noticed a man matching Defendant's description walking near the road. Deputy Goodman asked for Defendant's identification, which provided the name Khalil Farook, and when asked if Defendant knew "Donald Miller," Defendant responded he did not. Deputy Goodman noticed "a strong odor of an alcoholic beverage coming from [Defendant's] breath[,]" Defendant was "swaying, shifting his weight left to right[,]" and had slurred speech. As Deputy Goodman did not know at the time Khalil Farook and Donald Miller were the same person, he was released at that time. Law enforcement later learned Defendant was Donald Miller and was now going by the name Khalil Farook. Defendant turned himself in approximately two days later.

Defendant was "initially charged with Felony Hit and Run resulting in Death, DWI, and Resisting an Officer." Defendant was then charged with "two additional charges of Felony Death by Vehicle." Defendant was placed in jail on the day of his arrest, 19 June 2012, and was not subsequently released before his trial on 8 October 2018. Defendant was later indicted on 2 July 2012 and 30 July 2012 for "Reckless Driving, Resisting an Officer, two counts of Felony Death by Vehicle, Reckless Driving to Endanger, Left of Center, Driving While License Revoked, and Felony Hit and Run resulting in two deaths." Mr. James Randolph was appointed to represent Defendant on 11 July 2012, but on 6 August 2012 Mr. Randolph was "allowed to withdraw, and Mr. James Davis was appointed" to represent Defendant. The State produced discovery to Mr. Davis on 5 December 2012 and Mr. Davis sent a letter to the DA's office requesting time to review the discovery. On 12 July 2013, Defendant sent a letter to the trial judge explaining he had been in confinement for nearly a year and asking for the discovery in his case. The trial judge sent a letter back to Defendant explaining that since he was represented by an attorney "[i]t is inappropriate to write ex parte letters to any individual presiding judge."

---

1. Law enforcement initially identified Defendant as Donald Miller, the name Defendant used before changing his name to Khalil Farook.

On 26 June 2012, Rowan County Assistant District Attorney Seth Banks "made a rush request for DNA results" but "the submission was returned because the known standard from [D]efendant was . . . not submitted." On 28 June 2012, a sample of Defendant's blood was sent to the North Carolina Crime Lab for alcohol and drug testing. After ADA Banks resigned, ADA Barrett Poppler took over the case. The DNA from Defendant was not resubmitted to the Crime Lab "with known standard" until 10 July 2014 but ADA Poppler "did not ask for a rush request" since "it was his understanding from the State Crime Lab that a rush request should not be made unless there was a pending trial date." "District Attorney Brandy Cook emailed the Director of the North Carolina Crime Lab" on 26 March 2015 to inquire about the results of the DNA testing; the "DNA results were completed on" 17 April 2015, nearly three years after the date of Defendant's arrest. The blood alcohol testing "c[a]me back from the North Carolina Crime Lab" on 9 March 2015.

On 15 July 2015, "Defendant appeared on the Criminal Administrative Calendar for the first time since labs came back." On 13 January 2016, Defendant sent a letter to United States District Court Judge Loretta Biggs again stating he had been in confinement for several years and that his due process rights were being infringed. Defendant did not specifically demand a speedy trial in this letter; the federal district court "construed [the letter] as a habeas petition" and dismissed it without prejudice on 2 March 2016. Defendant filed another letter in the same federal court in February 2016 mainly alleging the same as his January 2016 letter; this February 2016 action was dismissed on 19 April 2016. Defendant sent another letter to US District Court Judge Biggs in August 2017, stating his Fifth, Eighth, and Fourteenth Amendment rights were violated and that this was a "vindictive prosecution" and "prosecutorial misconduct[.]" Defendant did not demand a speedy trial under the Sixth Amendment in this letter and the federal court again dismissed this complaint.

On 27 June 2016, DA Cook sent Defendant's attorney a letter advising the Conference of District Attorneys would be handling the case moving forward, specifically Sarah Garner and Aaron Berlin. On 11 April 2017, Ms. Garner sent a formal plea offer to Mr. Davis. Between April and July 2017, Ms. Garner repeatedly reached out to Mr. Davis to discuss the status of the plea offered on 11 April. On 5 July 2017, Mr. Davis was allowed to withdraw as Defendant's attorney, Mr. David Bingham was appointed, and Defendant rejected the plea offer. Then, on 17 July 2017, Defendant was indicted "for two counts of second-degree murder, habitual felon status, and violent habitual felon status." On 25 September 2017, after previously filing two motions to withdraw, Mr. Bingham was

allowed to withdraw and Mr. Christopher Sease was appointed to represent Defendant. The trial court entered an order on 1 October 2017 "setting [a] deadline for motions on December 4, 2017 and a hearing on all motions for January 27, 2018."

On 19 March 2018, Defendant sent a letter to the Rowan County Clerk of Court's office seeking a copy of any motions filed in his cases and requesting information "as to why his trial was delayed from 2013 to 2017. [The] Clerk responded . . . that there were no motions." On 6 September 2018, Defendant filed a *pro se* motion alleging he was denied effective assistance of counsel stating his attorney, Mr. Davis, had not visited him in jail until 2 March 2017. About a week later, on 13 September 2018, Defendant filed another *pro se* motion alleging ineffective assistance of counsel against one of his other previous attorneys, Mr. Bingham. The 13 September *pro se* motion also argued a speedy trial violation as a reason to dismiss.

On 18 September 2018, Defendant's attorney, Mr. Sease, filed a motion to dismiss for a speedy trial violation. Essentially, Defendant contended that even though the date of the offense was in June 2012, he "was not charged with nor served with the warrants for Second Degree Murder, Violent Habitual Felon, and Habitual Felon" until July 2017. Defendant alleged since he was in the Rowan County jail since his arrest in 2012, he was not the cause of the delay and the 2017 indictments were "purposely held until after [ ]he had rejected the State's plea offer and after his original counsel of record had withdrawn from his case, in an attempt to oppress, harass and punish him further." Defendant's motion also included a detailed account of the dates of various events in the case since the alleged crime occurred. This Court's previous opinion condensed those dates into a timeline helpful for this Court's review:

> 31 July, 2012 Indictment.
>
> 6 August 2012 Case was calendared for this week but Mr. Randolph, counsel, withdrew.
>
> 8 August 2012 Mr. Davis appointed as counsel.
>
> 13 August 2012 Defendant entered not guilty plea.
>
> 18 February 2013 Defendant's case was calendared but not reached.
>
> 19 March 2013 Defendant's case was calendared but not reached.
>
> 16 April 2013 Defendant's case was calendared. New assistant district attorney was assigned to the case.

> 15 July 2015 Defendant's case was calendared but not reached.
>
> 13 February 2017 Defendant's case was calendared but not reached. Assistant District Attorney was released from the case, and it was assigned to the Conference of District Attorneys.
>
> 5 July 2017 Defendant was indicted for second degree murder, habitual felon, and violent habitual felon. Defendant's case was calendared for the week and not reached. Mr. Bingham was appointed as [D]efendant's counsel and Mr. Sease was appointed to aid Mr. Bingham in going through discovery.
>
> 29 August 2017 Defendant's case was calendared but not reached.
>
> 26 September 2017 Defendant's case was calendared and not reached. Mr. Bingham withdrew and Mr. Sease became [D]efendant's attorney.
>
> 8 January 2018 Defendant's case was calendared but not reached. A tentative trial date was set for September 2018.

State v. Farook, 274 N.C. App. 65, 69-70, 850 S.E.2d 592, 598 (2020) (footnotes omitted), *rev'd in part and aff'd in part*, 381 N.C. 170, 871 S.E.2d 747 (2022).

Defendant ultimately claimed he "has been prejudiced by an inability to adequately assist his defense attorney in preparation for his trial" and was thus unable "to locate any possible witnesses for the defense." The trial court heard Defendant's motion to dismiss on 24 September 2018 and entered an order denying the motion on 8 October 2018 *nunc pro tunc* 24 September 2018.

On 24 September 2018, the trial court heard various pretrial motions, including *Harbison* admissions by Defendant. Defendant's attorney stated to the trial court that Defendant was "willing to concede certain elements" including that he was driving the car at issue, that the victims died as a result of the collision, and that Defendant's driver's license was revoked for an impaired driving revocation. The trial court engaged in a colloquy with Defendant asking if his attorney had permission to concede these elements, that he understood he was conceding the elements and that as a result the State would not have to prove these elements beyond a reasonable doubt. Defendant answered in the affirmative to each question.

Defendant's case finally came on for trial on 8 October 2018. During closing arguments, Mr. Sease stated to the jury, "we ask you to find [Defendant] guilty of misdemeanor death by motor vehicle" and "we're not, as a defense, not asking you to find him not guilty of anything. We're asking you to find the most appropriate, which is the lesser included . . . misdemeanor offenses of both of these crimes." The trial court engaged in another *Harbison* inquiry with Defendant after trial, confirming he gave Mr. Sease permission to concede the elements previously discussed and that Defendant left the scene of the crash. The jury found Defendant guilty of "feloniously failing to remain at the scene of a crash resulting in serious injury or death" and two counts of second-degree murder. Defendant subsequently entered a guilty plea to the violent habitual felon charge and judgments were entered. Defendant appealed and this Court reversed his conviction on speedy trial grounds in *Farook*, 274 N.C. App. 65, 850 S.E.2d 592; our Supreme Court reversed in part, affirmed in part, and remanded for a new hearing in *Farook*, 381 N.C. 170, 871 S.E.2d 747.

On or about 3 October 2022, the trial court held a new hearing on Defendant's motion to dismiss on speedy trial grounds. The trial court heard extensive testimony, specifically addressing the State's reasons for the delay in Defendant's trial, among other factors, and entered an order denying Defendant's motion on 9 March 2023. Defendant appeals the order denying his motion to dismiss on speedy trial grounds and the underlying judgments.

II. Speedy Trial

[1] Defendant first argues "where the primary reason for the six-year delay in bringing [Defendant's] case to trial was a backlog in the courts, which the remand court failed to weigh against the State, the remand court erred in concluding that [Defendant's] right to a speedy trial was not violated." (Capitalization altered.)

> We review an alleged violation of a defendant's Sixth Amendment right to a speedy trial de novo. In reviewing the denial of a motion to dismiss for a speedy-trial violation, we review the superior court's order to determine whether the trial judge's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the judge's ultimate conclusions of law. In reviewing the conclusions of law, we consider the matter anew and substitute our judgment for that of the trial court.

State v. Spinks, 277 N.C. App. 554, 561, 860 S.E.2d 306, 314 (2021) (citations, quotation marks, and brackets omitted).

The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. Our North Carolina State Constitution further protects a criminal defendant's right to a speedy trial, stating "[a]ll courts shall be open . . . and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. 1, § 18.

> The Supreme Court of the United States laid out a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. These factors are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.

Spinks, 277 N.C. App. at 562, 860 S.E.2d at 314-15 (citations and quotation marks omitted). These factors are commonly referred to as the *Barker* factors, as they were established in *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972).

A. Length of the Delay

Defendant previously appealed the denial of his speedy trial motion, and our Supreme Court issued an opinion on 6 May 2022 stating, as to the length of the delay, "a delay of over six years is 'extraordinarily long,' 'striking,' and 'clearly sufficient to raise a presumption that defendant's constitutional right to a speedy trial may have been breached.' " *Farook*, 381 N.C. at 179, 871 S.E.2d at 747 (citation and brackets omitted). As our Supreme Court recognized and is undisputed in this case, Defendant "was incarcerated for 2,302 days – six years and three months – without a trial." *Id.* at 179, 871 S.E.2d at 746. Our Supreme Court stated "[t]he over six-year delay in this case must therefore be considered unreasonable and presumptively prejudicial within the meaning of the Sixth Amendment and is clearly sufficient to shift the burden of proof to the State to rebut and offer explanations for the delay." *Id.* at 179, 871 S.E.2d at 747 (citation and quotation marks omitted).

In the trial court's order on remand, it recognized the length of delay in conclusion of law 3: "The length of delay over 6 years is sufficient enough to trigger analysis of the Barker speedy trial factors." Nonetheless, Defendant contends "[t]he remand court erred in not weighing this factor heavily in [Defendant's] favor." As was recognized by our Supreme Court and the remand court, the length of delay of over

six years is presumptively prejudicial to Defendant. *See id.* However, Defendant contends the trial court erred by failing to give the length of the delay proper weight, stating that "despite clear command of precedent from ou[r] Supreme Court and the U.S. Supreme Court, the remand court gave no weight to the fact that the pretrial delay in this case was extraordinarily long" and that in addition to triggering a full analysis of the *Barker* factors, the length of delay is also significant since "it must be weighed together with those factors to determine whether a violation has occurred."

But the remand court gave the length of the delay proper consideration; the Supreme Court's opinion did not direct the remand court to give any specific weight to this factor other than triggering the *Barker* inquiry and shifting the burden of proof to the State. *See id*. The remand court properly concluded the length of delay triggered an analysis of all four *Barker* factors, *see id*., and concluded "[t]he [c]ourt, in its evaluation and balancing of the four factors enumerated in Barker v. Wingo, concludes as a matter of law that [D]efendant's right to a speedy trial has not been violated." The remand court also found "it is proper to assign the shifted burden to the State to show the reasons for the delay." Thus, as the remand court and this Court are bound by our precedent, there is no question the six-year delay here is presumptively prejudicial and requires we weigh all four *Barker* factors; further, the extraordinary delay weighs in favor of Defendant, but that does not end the inquiry and the other three factors must be examined to decide if this factor, even weighing in favor of Defendant, is outweighed by the remaining factors. *See id.*

B. Reasons for the Delay

Defendant disputes multiple findings and conclusions made by the remand court on this factor, specifically conclusion of law 5, which states "[t]he State's reasons for the delay in the trial of [D]efendant's cases are reasonable and valid justifications for delay in this case." Defendant also disputes findings 84, 106, 110, 115, 117 and conclusions 4-10. As Defendant groups his challenges to these findings and conclusions by the reason for delay, we will address each challenged finding similarly. Further, since the challenges to the trial court's conclusions of law deal with the reasons for delay generally, we will address those conclusions after analyzing each reason discussed.

Our Supreme Court, citing *Barker*, "recognizes four categories of reasons for delay: (1) deliberate delay on the part of the State, (2) negligent delay, (3) valid delay, and (4) delay attributable to the defendant." *Id*. at 180, 871 S.E.2d at 747 (citation omitted). The Court first defined a

"deliberate delay[,]" which should be weighed heavily against the State, as "an attempt to delay the trial in order to hamper the defense, or to gain some tactical advantage over a defendant or to harass them[.]" *Id.* (citations, quotation marks, and brackets omitted). "A more neutral reason such as negligent delay or a valid administrative reason such as the complexity of the case or a congested court docket is weighted less heavily against the State than is a deliberate delay." *Id.* (citation omitted). Nonetheless, "such neutral circumstances do not necessarily excuse delay and speedy trial claims . . . should be considered when there is a neutral reason for the delay, since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* (citations and quotation marks omitted). The third category is a valid delay, such as a "delay caused by difficulty in locating witnesses" which "serves to justify appropriate delay." Id. (citation omitted). Finally, "delays occasioned by acts of the defendant or on his or her behalf are heavily counted against the defendant and will generally defeat his or her speedy trial claim." *Id.* at 180, 871 S.E.2d at 747-48 (citation omitted).

1. Backlog in the Courts

Defendant contends the remand court should have weighed this factor against the State instead of treating it as neutral. Finding 106 a. states "[t]he State presented evidence and reasons for the delay: a. The number of pending cases in Rowan County." Defendant also challenges finding 84, which states:

> 84. Ms. Garner did nothing to delay [D]efendant's case from being tried. Ms. Garner took the necessary steps to move this case to trial once [D]efendant rejected the formal plea offer. Any delay from the date Ms. Garner was assigned to the case until the plea offer was rejected does not weigh against the State or [D]efendant. At most, plea negotiations are a neutral and explainable reason for the delay.

Defendant argues Ms. Garner "testified her workload as a Resource Prosecutor was so heavy that almost eight months passed after her appointment before she had time to visit the victims' famil[ies], which was a prerequisite to her making a formal plea offer[,]" and "[t]his testimony contradicts the remand court's finding that none of the delay following Ms. Garner's appointment could be weighed against the State." Ms. Garner was appointed to handle this case in June 2016 and Ms. Garner testified that she met with the victims' families in April 2017. The

plea offer was made 11 April 2017. Defendant's characterization of the reason Ms. Garner could not speak to the families for eight months is correct: Ms. Garner specifically stated the reason for the delay was "[a]t the time I had quite a few other cases that I was handling in various jurisdictions." Ms. Garner also stated she was not in a position to make a plea offer until she spoke with the families; it took 8 months for her to speak to them. Some portion of this delay may be reasonable, as Ms. Garner would need some time to become familiar with the case before making a plea offer, but the description as "plea negotiations" does not address the entire time. The evidence does not indicate that the entire time period from Ms. Garner's appointment until the offer of the plea was attributable to "plea negotiations" as finding 84 states. As the delay from Ms. Garner's appointment in June 2016 to the time of the plea offer in April 2017 was due to Ms. Garner's backlog of her own cases, we will weigh this appropriately in this discussion as to the backlog of courts and will not consider the delay from June 2016 to April 2017 a result of "plea negotiations."

Concerning the backlog of cases in Rowan County generally, we determined above in our discussion on the length of the delay, the substantial delay between Defendant's arrest and trial requires the burden to shift to the State to demonstrate reasons for the delay. *See id.* at 179, 871 S.E.2d at 747. The underlying facts making up this argument are largely undisputed. The elected District Attorney for Rowan County testified at the remand hearing and stated in 2011 Rowan County had a backlog of cases of 3,008 in Criminal Superior Court from June 2009 through June 2010 and 3,006 cases from June 2010 to June 2011. The remand court also found "according to the Administrative Office of the Courts, Rowan County District Attorney's Office was listed as 80.9% of the workload to staff ratio and based upon that ratio they were one of the lowest funded District Attorney's Office[s] in the State." Further, the Rowan County District Attorney's Office had 8 assistant district attorneys, and "5 were assigned to Superior Court" and "each Superior Court ADA averaged approximately 601 cases as their caseload" while the State average in North Carolina was 357 cases. Rowan County eventually brought in the resource prosecutor from the Conference of District Attorneys in June 2016.

In *State v. Farmer*, our Supreme Court stated

> [t]he nation's highest court is clear that, while different reasons for delay in a criminal trial's execution should be weighed in appropriate increments, a reason such as crowded criminal case dockets—expressly cited by the

> Supreme Court of the United States in *Barker* and offered as a reason for delay by the State in the instant case—while largely neutral and hence weighted less heavily against the State than a more intentional effort to prejudice a defendant with a delay, nonetheless must be borne by the State rather than by the defendant, since the State bears the responsibility for such a lag in time.

376 N.C. 407, 416, 852 S.E.2d 334, 341-42 (2020). The Court went on to explain it would "refrain from characterizing the State's prosecutorial backlog and usage of prosecutorial resources as being demonstrable of neglect or willfulness in its delay of scheduling [the] defendant's trial, we recognize that we have repeatedly held that overcrowded dockets and limited court sessions are valid reasons excusing delay." *Id.* at 416, 852 S.E.2d at 342 (citations omitted).

Similarly, it is undisputed there was a significant delay in this case; however, it is also undisputed that the Rowan County District Attorney's Office had a significant backlog in its cases due to low funding and a shortage of staff. As finding of fact 106 merely states the State presented evidence that the backlog in the courts was a reason for the delay, the finding is supported by competent evidence. Finding 84 is unsupported as it identifies the delay between Ms. Garner's appointment and the formal plea offer as neutral reasons for delay since there were ongoing plea negotiations, but Ms. Garner testified she was unable to meet with the victims' families due to her own caseload. Finally, following our Supreme Court in *Farmer*, as the State produced evidence as to the reason of delay, we cannot conclude the backlog of cases was due to neglect or willfulness, but we nonetheless conclude this reason for delay "slightly, but firmly, weighs in the favor of [D]efendant." *Id.*

2. Backlog in the State Crime Lab

Defendant next asserts "the fact that the Lab was so under-resourced that it routinely took years to process DNA results is a finding of fact properly weighed against the State, and the remand court erred in finding that lab delays rebutted either the presumption of negligence or the presumption of prejudice" and "the record does not support the remand court's characterization" that the "State Crime Laboratory did not produce test results 'for almost three years, despite several rush requests.' " Defendant also challenges finding of fact 16, which states "ADA Seth Banks never intentionally delayed the trial of [D]efendant's cases" since "Seth Banks did not testify, and as such there was no evidence of his intentions."

As to finding 16, even though ADA Banks did not testify, the record shows he sent a prompt rush request to the Lab to expedite analysis of the DNA in June 2012; delivered the discovery to Mr. Davis by December 2012; Mr. Davis sent a letter in January 2013 asking for additional time to review the discovery and prepare the case; Defendant then appeared on two administrative calendars in March and April 2013, and shortly after ADA Banks left the DA's office. Even without ADA Banks's testimony, this evidence is sufficient for the trial court to conclude ADA Banks did not intentionally delay Defendant's trial. The finding regarding ADA Banks is supported by the evidence.

The trial court made several findings regarding the backlog in the Lab and the State's efforts to test the blood and DNA:

> 6. [The State] made a rush request for DNA results on June 26, 2012, but the submission was returned because the known standard from . . . [D]efendant was not also submitted.
>
> . . . .
>
> 16. ADA Seth Banks never intentionally delayed the trial of [D]efendant's cases.
>
> 17. When ADA Poppler received the case, it was not ready for trial as he was awaiting lab results. ADA Poppler and [Defendant's counsel] or members of his law firm had numerous conversations early on about [D]efendant's case. . . . ADA Poppler and [Defendant's counsel] essentially agreed that they were in a holding pattern until they got labs back. . . .
>
> 18. July 10, 2014, DNA was resubmitted with known standard from [D]efendant. [The State] did not ask for a rush request. [The State] indicated that it was [its] understanding from the State Crime Lab that a rush request should not be made unless there was a pending trial date. [The State] testified that if everyone sent in a rush request for every case it would further delay the labs in all cases. [The State] stated that back in 2012 through 2015 labs were taking years and "we all knew that."
>
> . . . .
>
> 21. March 9, 2015, blood alcohol labs came back from the North Carolina Crime Lab.

> 22. District Attorney Brandy Cook emailed the Director of the North Carolina Crime Lab, John Byrd, on March 26, 2015 to inquire about the DNA and asked it be expedited.
>
> 23. DNA results were completed on April 17, 2015.
>
> . . . .
>
> 107. . . . b. The Lab Results were not provided by the State's Crime Laboratory for almost three years, despite several rush requests.
>
> . . . .
>
> 110. The number of pending case[s] in Rowan County and the length of time to obtain the lab results (Blood/Alcohol and DNA) can not be weighed against [D]efendant.

As to the time the Lab had Defendant's DNA sample, Defendant contends "[t]he actual time the Lab was in possession of [Defendant's] DNA was less than a year, not the three years attributed to it by the remand court." Our review of the timeline the Lab had Defendant's DNA sample is complicated as the evidence does not show the date the Lab sent the sample back to law enforcement between the time of submission on 26 June 2012 and the resubmission on 10 July 2014. In any event, the State's first DNA submission to the Lab on 26 June 2012 was incomplete because the known standard from Defendant was not also submitted. As a practical matter, the sample could not be tested until the time of the resubmission on 10 July 2014. After resubmission, the Lab returned the DNA test results on 17 April 2015. Thus, the delay in processing the DNA test by the Lab was only about 9 months after the DA's resubmission of the DNA to the Lab.

The record does not indicate why the first DNA test request sent to the Lab was incomplete, but the burden is on the State to provide evidence as to the reasons for delay. *See Farook*, 381 N.C. at 179, 871 S.E.2d at 747. Based upon the evidence, about nine months of the delay can be attributed to the backlog at the Lab, but the State did not explain the reasons for the remainder of the three years of delay. Therefore, the evidence does not support the trial court's finding that the Lab had the DNA for 3 years.

This Court confronted a similar issue in *State v. Washington*, where "the record show[ed] that much of the delay was caused by the State's failure to submit its physical evidence to the SBI lab to be examined." 192 N.C. App. 277, 284, 665 S.E.2d 799, 804 (2008). In *Washington*, the defendant was arrested in May 2002 and indicted in August 2002, and

between August 2002 to May 2003 the defendant "moved the court four times to reduce [the] defendant's bond" and the trial court "directed the State to proceed with the testing as expeditiously as possible." *Id.* However,

> [b]y 20 July 2006, the case had appeared on at least three trial calend[a]rs, but was continued at the request of the State because the SBI had not performed the necessary tests on the evidence. Thus, it is clear that at least 49 months of the delay, from 30 May 2002 to 20 July 2006, is attributable to the State's continuances, pending SBI testing of the evidence.
>
> According to SBI lab reports, however, the black purse, containing three exclusionary fingerprints, and the black toboggan, containing exclusionary DNA evidence, were not submitted to the SBI lab for analysis until 4 August 2005, which was more than three years after these items were collected.

Id. at 284-85, 665 S.E.2d at 804-05 (footnote omitted). This Court concluded "the primary reason that the SBI did not complete its analysis of the State's evidence until January of 2006 was not a neutral factor, but rather, was a factor wholly within the prosecution's control: the prosecution's failure to submit the evidence to the lab prior to August of 2005." *Id.* at 285, 665 S.E.2d at 805. Thus, the prosecutor in *Washington* did not submit the evidence for three years after the defendant's arrest; in contrast, here, the State did initially submit the blood and DNA samples in 2012, shortly after Defendant's arrest. *See id.*

The State in *Washington* also failed to submit evidence of another potential suspect to the Lab, which this Court concluded,

> Because the State did not make a request for such a comparison, the fingerprints obtained from the purse, which did not match [the] defendant, were not run through the system for comparison. Likewise, the State did not request that the mixture of DNA profiles obtained from the toboggan, none of which matched [the] defendant, be queried against the convicted offender indexes of the NCSBI State Database. We conclude that the State's failure to request that such comparisons be made is evidence of the State's repeated neglect of this case over the course of the prosecution.

Id. at 288, 665 S.E.2d at 806.

Finally, in *Washington*, this Court discussed the State's "[u]nderutilization of court resources:"

> the record shows that for nearly two years the Durham County District Attorney's Office failed to notify the SBI that it had been court ordered on 18 March 2004 to analyze the evidence; as such, the SBI lab did not comply with the order and did not conduct all of the tests mandated by Judge Stephens. As previously discussed, we note that even if the State had provided the SBI with a copy of Judge Stephens' Order in 2004, the SBI could not have tested the purse or toboggan at that time because the State did not submit those items to the lab for examination until August of 2005.

Id. at 288, 665 S.E.2d at 806-07. The SBI did not have a copy of the court order in its file and "four different SBI agents . . . testified that they were not provided with notice of the 2004 court order." *Id.* at 289, 665 S.E.2d at 807.

The State's actions, or lack thereof, in *Washington* demonstrated a clear case of negligence on behalf of the State. *See id.* In contrast, here, the State immediately submitted samples to the Lab in 2012, although the "submission was returned because the known standard from [D]efendant was not also submitted." Defendant contends that by failing to include the "known standard" in the original sample, the State was negligent in its handling of Defendant's DNA. However, we note that the prosecution did not submit the original DNA sample to the crime lab, Trooper Deal with North Carolina State Highway Patrol did. ADA Banks submitted the accompanying rush request. A failure of the State Highway Patrol to submit the sample correctly would still be the fault of the State, but it does not demonstrate gross negligence comparable to the State's repeated total failures to submit evidence in the *Washington* case. *See id.* The record in this case is unclear when the DNA was returned from the Lab after the original submission in 2012, but it was not resubmitted until July 2014. This is an important omission as the weight to be given to Defendant in this factor could depend on the amount of time the DA's office had the samples back in its possession and thus the DA would have been aware of the need to resubmit the DNA. And the burden of proof is on the State at this point, *see Farook*, 381 N.C. at 179, 871 S.E.2d at 747, but the State failed to explain why the incomplete submission was not discovered and corrected sooner. We do recognize that the law enforcement agency and the prosecution separately sent the DNA sample and rush requests to the Lab, but as the first two years of that

time was essentially wasted due to the incomplete submission in 2012, the State has failed to explain at least some level of negligence in this portion of the delay, although it does not rise to the level of negligence in the *Washington* case. *See Washington*, 192 N.C. App. at 288, 665 S.E.2d at 806-07.

Finally, the State attempts to place some of the blame for the delay in the Lab on Defendant, stating he did not request a trial and "was requesting additional undefined delays at this point." Unlike *Washington*, where the State was responsible for three continuances due specifically to the delay in the lab, for a total of 49 months delay, here Defendant's counsel received discovery and in January 2013 wrote a letter to the prosecutor stating that

> because of [his] heavy trial schedule, the number of cases in which [he] recently received discovery . . . [he is] in need of additional time to review the discovery to see if it is complete, prepare motions, and consider any suppression issues. Based on the above, I respectfully request ample time to review the materials.

The State did not need to request a continuance before January 2013 and for an "ample time" after because Defendant was also not ready to proceed to trial. At minimum, Defendant acquiesced in the delay at this point, but the State nonetheless failed to re-submit the samples to the lab until 2014 and the labs were not completed until 2015. While the State failed to have the DNA and blood tested for approximately three years due to the incomplete submission in 2012, combined with a backlog in the Lab, which can be attributed both to the prosecution and law enforcement's failure to initially send a "known standard" from Defendant and to the backlog in the Lab generally, Defendant acquiesced in part of this delay. But the prosecution and state crime lab are both responsible for processing evidence, and the State did not do so due to the incomplete submission of the DNA test request combined with the Lab backlog, similar to the rationale for a backlog in the trial court, so this weighs "slightly, but firmly, . . . in the favor of [D]efendant." *Farmer*, 376 N.C. at 416, 852 S.E.2d at 342.

3. Defendant's Change of Counsel and Plea Negotiations

Next, Defendant asserts the trial court improperly considered his changes in trial counsel was a neutral factor when the changes did not cause any delay and that "[a]t most, the plea negotiations account for a few months of the six-year delay."

As to Defendant's change of counsel, Defendant challenges finding 106(c) and conclusion of law 10. Finding 106(c) states, Defendant "due to no fault of his own, had new counsel on three separate occasions, and was ultimately represented at trial by his fourth attorney." Conclusion of law 10 provides "Mr. Randolph, Mr. Davis, and Mr. Bingham were allowed to withdraw in this case by order of a Superior Court Judge. Withdraw of counsel is not weighed against [D]efendant or the State, the [c]ourt concludes they are neutral reasons for the delay." The State briefly addresses Defendant's "multiple changes in counsel" but does not address this part of Defendant's argument further, other than noting one of Defendant's counsel's date of withdrawal in the context of plea negotiations; still, in this section the State does not contend Defendant's change in counsel resulted in a delay. In Defendant's prior appeal, our Supreme Court stated "even if changes to [Defendant's] counsel prolonged the pendency of this case, it may be of no constitutional significance if those changes were warranted and necessary." *Farook*, 381 N.C. at 187, 871 S.E.2d at 752. Further, our Supreme Court stated "[o]n remand, the trial court can evaluate what weight, if any, should be given to this fact in assigning responsibility for the delay in this case." *Id.* While Defendant takes issue with the trial court "fail[ing] to acknowledge . . . that the changes in counsel account for virtually none of the delay[,]" the trial court did not state how long of a delay the changes in counsel caused and, importantly, did not weigh the change in counsel against Defendant. We conclude Defendant's argument here is without merit as the trial court merely stated Defendant had multiple attorneys withdraw and did not weigh this against Defendant.

As to the plea negotiations, Defendant argues

> [t]he remand court understood that plea negotiations are a neutral reason for delay – that is, they do not weigh against either party. However, the remand court failed to appreciate that a neutral factor, having no weight, cannot overcome the weight of other factors. To the extent that plea negotiations in 2017 might excuse some portion of the delay, the majority of the delay remains attributable to the State of North Carolina.

Defendant challenges findings of fact 43, 47, 48, and 106. These findings state:

> 43. July 20, 2016, the Conference of District Attorneys received the discovery in [D]efendant's cases. There were some initial conversations between Sarah Garner and Mr. Davis and/or members of Mr. Davis['s] law office. Ms.

> Garner often corresponded with Candace, who was Mr. Davis's legal assistant. Mr. Davis was still heavily concentrating on Alisha Carlisle and Marlene Johnson cases along with many other matters.
>
> . . . .
>
> 47. Around January 2017[,] Ms. Garner began telephone conversations about this case with [ ] ADA Poppler and Mr. Davis and/or Candace who was Mr. Davis['s] legal assistant. When speaking with Mr. Davis, Ms. Garner proceeded to give her thoughts on the case and a range of years that she was thinking as to an appropriate plea. Ms. Garner asked what Mr. Davis was thinking as a range of years. Ms. Garner testified there was a range offer somewhere between twenty to thirty years, nothing firm. This was just to see if there were (sic) room for further plea discussions. There was no indication that [D]efendant would not take a plea under any circumstances.
>
> 48. On March 10, 2017, Ms. Garner set a deadline for response on "range" of years for a plea offer. Ms. Garner did not usually involve the victims' family members in a discussion about a plea offer unless there was some indication that a plea may be acceptable to [D]efendant. No response from Mr. Davis during March 2017.
>
> . . . .
>
> 106. The State presented evidence and reasons for the delay:
>
> > d. That prior to the trial, the State and defense counsel engaged in substantial plea negotiations in an effort to find a resolution that was mutually agreeable to each party. Ms. Garner testified that at one point she and Mr. Davis were only about 10 months apart on the minimum sentence to be served. She further testified that she had given enough and would not go any lower.

While it is undisputed Ms. Garner made a formal plea offer to Defendant in April 2017, Defendant contends there were no "initial conversations" between Ms. Garner and Mr. Davis, and that Ms. Garner and Mr. Davis did not speak in January 2017 about a plea offer. The State merely responds that "[u]pon taking over the case, Resource Prosecutor Sarah Garner generally discussed plea figures with Defendant's counsel"

without citing to the record and makes a conclusory statement that "Defendant was engaged in plea discussions and negotiations throughout the case until 30 June 2017," again not citing to the record. In his reply brief, Defendant concedes ADA Poppler had a conversation with Mr. Davis about a potential plea in 2015 but states "[t]he conversation . . . was with Mr. Davis, not [Defendant]." First, we put no weight into the fact that plea negotiations were taking place between the State and Defendant's attorney as the State would not be negotiating with Defendant directly when he was represented by an attorney. Ms. Garner testified she initially met with Mr. Davis and his legal assistant when she first got the case but recognized "[d]uring that communication we talked about things, and we had an understanding essentially that we're waiting on information. There's not a whole lot to intelligently . . . talk about without missing pieces of the puzzle." Thus, Ms. Garner did engage in "initial conversations" about the case with Mr. Davis when she got the case, and finding 43 does not specifically state these conversations were plea negotiations; finding 43 is supported by the evidence as Ms. Garner testified she met with Mr. Davis and his legal assistant to discuss the case when she first received it in June 2016.

As to finding 47, Defendant notes the only supporting evidence that there were plea discussions in January 2017 is the prosecution's timeline which identifies "[i]nitial phone conversations with Sarah Garner" but as Defendant notes, this does not state who the conversations were with. And as Ms. Garner stated she was not in a position to make a plea offer until she discussed it with the victims' families, which did not occur until March 2017, finding 47 is unsupported in that it states Ms. Garner and Mr. Davis were engaged in plea discussions. Finally, as to finding 48, the record does not support that "Ms. Garner set a deadline for response on 'range' of years for a plea offer" in March 2017 with Mr. Davis. In her testimony, after being asked about the 10 March conversation and whether there was a deadline, Ms. Garner stated "I do not recall what the deadline was. I know that there is a specific deadline on the written plea offer that I had sent Mr. Davis." This testimony indicates there was not a deadline for this unofficial discussion of the range of years in March 2017 and we will disregard that part of finding 48.

Overall, as to finding 106 and conclusion 9, the only evidence in the record as to plea negotiations are a brief period in 2015 with ADA Poppler and the time between the formal plea offer in April 2017 and Defendant's rejection of the offer in July 2017. In fact, Ms. Garner's testimony that she was unable to make a plea offer until speaking with the victims' families indicates there were not lengthy and ongoing plea discussions throughout the entire case as the trial court found. In *State*

v. Pippin, this Court considered plea negotiations in the context of a speedy trial claim, stating:

> We hold that any time periods actually attributable to defense counsel's requested plea negotiations is a waiver by defendant of predicating a speedy trial claim on that period. Plea bargaining is a universal and necessary practice in the courts of this state. The practice is mutually beneficial to the state and defendants. Permitting defendants to avail themselves of this beneficial process and then to subsequently base speedy trial claims on delays expended in plea negotiations would be grossly prejudicial to the state. The trial court's order failed to determine this period of time, and we have been unable to determine this period from the motion transcript. The burden of proof for establishing any periods relating to plea bargaining was on the state. The state, having failed to adequately present the trial court with evidence as to the period expended in plea negotiations, cannot now complain as to the trial court's failure to exclude that time.

72 N.C. App. 387, 394, 324 S.E.2d 900, 905 (1985) (citation omitted). Similar to *Pippin*, the State here has not presented evidence to demonstrate exactly when and for how long plea discussions were taking place other than a brief period in 2015 and the time between the formal plea offer in April 2017 to the rejection in July 2017. *See id.* Nonetheless, the trial court gave this reason for delay neutral weight, which Defendant agrees with and is appropriate. However, as Defendant contends, this neutral reason for delay accounts for little of the overall delay. We will determine the effect of this neutral reason for delay as to the trial court's overall weight to the factor of the reason for delay in context of each reason given by the State.

4. Defendant's Failure to Calendar the Case

The final reason for delay listed by the remand court in finding 106 is that Defendant did not move to have the case calendared. Specifically, finding 106 e. and f. states:

> 106. The State presented evidence and reasons for the delay:
>
> . . . .
>
> e. Since [D]efendant's arrest on June 19, 2012, none of [D]efendant's various court appointed attorneys . . . asked

> for or filed any motion to calendar [D]efendant's cases for trial.
>
> f. The State never refused to calendar any motions or request from [D]efendant to set a trial date.

Defendant contends "[b]ecause the inaction of defense counsel did not lengthen the pretrial delay, this factor carries no weight in the *Barker* analysis." We agree with Defendant. It is well-established that the State is responsible for setting the calendar in a criminal case. *See* N.C. Gen. Stat. § 7A-49.4 (2023) ("(a) Criminal Docketing. – Criminal cases in superior court shall be calendared by the district attorney[.]"); *see also Farook*, 381 N.C. at 190, 871 S.E.2d at 754 ("In fact, the State has the calendaring authority to set a case for trial." (citation omitted)).

Both the State and the remand court cite *Vermont v. Brillon*, 556 U.S. 81, 92, 173 L. Ed. 2d 231, 241 (2009), to assert "[a]n assigned counsel's failure to move the case forward does not warrant attribution of delay to the State." While this is a correct statement of the law, *Vermont* was dealing with a case where the lower court concluded "a significant portion of the delay in bringing [the] defendant to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward" and each of the defendant's three court-appointed counsel requested "extensions and continuances." *Id.* *Vermont* also stated in this discussion that "[c]ontrary to the Vermont Supreme Court's analysis, assigned counsel generally are not state actors for purposes of a speedy-trial claim." *Id.* Thus, the State and remand court's reliance on this case is inapposite as Defendant here is not asserting his counsel is a state actor, and more importantly, this case is distinguishable as there is a difference in Defendant or his counsel moving to continue the case or causing a delay in the calendar for another reason and the State failing to calendar the case at all.

While Defendant's actions in asserting his speedy trial rights are clearly relevant in the analysis of factor 3, Defendant's assertion of the right, the remand court weighed this in its discussion on the State's reasons for delay. As the State itself is responsible for calendaring a case for trial, the State's failure to calendar the case cannot be weighed against Defendant as a reason for the delay.

5. Conclusion as to the Reason for Delay Factor

Overall, we conclude the trial court should have weighed this factor slightly in favor of Defendant as the State is responsible for the backlog in the courts and the state crime lab, but as this case does not

reach the level of neglect or willful delay as the *Washington* case, *see Washington*, 192 N.C. App. at 284, 665 S.E.2d at 804, we do not weigh this factor heavily in favor of Defendant. Similarly, no weight should be given to Defendant's failure to calendar the case as that is the duty of the State. Finally, the trial court did not err in weighing Defendant's change of counsel and plea negotiations as neutral delays. While some findings of fact made by the trial court are not supported by the evidence, there are sufficient findings to show the State presented valid justifications for the reasons for delay in this case and this factor should weigh "slightly, but firmly, . . . in the favor of [D]efendant." *Farmer*, 376 N.C. at 416, 852 S.E.2d at 342. Finally, we note that although Defendant generally challenges findings of fact 110 and 117 in his introduction, Defendant makes no arguments as to these challenges and they are deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

C. Defendant's Assertion of his Right to a Speedy Trial

Defendant argues the third factor, Defendant's assertion of the right to a speedy trial, should weigh in his favor despite not filing a speedy trial motion until 2018 since: (1) he attempted to alert the courts "to his prolonged detention beginning in 2013 and several times during the years that followed[;]" (2) "under the unique circumstances of this case, [Defendant's] trial counsel's failure to take action on his client's behalf cannot be imputed to [Defendant;]" and (3) "the State was independently aware that the backlog in the Rowan County courts and at the State Crime Laboratory had the potential to infringe on [D]efendants' constitutional rights." Defendant specifically challenges finding 88, which states "Defendant's failure to state or file his Demand for a Speedy Trial for a period of six years weighs against his claim."

> A defendant is not required to assert his right to a speedy trial in order to make a speedy trial claim on appeal. But a defendant's failure to assert his speedy trial right, or his failure to assert the right sooner in the process, does weigh against his contention that he has been denied his constitutional right to a speedy trial.

State v. Johnson, 251 N.C. App. 260, 268-69, 795 S.E.2d 126, 132-33 (2016) (citations and quotation marks omitted).

1. Defendant's Letter to the Trial Judge and Federal Court Actions

It is undisputed that Defendant's first speedy trial motion did not occur until September 2018; the trial court found Defendant filed a

pro se motion to dismiss for a speedy trial violation on 13 September 2018 and his counsel filed a speedy trial motion on 18 September 2018. Both motions were filed over 6 years after Defendant was arrested and less than one month before the date of trial. Typically, "[t]he eleventh-hour nature of Defendant's speedy trial motion [would] carr[y] minimal weight in his favor." *Id.* at 269, 795 S.E.2d at 133.

However, Defendant sent a letter to Senior Resident Superior Court Judge Anna Mills Wagoner on 12 July 2013 seeking discovery for his case and explaining he had been in pre-trial confinement for over a year. In response, the trial court sent a letter to Defendant, which was also sent to the District Attorney, informing Defendant that the trial court cannot speak with him about his case since he "ha[s] an attorney and cannot both be represented by [him]self and an attorney at the same time." In January 2016, Defendant sent a letter to United States District Court Judge Loretta Biggs claiming his due process rights have been violated as he has been in the Rowan County Jail for 43 months "without enough evidence[.]" Defendant stated his bail was too high for the charges and that "[f]or some unknown reason the . . . District Attorney is letting pretrial detain[e]e s[i]t in jail [for] 3, 4, 5 years." Finally, Defendant contended he was discriminated against due to his race during his arrest. The letter does not explicitly invoke the Sixth Amendment right to a speedy trial, but as stated above, discusses the amount of time he has been in jail without a trial or plea bargain. The federal court treated this letter as a habeas petition and dismissed it on 2 March 2016.

Defendant also filed a separate federal action in February 2016 under 28 United States Code Section 2241 alleging his due process rights have been violated as he has been in detention for 43 months and the State does not have enough evidence to prosecute the case. He asserted he was being discriminated against and he had an excessive bond. This action was similarly dismissed on 19 April 2016. In August 2017, Defendant sent another letter to Judge Biggs in the United States District Court, stating he had now been incarcerated for 57 months in violation of the Fifth, Eighth, and Fourteenth Amendments and that this was a "vindictive prosecution" and "prosecutorial misconduct[.]" Again, Defendant did not specifically raise a speedy trial motion under the Sixth Amendment in this letter. The federal court again dismissed this complaint. Each United States District Court judgment was served on the Rowan County District Attorney. Finally, on 17 March 2018, Defendant sent another letter to the Rowan County Clerk of Court inquiring into the delay of his trial. This was file-stamped by the clerk who responded "[t]here are no written motions in any of your files."

The State does not address Defendant's letter to Rowan County Judge Wagoner but contends the filing of the federal actions (1) does not demand a speedy trial but instead contends there is insufficient evidence, among other due process violations and (2) the federal complaints cannot be used to show he asserted his right to a speedy trial since "a [c]ourt cannot take any action on matters of which it has no knowledge, and that a party never raises before it."

This Court has previously determined such "informal" assertions of a speedy trial claim can be considered by the court in its analysis of this factor. *See Washington*, 192 N.C. App. at 291, 665 S.E.2d at 808 ("Thus, while [the] defendant's formal assertion of his right was not immediate, he did assert this right almost two years prior to the start of his trial. Further, [the] defendant began informally asserting his right as early as October of 2002, when he began moving the court to expedite SBI testing. The [d]efendant continued to complain about the delay throughout his prosecution. Accordingly, when considered together, these actions weigh in favor of [the] defendant."); *see also State v. Armistead*, 256 N.C. App. 233, 240, 807 S.E.2d 664, 670 (2017) ("We conclude that [the d]efendant's attempts to assert his speedy trial right through informal methods—absent any evidence that his assertions reached the proper court officials or the prosecutor until three years after [the d]efendant first failed to appear in court—are neutral to our determination.").

The 2013 letter sent to Judge Wagoner was file-stamped, copied to the District Attorney, and put into Defendant's court file. This letter did not specifically assert Defendant wanted a speedy trial but did complain of the time he spent in the county jail, though his arguments centered on the lack of evidence and other due process concerns. However, Defendant's formal assertion of his right to a speedy trial was not raised until 2018, weeks before trial. This is in contrast to *Washington*, where the defendant's formal assertion was "one year and eight months before his trial began[;]" this Court weighed this factor in favor of the defendant. *Washington*, 192 N.C. App. at 290-91, 665 S.E.2d at 808. In *Armistead*, the defendant did not formally assert his right to a speedy trial at all but sent letters to court officials asserting such a right; however, in that case there was no evidence the informal methods ever reached court officials as some of the letters were not in the defendant's court file. *See Armistead*, 256 N.C. App. at 240, 807 S.E.2d at 670. This Court determined this factor was neutral in the analysis. *See id.*

Here, Defendant's 2013 letter did reach court officials and it was put in Defendant's file. Still, as noted above, this letter raised various other due process issues and did not specifically demand a speedy trial.

Defendant did mention how long he spent in jail in this letter, but he did not demand a speedy trial. Defendant was represented by counsel during the years prior to his formal assertion in September 2018, but never explicitly raised a speedy trial issue.[2] The same can be said for Defendant's federal filings, which were served upon the Rowan County District Attorney. Defendant did not specifically raise a speedy trial claim or demand a trial, he raised other due process issues and sufficiency of the evidence against him. The State's argument that it did not know about the federal filings is unconvincing as they were served upon the District Attorney. Thus, as Defendant did inform the court about the significant time he was in jail pending trial, which can be deemed informal assertions of his right to a speedy trial, he failed to specifically raise a speedy trial claim until September 2018 when he filed his formal motion.

2. Lack of Meaningful Assistance from Counsel

In his discussion of the third *Barker* factor, Defendant also claims he received a "lack of meaningful assistance from counsel" during the pendency of the case and his attorney's failure to inform him of his speedy trial rights should not be imputed on him. Central to Defendant's claim of lack of meaningful assistance from counsel is the assertion he "did not meet with any attorney appointed to his case until 2017." The State disputes this claim and states "[a]ny implication or allegation that Defendant had no conversations or discussions with his attorneys prior to 2017 is contradicted by his own admission in his own exhibits in the record, and is therefore not credible."

The State argues Defendant is trying to argue ineffective assistance of counsel without actually raising an ineffective assistance of counsel claim; Defendant responds that

> [t]he State fails to respond to any of the cases cited [in Defendant's opening brief]. Instead, the State accuses counsel of attempting to raise a claim of ineffective assistance of counsel on direct appeal. Counsel refers the State to page 38 of the Opening Brief, which plainly states that issue is not before this Court.

However, none of the cases cited by Defendant in his opening brief involve speedy trial claims. *See Holland v. Florida*, 560 U.S. 631, 177

2. We recognize Defendant claims he received "lack of meaningful" assistance from counsel during this time period, but we nonetheless note Defendant was not a *pro se* defendant during most of the time he was incarcerated.

L. Ed. 2d 130 (2010); *see also Maples v. Thomas*, 565 U.S. 266, 181 L. Ed. 2d 807 (2012); *Christeson v. Roper*, 574 U.S. 373, 190 L. Ed. 2d 763 (2015). Defendant seemingly argues, as the State contends, that he should not be penalized for his failure to submit a formal speedy trial demand before September 2018 due to his counsel's actions but that he did not receive ineffective assistance of counsel. If Defendant claims that the delay in his trial was a result of ineffective assistance of counsel, he should have argued that, but he did not.

Defendant mostly relies on *Holland v. Florida* to assert "[w]hile the actions of counsel are ordinarily imputed to his client, there are circumstances where this is not so." 560 U.S. 631, 177 L. Ed. 2d 130. In *Holland*, the defendant's attorney "failed to file [the defendant's habeas corpus] petition on time and appears to have been unaware of the date on which the limitations period expired[.]" *Id.* at 652, 177 L. Ed. 2d at 147. The Court stated these "two facts . . . alone, might suggest simple negligence" but then identified the other extraordinary facts of the case:

> But, in these circumstances, the record facts we have elucidated suggest that the failure amounted to more: Here, [the attorney] failed to file [the defendant's] federal petition on time despite [the defendant's] many letters that repeatedly emphasized the importance of his doing so. [The attorney] apparently did not do the research necessary to find out the proper filing date, despite [the defendant's] letters that went so far as to identify the applicable legal rules. [The attorney] failed to inform [the defendant] in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite [the defendant's] many pleas for that information. And [the attorney] failed to communicate with his client over a period of years, despite various pleas from [the defendant] that [the attorney] respond to his letters.

Id. at 652, 177 L. Ed. 2d at 147-48.

One of the key factors the Court noted in *Holland* is the defendant's "many letters that repeatedly emphasized the importance of" filing the petition. *Id.* If Defendant had informed his attorney multiple times of his desire to assert a speedy trial claim, this case would be more analogous to *Holland*. *See id.* However, despite Defendant's ability to write letters, including letters specifically relating to the amount of time he spent in jail, there is nothing in the record to suggest Defendant informed his attorney of his desire to demand a speedy trial. In fact, Defendant did not send his attorney a copy of the 2013 letter to Judge Wagoner, although

Judge Wagoner's response was copied to Defendant's attorney. Similarly, the letters and actions submitted to the federal court by Defendant do not show that any of these items were copied to Defendant's attorney; while the judgments were seemingly served on the District Attorney, a party to the action, they were not served on Defendant's attorney. And based on the record before this Court we are unable to say if this delay was a trial tactic or if Defendant's attorney was negligent in his representation. Defendant's attorney's motive for delay was a major issue in Defendant's prior appeal, where our Supreme Court concluded the trial court improperly heard testimony about the delay from Defendant's attorney in violation of the attorney-client privilege. *See Farook*, 381 N.C. at 188-89, 871 S.E.2d at 753. Even assuming *Holland* is relevant in our analysis of this speedy trial claim, despite interpreting a federal habeas statute and not the constitutional right to a speedy trial, *Holland*, 560 U.S. at 652, 177 L. Ed. 2d at 142, the facts of that case are much more egregious than this case, and as Defendant does not raise an ineffective assistance of counsel claim, we find no merit in this argument.

3. Conclusion as to Defendant's Assertion of his Speedy Trial Rights

As Defendant made multiple informal assertions regarding his speedy trial rights and these informal assertions were served on the State, we conclude his failure to submit a formal demand for speedy trial until September 2018 should not weigh against him. But since Defendant's formal assertion was not made until shortly before his trial date, we give this factor neutral weight instead of being weighed against Defendant.

D. Prejudice to Defendant

As to the final *Barker* factor, prejudice to Defendant, Defendant asserts "[t]he remand court erred in failing to give any weight to [Defendant's] pretrial incarceration, the anxiety [Defendant] suffered as years passed with no progress in his case, or the prejudice inherent in an extraordinary pretrial delay followed by the imposition of new charges."

Defendant challenges findings of fact 63 and 93. Findings 63 and 93 state:

> 63. ADA Poppler and Ms. Garner made it clear early on (in their involvement in the case) that if [D]efendant rejected the plea offer there would be new indictments. This particular issue relating to the potential for new charges was discussed even before ADA Banks left the Rowan County District Attorney's Office.

. . . .

> 93. The State filed new charges in 2017. These charges are from the same set of facts and underlying allegations and criminal record that existed on the date of [D]efendant's arrest (June 19, 2012). There is no prejudice, actual or presumptive.

As to finding 63, Defendant contends "[t]his record does not establish that the defense was aware 'early on' that there was a potential for additional indictments." ADA Poppler testified he inherited the case in May 2013 and when asked whether he had "any conversations with [Defendant's counsel] about possible alternate charges as an inducement to a plea agreement[,]" ADA Poppler responded:

> When I met with Mr. Davis or when I spoke to him on one of the occasions about this case, I made it clear to him as I did on every case, if I'm trying a case, I'm going after what I can go after to try it. Specifically, Habitual Felon we knew was certainly in play here. I believe we spoke about Violent Habitual Felon. Mr. Davis was aware of that either through Mr. Banks or myself as appearing to be something [Defendant] was eligible for.

ADA Poppler also addressed this in response to questioning about the indictments:

> Q. Okay. So if the record were to indicate that he was not indicted for either Second Degree Murder, Habitual Felon or Violent Habitual Felon until 2017, you wouldn't disagree with that?
>
> A. I would agree with whatever the indictments say that are in the court file.
>
> Q. Okay. So that would mean that at the time that you had the cases the charges were E and F felonies?
>
> A. If that's correct what you're saying, then yes. *However, as I stated earlier, in speaking with Mr. Davis, he was well aware and I made him aware that those charges were potentially out there.*

(Emphasis added.) Ms. Garner also testified as to her decision-making in deciding which charges to pursue:

> Q. At the time that you're making your charging decision about the substantive offense, are you going to definitively

> decide whether you might also proceed on a status offense like Violent Habitual Felon or Habitual Felon?
>
> A. My process has always been it's out there if you need it. I wouldn't say you use it as a threat, but it is certainly something that I would always say to defense attorneys, this is an option. If you want to try, you're getting a full trial, a lot like Mr. Poppler said.
>
> Q. I mean, would you consider making a concession for a plea agreement that you might not charge something that you could charge?
>
> A. Absolutely, which is exactly what I did.

Therefore, the testimony from the State's prosecutors suggests Defendant or his attorneys knew early on in the case there may be more indictments coming and that if Defendant did not plead to some of the crimes they would proceed with a trial on all of the charges. Defendant's challenge to finding 63 is overruled.

As to Defendant's challenge to finding 93, it is essentially a challenge to whether Defendant was prejudiced as a result of the delay from the 2017 indictments. In Defendant's prior appeal, our Supreme Court stated:

> *Barker* and its progeny make clear that one of the purposes of the speedy trial guarantee is to protect against those forms of prejudice that are so axiomatic as to require no affirmative proof. *Doggett*, 505 U.S. at 655. The failure to show actual prejudice to the defense is not fatal per se to a speedy trial claim. Thus, "presumptive prejudice" along with the fact that the other factors are found to tip the scales in a defendant's favor may be enough to require dismissal of the charges, especially when there is no justification presented by the government. *See id.* (declaring the defendant had done enough to secure dismissal on speedy trial grounds, recognizing that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify"). And as the Court clarifies in *Doggett*, a criminal defendant may establish prejudice for purposes of his speedy trial claim through proof of either actual prejudice or presumptive prejudice.

Farook, 381 N.C. at 190, 871 S.E.2d at 753-54 (quotation marks omitted). Our Supreme Court relied almost exclusively on the United States

Supreme Court opinion in *Doggett v. U.S.*, 505 U.S. 647, 120 L. Ed. 2d 520 (1992), in its discussion of prejudice. In *Doggett*, the delay of eight-and-a-half years was between the defendant's indictment and his arrest. *Id.* at 650, 120 L. Ed. 2d at 527. The Supreme Court stated, as to prejudice, "[w]hile not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.* at 657, 120 L. Ed. 2d at 531.

In *Farmer*, our Supreme Court stated, as to the prejudice factor:

> In examining the most serious component of the prejudice factor which was identified by our country's preeminent legal forum in *Barker*—the possibility that the defense will be impaired—this prospect did not manifest itself in the present case. There has been no contention by [the] defendant that the presentation of his trial defense was impaired, nor any representation by [the] defendant regarding such a compromise of his trial defense. Therefore, the most significant of the three prongs of the prejudice factor does not exist in this case. The first identified prong—the prevention of oppressive pretrial incarceration—inherently exists by virtue of the longevity of [the] defendant's continuous confinement prior to his trial. The remaining feature of the prejudice components—the minimization of [the] defendant's anxiety and concern—would also inherently exist as he awaited the occurrence of his trial which would resolve the charges against him. While we do not disregard nor diminish the deleterious effects of [the] defendant's prolonged pretrial incarceration, as well as anxiety and concern, upon an accused such as [the] defendant who is awaiting trial for an appreciable period of time, we nonetheless are bound to follow the *Barker* formula on prejudice in recognizing that there was no impairment of [the] defendant's defense which was occasioned by the delay of the trial and the standard presence of the remaining two interests did not rise to a level which amounted to any prejudice to [the] defendant's rights.
>
> In assessing the identified interests which compose the prejudice factor established in *Barker*, we agree with the Court of Appeals majority that [the] defendant did not suffer prejudice in this case stemming from the delay of

> his trial. While the dissenting view of the Court of Appeals deems this fourth *Barker* factor to weigh slightly in favor of [the] defendant without a demonstration of actual prejudice experienced by [the] defendant, we determine that this final *Barker* factor of prejudice to [the] defendant as a result of the trial's delay significantly weighs against [the] defendant.

Farmer, 376 N.C. at 418-19, 852 S.E.2d at 343.

While our Supreme Court in Defendant's prior appeal stated there was presumptive prejudice due to the lengthy delay in this case, we agree with the Court's opinion in *Farmer*, which does not contradict the Court's reasoning in Defendant's prior appeal. *See id.*; *see also Farook*, 381 N.C. at 190, 871 S.E.2d at 753-54. Like *Farmer*, we recognize the presumptive prejudice due to Defendant's time spent incarcerated and the anxiety caused by that time, but there is simply no indication Defendant's defense was hampered in any way by this delay. *See Farmer*, 376 N.C. at 418-19, 852 S.E.2d at 343. As Defendant or his attorneys knew the State may proceed with additional indictments for the same acts as he was initially charged, he cannot now claim he was prejudiced in his defense as the new indictments were from the same underlying facts and the new indictments would not create a need for any new witnesses or evidence. Defendant does not even attempt to articulate what additional evidence, witnesses, or otherwise would have supported his defense had he known about the additional indictments; instead, Defendant relies on presumptive prejudice. This is analogous to our Supreme Court's decision in *Farmer*, where the Court stated "there has been no contention by [the] defendant that the presentation of his trial defense was impaired, nor any representation by [the] defendant regarding such a compromise of his trial defense. Therefore, the most significant of the three prongs of the prejudice factor does not exist in this case." *Id.* at 418, 852 S.E.2d at 343.

Finally, Defendant claims that even if his attorneys were aware of the potential for new charges to be filed, "there is no basis to find that any earlier discussions [regarding the filing of new charges] were communicated to" Defendant and "[i]t is impossible to know how the case might have progressed differently had [Defendant] been aware from the start that he faced the possibility of a life sentence." However, Defendant argues in a different section of his brief that he is not contending he received ineffective assistance of counsel and he even challenges certain findings addressing such a claim. Further, the State cannot be responsible for Defendant's attorneys' potential failure in

communicating the possibility of new charges to Defendant since that is out of the State's control and attempting to contact Defendant directly would not have been proper. *See* U.S. Const. amend. VI. We are unconvinced that Defendant was prejudiced because the State filed additional charges against him.

In *Farmer*, after the Court acknowledged the presumption of prejudice created by the length of the delay, it nonetheless "determine[d] that the presumption of prejudice in [the] defendant's case due to the length of the delay has been sufficiently rebutted by the collective effect of the other *Barker* factors." *Id.* at 419, 852 S.E.2d at 344. We see no reason to depart from *Farmer* and likewise conclude the prejudice prong weighs against Defendant as the State presented substantial evidence as to the backlog in the court.

E. Miscellaneous Challenged Findings

Finally, Defendant challenges findings of fact 17, 71, 44, and 115 in a separate section of his brief entitled "Additional Contested Findings of Fact[.]" These contested findings state:

> 17. When ADA Poppler received the case, it was not ready for trial as he was awaiting lab results. ADA Poppler and Mr. Davis or members of his law firm had numerous conversations early on about [D]efendant's case. . . .
>
> . . . .
>
> 44. Mr. Davis tried approximately 18 jury trials in Rowan County Criminal Superior Court between 2013 and 2017. Mr. Davis has a very busy criminal and civil practice in Rowan County. Mr. Davis in addition to the Carlisle murder case represented other defendants charged with first degree murder during this time. One of those cases was Marlene Johnson. Mr. Davis had a substantial case load and many scheduling conflicts from 2012 to 2018.
>
> . . . .
>
> 71. September 10, 2017, [D]efendant submitted a pro se document alleging ineffective assistance of counsel as to Mr. Davis. Defendant is at this time still represented by Mr. Bingham.
>
> . . . .
>
> 115. The lengthy plea discussions could in theory be weighed against the defendant as acquiescence of the

> delay. The [c]ourt does consider the length of time in which the defendant went without seeing or speaking directly with his court appointed counsel Mr. Davis. The [c]ourt does not weigh the lengthy plea negotiations against the defendant. This particular issue is more appropriately dealt with in any ineffective assistance of counsel claim. There was some evidence that Mr. Davis sent individuals from his office to speak to the defendant but there was no evidence as to what was communicated to the defendant. Defendant presented jail records indicating Mr. Davis did not visit him for 57 months.

As to finding 17, Defendant contends the finding should be modified to say "[w]hen ADA Poppler received the case, he did not believe [the case] was ready for trial" instead of "[w]hen ADA Poppler received the case, it was not ready for trial as he was awaiting lab results." But this finding is supported by the evidence. If the State needed the DNA results to prove its case, the case was not ready for trial. Next, Defendant contends "the finding that Mr. Poppler had 'numerous' conversations with Mr. Davis shortly after his appointment is not supported by the record" since he "testified to a single conversation." We agree with Defendant that the record supports a conversation happened, but not numerous conversations. We will disregard the part of finding 17 that states ADA Poppler had "numerous" conversations with Mr. Davis.

Defendant contends finding 71 is not supported as there was no *pro se* document filed by Defendant on 10 September 2017. Our record contains a *pro se* document filed by Defendant on 11 September 2017 entitled "Motion to Dismiss Appointed Attorney[.]" (Capitalization altered.) The document is hard to read in our record, but this may have been the document referred to by the trial court in finding 71. The trial court's finding is supported by the evidence, and if finding 71 stated the wrong date, the difference of one day in the date filed is *de minimis*.

As to findings 44 and 115, Defendant does not really challenge the findings, instead stating he "wishes to emphasize that the fact he may also have received ineffective assistance does not absolve the State of its duty to provide him with a speedy trial." Finding 44 does not mention ineffective assistance of counsel but merely outlines Mr. Davis's heavy caseload during his representation of Defendant. Since Defendant does not challenge the substance of finding 44, it is supported by the evidence. *See In re S.C.L.R.*, 378 N.C. 484, 491, 861 S.E.2d 834, 841 (2021) ("As findings not challenged for their lack of evidentiary support are deemed to be supported by the evidence and are binding on appeal and

because respondent-mother has not challenged the evidentiary basis for any of the findings of fact, we must consider all findings of fact binding on appeal as to respondent-mother." (citation omitted)). Finding 115 does mention the possibility that Defendant may have received ineffective assistance of counsel but it does not absolve the State of its duty to provide Defendant with a speedy trial. This challenge is overruled.

F. Conclusion

While the first factor in the *Barker* analysis – length of the delay – shows presumptive prejudice, the State rebutted this presumption with its extensive evidence as to the reasons for the delay, specifically the backlog of the court system in Rowan County during Defendant's trial. Further, the third factor – the assertion of right – has neutral weight as Defendant attempted to alert the State to his incarceration by mailing a letter to the trial judge and filing a federal action, but nevertheless did not submit a formal motion until September 2018, weeks before his trial date. And as in *Farmer*,

> [a]s we follow the guidance articulated by the Supreme Court of the United States, since the length of the delay was "presumptively prejudicial" which necessitated the inquiry into the other *Barker* factors and since "they are related factors and must be considered together with such other circumstances as may be relevant," we determine that the presumption of prejudice in [D]efendant's case due to the length of the delay has been sufficiently rebutted by the collective effect of the other *Barker* factors.

Farmer, 376 N.C. at 419-20, 852 S.E.2d at 344 (citation omitted). We affirm the trial court's order denying Defendant's motion to dismiss on speedy trial grounds.

III. Sufficiency of the Evidence

[2] Defendant next contends "where the only evidence to support a finding of malice was that Defendant was driving while license revoked at the time of the accident and that he inadvertently crossed the center line, the trial court erred in denying the motion to dismiss the charges of second-degree murder."

A. Standard of Review

> In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary

> to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo.

State v. Golder, 374 N.C. 238, 249-50, 839 S.E.2d 782, 790 (2020) (citations, quotation marks, ellipses, and brackets omitted).

B. Malice

As Defendant only challenges the element of malice, our review will be limited to that element. "The essential elements of second degree murder are an unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Trogdon*, 216 N.C. App. 15, 25, 715 S.E.2d 635, 642 (2011) (citation omitted). Our Courts have identified three different types of malice for purposes of second-degree murder:

> First, there is actual malice, meaning express hatred, ill-will or spite. The second type of malice exists when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. The third type of malice is a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

Id. (citations and quotation marks omitted). As Defendant did not know the victims in this case and it is undisputed Defendant did not intentionally kill them, the second type of malice is the only type at issue here. Our Supreme Court has also stated, in a case involving vehicular second-degree murder, "it was necessary for the State to prove only that [the] defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000).

The State cites *State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992), to contend "where a defendant drove a car knowing that his license was permanently revoked, such act indicated that the defendant acted with a mind without regard for social duty and with 'recklessness of consequences.' " This Court stated in *Byers*, "[w]e find the evidence presented at trial tending to show [the] defendant knew his license was revoked and proceeded to drive regardless of this knowledge indicates [the] defendant acted with 'a mind regardless of social duty' and with 'recklessness of consequences.' " *Id.* at 382, 413 S.E.2d at 589. However, this Court also recognized other facts that indicated malice, such as the defendant taking "the car without permission and display[ing] fictitious tags in order to drive indicates a mind 'bent on mischief.' " *Id.*

Here, the State relied on Defendant's license being revoked at the time of the crash, Defendant driving left of center, and Defendant slurring his words and smelling of alcohol upon his arrest as evidence of malice. We also note Defendant fled the scene of the crash after getting out of the car to check on the victims but failed to render any aid and then lied to investigating officers about his identity to avoid responsibility. However, as the State did not present sufficient evidence that Defendant was impaired by alcohol or drugs at the time of the crash, driving under the influence cannot be a basis for malice in this case. Many of our cases rely on the defendant being impaired at the time of a crash to find malice. *See State v. Bethea*, 167 N.C. App. 215, 219, 605 S.E.2d 173, 177 (2004) ("[The d]efendant correctly points out that every North Carolina appellate decision involving an automobile accident, where the court found sufficient evidence to prove malice for a second-degree murder conviction, involved a defendant driving under the influence of alcohol or some other impairing substance at the time of the accident."). In *Bethea*, the

> defendant was driving with a revoked license, fled to elude law enforcement officers, sped through a red light and several stop signs, drove at speeds up to one hundred miles per hour, crossed into the oncoming traffic lane several times, and turned his car lights off on dark rural roads, decreasing his own visibility and making his car extremely difficult to see, while traveling at speeds between ninety and ninety-five miles per hour.

Id. While *Bethea* itself was one of the first North Carolina cases to rely on acts other than driving while impaired to show malice, the facts in that case were egregious and clearly showed malice. *See id.*

Another case where this Court held there was sufficient evidence to support a finding of malice noted as relevant in its analysis that the defendant "fled the scene of the crash without checking on either the occupants of the truck or his friends inside the severely damaged car[.]" *State v. Tellez*, 200 N.C. App. 517, 525, 684 S.E.2d 733, 739 (2009). The defendant also "hid and slept in the woods and ran from police when apprehended." *Id.* While other factors supported a finding of malice, such as the defendant having 3 beers before driving, drinking another beer while driving, failing to stop at a stop sign, and "pull[ing] onto Highway 210 without noticing the truck" he collided with, this case is analogous to the instant case. *Id.*

Here, a witness who observed the crash saw Defendant get out of his car and walk up to the victims' bodies. The witness testified that Ms. Jones was still breathing by the time the witness got close to her body. However, instead of alerting emergency services or rendering aid, Defendant fled the scene of the crash. When Deputy Goodman approached Defendant after the crash asking if he knew Donald Miller, which was Defendant's name before he changed it to Khalil Farook, Defendant stated he did not. Finally, Defendant's driver's license was revoked at the time of the crash due to an impaired driving revocation. These actions by Defendant are all indicative of malice. *See id.*

While this case is not as clear as the cases involving driving while impaired, fleeing law enforcement, or driving at high rates of speed, we are bound by our precedent that driving with a revoked license due to an impaired driving revocation "indicates [D]efendant acted with 'a mind regardless of social duty' and with 'recklessness of consequences.' " *Byers*, 105 N.C. App. at 382, 413 S.E.2d at 589. Similarly, briefly exiting his car to check on the victims but failing to render aid or report the crash in any way and thereafter fleeing the scene of the crash "indicates a mind 'bent on mischief.' " *Id.* Under the facts of this case, we conclude there was substantial evidence of the element of malice and the trial court did not err by denying Defendant's motion to dismiss.

IV. *Harbison* Error

[3] Finally, Defendant argues "where . . . Defendant did not give his express, informed consent, trial counsel rendered ineffective assistance by conceding his guilt to lesser included offenses during closing argument."

"We review *per se* ineffective assistance of counsel claims *de novo*." *State v. Mahatha*, 289 N.C. App. 52, 60, 887 S.E.2d 462, 469 (2023) (citations and quotation marks omitted). It is well-established that to prevail on an ineffective assistance of counsel claim,

> [f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Harbison, 315 N.C. 175, 178-79, 337 S.E.2d 504, 506 (1985) (citation omitted). In *Harbison*, our Supreme Court first articulated the rule that a "per se . . . violation of the Sixth Amendment[ ] has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08.

> Where defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy. The trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision.

Mahatha, 289 N.C. App. at 61, 887 S.E.2d at 470. Thus, we must first address whether Defendant's counsel made a concession of guilt, and if so we must consider whether Defendant consented to the concession. *See id.*

Here, as Defendant notes, and we agree, Defendant's trial counsel conceded guilt during closing arguments when counsel stated "we ask you to find [Defendant] guilty of misdemeanor death by motor vehicle" and "we're not, as a defense, not asking you to find him not guilty of anything. We're asking you to find the most appropriate, which is the lesser included . . . misdemeanor offenses of both of these crimes." In *State v. Greene*, our Supreme Court was confronted with the question of whether an attorney arguing during closing arguments that "in his opinion the jury would not find the defendant not guilty and that it could easily find that the 'slap was negligent,' 'harder than it ought to have been,' and 'it was reckless disregard.' " 332 N.C. 565, 571-72, 422 S.E.2d 730, 733 (1992). However, the defendant's counsel further stated, "I don't say you should find that." *Id.* at 572, 422 S.E.2d at 733. Our Supreme Court concluded

> [w]e believe the argument was that the defendant was innocent of all charges but if he were to be found guilty of any of the charges it should be involuntary manslaughter because the evidence came closer to proving that crime than any of the other crimes charged. This is not the equivalent of asking the jury to find the defendant guilty of involuntary manslaughter and the rule of *Harbison* does not apply.

Id. at 572, 422 S.E.2d at 733-34.

Therefore, while counsel is permitted to make an argument that if the jury should convict the defendant on any charge, it should be the lesser included charge, *see id.*, this was not the case here. Counsel first stated "[w]e're not here to ask you to find [Defendant] not guilty." Then, at the end of his closing, counsel stated "the most appropriate thing that you will convict - - that you *could* convict him of - - we ask you to find him guilty of misdemeanor death by motor vehicle." (Emphasis added.) But later, counsel unequivocally stated "we're not, as a defense, not asking you to find him not guilty of anything. We're asking you to find the most appropriate, which is the lesser included in misdemeanor offenses of both crimes." Thus, unlike in *Greene* where "[t]he clear and unequivocal argument was that the defendant was innocent of all charges[,]" *id.* at 572, 422 S.E.2d at 734, here, Defendant's counsel stated several times he was not asking the jury to find Defendant not guilty. Thus, we agree with Defendant that his counsel admitted Defendant's guilt to the lesser-included offenses.

We first briefly address the State's argument that "since *Harbison*, the North Carolina Supreme Court has recently revisited the issue of *per se* prejudicial error[,]" citing *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018). The State then engages in a significant discussion about the facts in *Malachi*, recognizes this Court is bound by our precedent in *Harbison*, yet asks us to "assess whether or not the *per se* prejudice analysis remains applicable to this type of error[,]" and if it is not still applicable, explains there is no prejudice in this case. As *Malachi* does not in any way depart from our Supreme Court's ruling in *Harbison*, *see generally id.*, we are bound by our Supreme Court's precedent and decline to revisit this issue. *See State v. Jones*, 253 N.C. App. 789, 796, 802 S.E.2d 518, 523 (2017) ("[T]his Court has no authority to reverse existing Supreme Court precedent. It is elementary that we are bound by the rulings of our Supreme Court." (citations, quotation marks, and brackets omitted)). Thus, we are bound by *Harbison* and will only address Defendant's consent, or lack thereof, to his counsel's concessions of guilt. *See id.*

As to Defendant's consent, the trial court conducted a *Harbison* hearing on 24 September 2018. At the hearing, Defendant's counsel stated the defense was "willing to concede certain elements" including that Defendant was driving the car at the time of the collision. The trial court then engaged in a brief colloquy with Defendant:

> THE COURT: And you're . . . you're not asking for the State to have to prove that beyond a reasonable doubt; is that correct?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Okay. All right.
>
> [DEFENDANT'S COUNSEL]: So we'll concede to driving.
>
> THE COURT: Okay.
>
> [DEFENDANT'S COUNSEL]: We will concede that the two decedents, the victim's (sic), did die as a result of the accident.

The trial court then discussed this further with Defendant:

> THE COURT: All right. I just want to be sure, [Defendant], that it is with your permission and you understand that you and your attorney are admitting that you -- you were driving; that two individuals died as a result of the accident - -
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: -- that you were driving while your license was revoked, and it was an impaired revocation, and you are admitting that without the State having to prove that it beyond a reasonable doubt?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And you're doing that of your own free will? No one is forcing you to do that?
>
> THE DEFENDANT: Yes, ma'am.

The trial court filed "Harbison Admissions" on 8 October 2018. There were three total admissions, which stated:

> 1. That . . . [D]efendant was operating a gold Saturn vehicle on the date of the offense;

> 2. That the vehicle he was driving on the date of the offense was involved in a crash with the motorcycle occupied by Tommy Jones and Suzette Jones, resulting in their deaths;
>
> 3. That at the time of the offense . . . [D]efendant's drivers license was in a state of revocation as the result of a 1987 impaired driving revocation.

Also on 8 October 2018, "Stipulations" were filed with the trial court, which provided:

> 1. That at the time of the fatal crash occurring on Sunday, June 17, 2012, on Airport Road also known as SR 1516, . . . [D]efendant was the driver and operator of the 1996 Saturn four door sedan that was involved in that crash at the time of the crash.
>
> 2. That at the time of the crash, . . . [Defendant] knew his license was in the state of revocation for an implied consent offense, driving while impaired.
>
> 3. That . . . [D]efendant does stipulate that all of the prior convictions listed in 17CRS1730 and charging . . . [D]efendant with being an habitual felon are in fact his prior convictions.
>
> 4. That . . . [D]efendant does stipulate that both of the prior convictions listed in 17CRS1728 and charging . . . [D]efendant with being a violent habitual felon are in fact his prior convictions.

We have previously held that a defendant's trial counsel admitting certain elements of a crime, "while still maintaining the defendant's innocence[,]" does not implicate *Harbison*. *State v. Wilson*, 236 N.C. App. 472, 477, 762 S.E.2d 894, 897 (2014) (citing *State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986)). However, the situation in this case is different; Defendant consented to admission of certain *elements* of the offenses, but his counsel admitted guilt to the *entire* lesser-included offenses. Further, while it is clear Defendant consented to the admission of these elements, it is unclear Defendant consented to admitting guilt to the offenses as a whole.

The State contends that Defendant "did not challenge the essential elements of misdemeanor death by motor vehicle" and Defendant's "trial strategy sought to challenge the existence of malice" in order to undermine the second-degree murder charge, and

> [p]rior to trial, [D]efendant stipulated to driving while license revoked as set forth above. Further, during his cross-examination of Trooper Deal, [D]efendant's counsel actively elicited established (sic) that [D]efendant drove off the road to the right, overcorrected, and crossed into the oncoming lane of travel where the collision occurred. Defendant never challenged that he failed to maintain control of his vehicle and that his vehicle crossed into the oncoming lane of travel causing the collision. It is clear that [D]efendant only sought to establish that he did not intentionally do so or do so with malice.

The State essentially contends Defendant effectively conceded every element of misdemeanor death by motor vehicle and therefore effectively conceded guilt to the entire offense.

Even assuming Defendant knowingly consented to each element of the offenses during the trial court's *Harbison* inquiry, nothing in our record indicates Defendant knew the consequences of admitting these elements or that admitting these facts and elements would amount to admitting guilt to the entire offense. Not only must Defendant show knowing and voluntary consent to his counsel's admission of guilt, but "the defendant must be aware of the potential consequences of his decision." *State v. Foreman*, 270 N.C. App. 784, 790, 842 S.E.2d 184, 189 (2020) (citation and quotation marks omitted). Even if Defendant consented to admission of all the elements of an offense, it is not clear Defendant was aware the consequences of that action would be conceding guilt to the entire offense. In fact, Defendant's actions indicate he was not consenting to conceding guilt to the entire offense. As Defendant notes in his brief, at the initial pre-trial hearing, his counsel only stated Defendant was "willing to concede certain *elements*[,]" (emphasis added), Defendant maintained a not guilty plea to the offenses his counsel admitted guilt to during closing arguments, and the jury was instructed "if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty."

The State's argument is unconvincing since even if a defendant knowingly and voluntarily consents to every element of a criminal offense, this does not necessarily indicate the defendant was aware that conceding these elements would amount to conceding guilt to the entire offense. It may seem logical that by consenting to every element of a criminal offense a defendwould thereby consent to admitting the entire offense, but we cannot presume a defendant understands this

distinction and the trial court must inquire as to whether that defendant understands he is admitting guilt to the entire offense.

We finally note that even though Defendant's counsel only conceded guilt to misdemeanor death by motor vehicle, a lesser-included offense of second-degree murder, the charge Defendant was convicted of, we must still grant relief in favor of Defendant. *See State v. Matthews*, 358 N.C. 102, 108-09, 591 S.E.2d 535, 540-41 (2004) (granting the defendant a new trial where his counsel conceded guilt to second-degree murder, a lesser-included offense of first-degree murder, and the defendant was convicted of first-degree murder). However, instead of granting Defendant a new trial, "we believe that the appropriate remedy is to remand this case to the [trial court] for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether [D]efendant knowingly consented in advance to his attorney's admission of" guilt to the misdemeanor death by motor vehicle charge. *State v. McAllister*, 375 N.C. 455, 477, 847 S.E.2d 711, 725 (2020) (citations omitted). "Following the evidentiary hearing, the trial court shall expeditiously make findings of fact and conclusions of law and enter an order. The trial court shall then certify the order, the findings of fact and conclusions of law, and the transcript of the hearing to this Court." *Id.* (citation omitted).

V. Conclusion

The delay of 6 years between the time Defendant was arrested to the date of his trial is sufficient to require the remand court to analyze the four *Barker* factors. Although we have weighed some factors a bit differently than the trial court, those differences do not change the result. After our *de novo* review, we conclude the trial court properly denied Defendant's motion. We also conclude there was sufficient evidence to support the charge of second-degree murder and the trial court properly denied Defendant's motion to dismiss based on sufficiency of the evidence. Finally, as Defendant can demonstrate *per se* ineffective assistance of counsel under *Harbison*, we reverse and remand to the trial court "for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether [D]efendant knowingly consented in advance to his attorney's admission of" guilt to the misdemeanor death by motor vehicle charge. *See id.*

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges COLLINS and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
WENDY DAWN LAMB HICKS

No. COA20-665-2

Filed 31 December 2024

1. Appeal and Error—preservation of issues—admission of exhibits at criminal trial—invited error analysis

In a murder case, defendant did not waive appellate review of his argument that the trial court committed plain error by admitting two exhibits into evidence—each consisting of numerous text or multimedia messages obtained from defendant's cell phone—and allowing the exhibits to be published to each jury member to retain for the duration of the trial where, because defendant did not affirmatively seek admission of the exhibits or ask that the exhibits be published to the jury in a prejudicial manner, the invited error doctrine did not apply. Although defense counsel told the court that the manner of publication was "probably a pretty good idea" and that he might use the same method on cross-examination, his statement constituted mere consent and failure to object rather than an unequivocal action directly precipitating the alleged error. Further, he did not elicit testimony on cross which was challenged on appeal. Finally, defense counsel's request for an additional extraction of data from defendant's phone—in order to obtain possible audio files that defense counsel had previously not been aware of—did not trigger the invited error doctrine because it represented counsel's due diligence in seeking to uncover potentially exculpatory evidence.

2. Evidence—text messages—relevance—manner of display—plain error shown

Defendant was entitled to a new trial on a charge of second-degree murder where the trial court committed plain error by admitting into evidence two exhibits—each consisting of numerous text or multimedia messages obtained from defendant's cell phone, some of which did not involve the victim—and allowing copies of the exhibits to be published (unredacted and without limiting instructions) to each jury member to retain for the duration of the trial, and where the erroneous admission and manner of display had a probable impact on the decision of the jury. The text messages were either irrelevant to the question of defendant's guilt, unnecessarily cumulative in light of other evidence of the tumultuous relationship

between defendant and the victim, or highly prejudicial because they shifted the focus from whether defendant acted in self-defense when she fatally shot the victim to defendant's unsavory lifestyle, including drug use and multiple affairs and sexual encounters, which served only to confuse and inflame the passions of the jury. Similarly, the photographs admitted, which were published to the jury in an enlarged format and some of which depicted graphic sexual images, were inflammatory and more prejudicial than probative, particularly where sufficient evidence was presented demonstrating that defendant acted in self-defense.

Judge MURPHY dissenting.

On remand by plurality opinion of the Supreme Court of North Carolina in *State v. Hicks*, 385 N.C. 52, 891 S.E.2d 235 (2023), reversing and remanding a published opinion by a unanimous panel of the Court of Appeals in *State v. Hicks*, 283 N.C. App. 74, 872 S.E.2d 152 (2022) ("*Hicks I*"). Originally heard in the Court of Appeals on 13 April 2021.

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

Marilyn G. Ozer, for the Defendant.

WOOD, Judge.

This case returns to us on remand from the Supreme Court of North Carolina for the limited purpose of considering Defendant's additional issue not reached by this Court in *Hicks I*: whether the trial court committed plain error by allowing a significant number of text messages and enlarged images to be published to each member of the jury without limiting instructions. After careful review of the Supreme Court opinion and the arguments advanced by the parties, we vacate the judgment entered against Defendant and remand for a new trial.

I. Factual and Procedural Background

The underlying facts of this case are set forth fully in *Hicks I* and the subsequent Supreme Court opinion; we briefly summarize as set forth herein.

Wendy Hicks ("Defendant") and the deceased, Caleb Adams ("Caleb"), met in September 2015 through their employment at Dart Container. Although both were married, they soon developed an intimate

relationship that lasted until Caleb's death on 13 June 2017. Caleb was married to Dana Adams ("Dana") and remained so until Caleb's death. Defendant divorced her husband in April 2016. Both Defendant and Caleb also maintained intimate relationships with other individuals, and Defendant tried to hide her other relationships from Caleb.

In early 2017, Caleb introduced Defendant to methamphetamine. According to Defendant, Caleb could become angry when using methamphetamine. After Caleb's methamphetamine supplier was arrested, Defendant introduced Caleb to a new supplier, Doug. Defendant began performing oral sex on Doug to pay for methamphetamine and started an intimate relationship with him, which she attempted to hide from Caleb.

On 23 May 2017, Defendant posted a photo on Facebook of her and Caleb kissing. Dana saw this photo and confronted Caleb, who denied that he was the man in the photo. On 8 June 2017, Defendant called Dana and informed her that Caleb was having an affair and using drugs.

During the week of 12 June 2017, Defendant and Caleb had several arguments, including one about the photo she posted on Facebook. According to Defendant, Caleb was also upset and angry because his supplier raised the price of methamphetamine, and he was concerned about owing people money.

On the morning of 12 June 2017, Caleb visited Defendant's trailer where she lived with her seventeen-year-old daughter, April. April testified that she awoke that morning and heard her mother and Caleb arguing. She further testified that Caleb threw open the door to the residence, causing the door to hit a dog gate. Caleb entered the home and screamed profanities and threats at Defendant. According to April, Caleb stated, "I've never hit a bitch but you're pushing me to hit a bitch. You're ruining my life. You're ruining my family." Caleb then left the trailer.

That evening, Caleb texted Defendant numerous times, and Defendant told him she would leave his drugs on the nightstand in her bedroom. At approximately 9:15 p.m., Caleb picked up his drugs. At approximately 11:30 p.m., Defendant texted Caleb, threatening to send sexually explicit photos to Dana to expose their affair.

At approximately midnight, Defendant called Dana, identified herself, and revealed that she and Caleb were having an affair. She further revealed Caleb was using recreational drugs. Defendant informed Dana that she and Caleb had been arguing, Caleb had threatened her, and she was concerned for her safety. Defendant asked Dana if Caleb was ever a violent person. Dana explained she was not aware of Caleb's outburst

on the morning of 12 June 2017. Dana also stated that Caleb had never been violent with her and admitted he needed assistance concerning his substance abuse. Defendant informed Dana she had a gun, and Dana told Defendant to call the police if she felt threatened by Caleb.

Later that night, an unknown man stood in Defendant's yard and yelled, "[W]here's Caleb?" Defendant told him Caleb was not there, and the man told Defendant to tell Caleb to "call his people." Defendant then called Caleb numerous times. His reply text stated, "You'll be lucky if you don't end up in a ditch."

At 5:58 a.m. on 13 June 2017, Caleb called Defendant and told her he was on the way to her home. At 6:13 a.m., Defendant texted Doug, "He [on the way] here." At 6:14 a.m., she texted Caleb, "No, please don't come here. They looking for you." At 6:28 a.m., she texted Doug, "He here."

At 6:30 a.m., Defendant called 911 and told the operator that she had shot Caleb. April was home at the time and although she did not see Defendant, she testified as to what she heard from her room. She testified that Caleb burst into the home and slammed the door as he had done the previous morning. She heard Caleb tell Defendant that he was going to kill her. She could hear that they engaged in a physical struggle violent enough to move furniture.

According to Defendant, Caleb was angry when he arrived at her home. He came into the trailer and entered her bedroom to try to take her phone. When she refused to hand over her phone, Caleb grabbed her gun from the nightstand.[1] At trial, Defendant testified that upon taking her gun, Caleb removed it from its holster and pointed it at her, and she threw her phone at him. Caleb then looked through her phone and started to leave with the gun. She told him to leave the gun there, and he came back and threw down the gun onto the nightstand. Defendant then picked up the gun and tried to walk past Caleb, who then grabbed her arm and stomped on her feet. She tried to break free, but Caleb pinned her arm. Defendant then shot Caleb. Caleb walked past her and then dropped face-down on the floor.

Defendant had given other accounts of the shooting to law enforcement officers prior to trial. To the deputies who arrived at the scene, she explained that after Caleb took the gun from her nightstand, he tried to grab her in an attempt to take her phone. He dropped the gun while doing so, and she picked up the gun and shot him.

---

1. Our Supreme Court notes that from here, Defendant's accounts differ. *Hicks*, 385 N.C. at 56, 891 S.E.2d at 239.

Later on, the day of the shooting, Defendant gave her account to two detectives at the sheriff's office. She did not tell them that Caleb dropped the gun. Rather, she explained that after she refused to relinquish her phone, a wrestling match ensued during which the gun and phone somehow switched hands, and she shot Caleb. She stated she could not remember how she obtained the gun or removed it from the holster.

Police arrived and found Caleb lying on his back on the floor, halfway through the bedroom doorway. An officer found a key fitting Defendant's front door near Caleb's leg and a "smoke vape" or "vape smoker." Defendant told an officer at the scene that the key belonged to Caleb and that he had used it to enter her home. Both gunshot wounds entered Caleb's back, and either could have caused his death. There was no stippling, which may be caused when unburnt gunpowder strikes the skin and causes a superficial injury. An expert for the State testified this indicates the gun was shot from more than six inches away.

Nothing was broken in the house or bedroom. Although the front door was broken at one of its hinges, Defendant told the detectives during questioning that this had occurred before Caleb's visits to her house during the week of June 12. Defendant did not mention the broken door during her testimony at trial. April testified she did not know when it occurred.

A forensic toxicologist testified that the level of methamphetamine in Caleb's blood was 1.5 milligrams per liter and the level of amphetamine was .12 milligrams per liter. The toxicologist testified that using methamphetamine can cause heightened alertness, aggression, paranoia, violence, and sometimes psychosis.

At the scene, Defendant did not appear to be injured and did not mention she was suffering any pain. When she was first questioned by the detectives, she had no bruises. Approximately four hours later, however, the detectives noticed what appeared to be bruises starting to develop. The photographs of the bruising were presented at trial.

On 11 July 2017, Defendant was indicted for second-degree murder. Defendant's case came on for trial during the 18 November 2019 criminal session of Randolph County Superior Court. The jury convicted Defendant of second-degree murder. The trial court sentenced her in the mitigated range to 180-228 months of imprisonment. Defendant appealed, arguing the trial court erred in instructing the jury on the aggressor doctrine. In *Hicks I*, in its unanimous opinion filed 19 April 2022, this Court held the trial court erred in instructing the jury on the

aggressor doctrine. 283 N.C. App. at 84, 872 S.E.2d at 159. This Court's decision to order a new trial for Defendant made it unnecessary to address her arguments regarding the State's Exhibits 174 and 175. *Id.* at 84, 872 S.E.2d at 160.

In its opinion filed 1 September 2023, our Supreme Court reversed the decision of this Court and remanded the matter to this Court "for consideration of Defendant's argument that the trial court committed plain error in admitting Exhibits 174 and 175 into evidence." 385 N.C. at 65, 891 S.E.2d at 244.

II. Analysis

Defendant argues the trial court plainly erred in admitting Exhibits 174 and 175. We agree.

A. Standard of Review

[1] Generally, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Nevertheless, "[i]n criminal cases, an issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

Here, Defendant "specifically and distinctly" contends in her appellate brief that the trial court erred in admitting Exhibits 174 and 175 and erred in the manner by which the exhibits were published to the jury. The State argues that any error was invited error and therefore Defendant has waived appellate review altogether. Therefore, as an initial matter, we must determine whether Defendant invited the alleged error about which she now complains.

The doctrine of invited error is codified in N.C. Gen. Stat. § 15A-1443, which states in pertinent part, "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). "Under the doctrine of invited error, a party cannot complain of a charge given at his request, or which is in substance the same as one asked by him." *State v. Miller*, 289 N.C. App. 429, 432–33, 889 S.E.2d 231, 234 (2023) (brackets and citation omitted). "Ordinarily one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial. . . . Invited error is not ground for a

new trial." *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Crane*, 269 N.C. App. 341, 343, 837 S.E.2d 607, 608 (2020) (citation omitted).

"Our courts have consistently applied the invited error doctrine when a defendant's *affirmative actions directly precipitate error*." *Miller*, 289 N.C. App. at 433, 889 S.E.2d at 234 (emphasis added). In *Miller*, the defendant argued on appeal that the trial court plainly erred in admitting portions of a recorded interview between himself and law enforcement. The State argued the invited error doctrine applied where "(1) Defendant, through counsel, actively cooperated with the State to determine the appropriate redactions to his videotaped interview; (2) the redactions to the video were for the benefit of Defendant; and (3) Defendant agreed to the admission of the redacted video and its publication to the jury." *Id.* at 432, 889 S.E.2d at 234.

In determining whether the invited error doctrine applied, the Court in *Miller* considered two cases in which North Carolina courts applied the invited error doctrine. *Id.* at 433, 889 S.E.2d at 234. First, in *State v. Barber*, the defendant argued on appeal that the trial court erred in failing to redact a polygraph examination that was published to the jury. *State v. Barber*, 147 N.C. App. 69, 73–74, 554 S.E.2d 413, 416 (2001). This Court held the invited error doctrine applied where the defendant requested that an exhibit "be submitted to the jury, despite explicit warnings by the trial court that defendant's statement had not been properly redacted." *Id.* at 74, 554 S.E.2d at 416. Second, in *State v. Roseboro*, the defendant sought to admit testimony from one of his witnesses for corroborative purposes only. *State v. Roseboro*, 344 N.C. 364, 372, 474 S.E.2d 314, 318 (1996). The trial court asked defense counsel for confirmation: "This evidence is offered for the purpose of corroborating?" Defense counsel replied, "Yes, sir, it is. Yes, sir." On appeal, however, the defendant argued that the witness's statements were admissible as substantive evidence. Our Supreme Court held that the invited error doctrine applied where the "defendant unequivocally agreed that he offered [the witnesses'] testimony for purposes of corroboration." *Id.* at 372–73, 474 S.E.2d at 318.

The Court in *Miller* also considered two cases in which this Court declined to apply the invited error doctrine. *Miller*, 289 N.C. App. at 433, 889 S.E.2d at 234–35. First, in *State v. Chavez*, this Court held the invited error doctrine did not apply where the defendant "did not request the conspiracy instruction, but merely consented to it." *State v. Chavez*, 270

N.C. App. 748, 757, 842 S.E.2d 128, 135 (2020), *rev'd on other grounds*, 378 N.C. 265, 861 S.E.2d 469 (2021). Second, in *State v. Harding*, this Court declined to apply the invited error doctrine and explicitly held that the defendant's argument was not precluded from plain error review where the defendant "failed to object, actively participated in crafting the challenged instruction, and affirmed it was 'fine.' " *State v. Harding*, 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018). The Court in *Harding* noted:

> Even where the trial court gave a defendant numerous opportunities to object to the jury instructions outside the presence of the jury, and each time the defendant indicated his satisfaction with the trial court's instructions, our Supreme Court has not found the defendant invited his alleged instructional error but applied plain error review.

Id. (quotation marks and brackets omitted).

Ultimately, the Court in *Miller* held that although the defense counsel "agreed with the State on certain portions that were redacted from the interview, and . . . did not object to the redacted interview being published to the jury," the invited error doctrine did not apply because he did not take "any affirmative action to introduce the redacted interview." *Miller*, 289 N.C. App. at 433, 889 S.E.2d at 235.

Here, Defendant did not affirmatively seek admission of Exhibits 174 and 175 or that they be published to the jury in a prejudicial manner. First, Defendant did not stipulate to the admission of the exhibits. Prior to trial, the Prosecutor and defense counsel discussed certain stipulations with the trial court. The trial court confirmed the items to which the parties stipulated: first, defense counsel stipulated to the authenticity of State's Exhibit 179, which showed a portion of call records from Defendant's phone; and second, the State stipulated to allowing Defendant's expert witness from Raleigh, North Carolina rather than one from Dallas, Texas to testify to the results of a Cellebrite extraction of a cell phone. Neither the parties nor the trial court specifically mentioned any stipulation to the admission of Exhibits 174 and 175.

During the conversation regarding stipulations, the Prosecutor stated:

> Judge, I do want to put on the record, I've spoken with [defense counsel] about this, the State intends to offer cumulus cell phones records, SMS texts, between the parties, the victim and the Defendant. I've made roughly 18 copies. Because of the cumbersome nature of it I would

> like permission to, once I've laid the foundation for admitting them, when we get to testifying about the content of those records, *to allow the jurors to actually hold their copies of the record, do kind of a read-along silently while we go through them simply because of the nature of the texts*.

Presumably, the "cumulus cell phone records [and] SMS texts" to which the Prosecutor referred were State's Exhibits 174 and 175, which the evidence log described as, respectively, "Report for Galaxy S7, SMS text msgs" and "Report for Galaxy S7, multimedia msgs." The trial court replied, "Well, if they're admitted before the read-along occurs, I don't have any trouble. I think I can probably do that in the Court's discretion, without a stipulation, but I mean they'll have to be admitted first." The Prosecutor replied:

> They're going to be admitted for witness prior to that but because of the nature of the -- just the nature of the records, how many there are and we're going to be flipping back and forth, I wanted to bring that to Your Honor's attention and I've spoken to Mr. Wells about it, just to go ahead and make sure that's okay before I start handing stuff out.

The trial court asked if defense counsel wished to be heard on the matter, and he replied, "I think that's probably a pretty good idea. I might want to use the same method in cross-examination or with [Defendant's expert witness] Mr. Green when the time comes."

This conversation does not indicate that defense counsel affirmatively requested that the jurors hold copies of State's Exhibits 174 and 175, that the entirety of Defendant's texts be submitted to the jury unredacted, nor that certain graphic images be enlarged. Although defense counsel stated, "I think that's probably a pretty good idea," this response is not an affirmative request to the trial court to publish the exhibits in the way they were published. Defense counsel's acquiescence, or failure to object, is more akin to a defense counsel's "mere consent" to an allegedly errant instruction or a defense counsel's statement that an allegedly errant instruction was "fine," which are both circumstances in which this Court declined to apply the invited error doctrine. *Chavez*, 270 N.C. App. at 757, 842 S.E.2d at 135; *Harding*, 258 N.C. App. at 311, 813 S.E.2d at 259. A defense counsel's failure to object is specifically the scenario in which our Rules of Appellate Procedure provide for plain error review. N.C. R. App. P. 10(a)(4).

Furthermore, as discussed *supra*, defense counsel *did not* stipulate to the admission of Exhibits 174 and 175 into evidence. The record is totally devoid of any evidence to support otherwise. The trial court confirmed with the parties that defense counsel stipulated to the authenticity of Exhibit 179, and the State stipulated to an expert witness testifying regarding an extraction from a cell phone. Thereafter, defense counsel never stipulated to the admission of Exhibits 174 or 175 into evidence nor that identical copies of the exhibits be published to each member of the jury to hold from the moment of publication for, presumably, the duration of the trial.

In *State v. Betts* this Court contemplated whether the invited error doctrine applied when the defendant's counsel stipulated that she had no objection as to the admissibility of the disputed evidence *if* the State made certain redactions. *State v. Betts*, 267 N.C. App. 272, 833 S.E.2d 41 (2019). In that case, a social worker conducted a forensic interview of a minor child whom the defendant allegedly had touched inappropriately. *Id.* at 274, 833 S.E.2d at 43. The social worker wrote a report on the interview. At trial, the State sought to admit the report into evidence. Defense counsel initially objected but did not object to the entry of a redacted version. *Id.* at 276, 833 S.E.2d at 44. On appeal, the defendant argued the trial court plainly erred in admitting the report. *Id.* at 282, 833 S.E.2d at 48.

This Court noted that after defense counsel's initial objection to the admission of the report at trial, the trial court held a colloquy on the matter, and "defense counsel stated she would not object to the . . . [r]eport, if the State were to make certain redactions." *Id.* at 283, 833 S.E.2d at 48. The trial court allowed the State, with defense counsel's consent, to review and redact the report during an evening recess and further ruled that defense counsel would have an opportunity to review the redacted version. The next day, after reviewing the redacted version of the report, defense counsel affirmed to the trial court that "[t]he objectionable materials have been removed." The State renewed its motion to admit the report, the trial court asked defense counsel if she had any objection, and she replied no. *Id.* at 283–84, 833 S.E.2d at 48–49. The Court in *Betts* ultimately held that the invited error doctrine applied to the defendant's argument that the trial court erred in admitting the report. *Id.* at 284, 833 S.E.2d at 49. The Court reasoned, "Defendant's counsel not only failed to renew Defendant's objection to the admission of the . . . [r]eport, but she affirmatively and explicitly represented that she had no objection to the admission of the . . . [r]eport after the State had made the requested redactions."

Betts is distinguishable for various reasons. In *Betts*, defense counsel specifically—and affirmatively—indicated that she would not object to the admission of the report if the State redacted the objectionable portions. Defense counsel actively participated in the process of making the report non-objectionable by reviewing the State's redacted version of it, approving of the new version, and then telling the trial court she had no objection to the admission of the redacted version. In the present case, however, the Prosecutor indicated he would seek to admit the "cumulus cell phone records" and "SMS texts . . . between the parties" and explained that he had "spoken with" defense counsel about "this." This does not indicate that the parties entered into a stipulation on the matter. The trial court specifically responded that it could allow identical copies of the exhibits to be published to each juror "without a stipulation" if they were admitted first. The extent of defense counsel's involvement in the matter occurred when he stated, "I think that's probably a pretty good idea. I might want to use the same method in cross-examination or with [Defendant's expert witness] Mr. Green when the time comes."

Therefore, *Betts* is distinguishable because the involvement of defense counsel in ensuring the report was redacted far exceeds any purported "involvement" of defense counsel in this case in causing Exhibits 174 and 175 to be admitted and published to each juror individually. Indeed, the Record does not reveal that defense counsel had any such involvement, nor that he in any other way affirmatively caused the error he now argues constitutes plain error. We cannot conclude defense counsel's statement, "I think that's probably a pretty good idea" constitutes an affirmative non-objection like defense counsel's action in *Betts*; much less an affirmative action directly precipitating the alleged error. *Miller*, 289 N.C. App. at 433, 889 S.E.2d at 234. Rule of Appellate Procedure 10(a)(4) specifically allows for plain error review upon a defense counsel's failure to object.

Likewise, defense counsel's statement that he "might want to use the same method in cross-examination or with [Defendant's expert witness] Mr. Green when the time comes" does not amount to invited error. The fact defense counsel was contemplating whether he "might want to use the same method" the trial court had just ruled the prosecutor could use is not an affirmative action inviting or joining in the error. As discussed *supra*, our Supreme Court has held that the invited error doctrine applies where a defendant's affirmative actions directly precipitating the error are "unequivocal." *Roseboro*, 344 N.C. at 372–73, 474 S.E.2d at 318. There, the defense counsel's statement of "Yes, sir, it is. Yes, sir"

was held as an invited error, to which the defendant could not seek relief due to his own actions. Here, counsel's statement that he "*might* use the same method" is insufficient to demonstrate "unequivocal" actions precipitating the alleged error. The word "might" does not meet the threshold articulated by the Court in *Roseboro*.[2]

Therefore, we must now determine whether defense counsel elicited testimony upon cross-examination which Defendant now challenges on appeal. We hold he did not. It is well settled that defense counsel invites error when he elicits testimony on cross-examination and then challenges the same testimony on appeal. *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986). In *Wingard*, our Supreme Court held that the defendant waived his challenge to certain testimony on appeal where the State elicited the testimony from a witness, and "defense counsel, on cross-examination, elicited the same testimony." *Id.*

The State points to trial transcript pages 1,778–1,836 of defense counsel's cross-examination of Detective Sibbett regarding certain portions of Defendant's and Caleb's text message exchanges. Much of defense counsel's cross-examination focused on demonstrating that Defendant was not the only one who initiated communications with Caleb. Indeed, for a significant portion of this cross-examination exchange, defense counsel questioned Detective Sibbett regarding State's Exhibit 179, the Verizon report of Defendant's phone call log. Defense counsel sought to highlight to the jury that

> although the text messages might make it look like this was a one-way thing, that [Defendant] was the one who was texting [Caleb] and that she was the one who was interested in having conversations, if we look at the record, the phone records as well, we can see that he was also interested in contacting her because he called her several times?

Detective Sibbett replied, "Yes, sir. There's conversation both ways." Defense counsel further sought to highlight Caleb's volatility as displayed by his "profane diatribe[s]," his tendency to go "from zero to red in five seconds," and his threatening texts to Defendant. Defense counsel did not address the numerous irrelevant and prejudicial texts nor

---

2. The Merriam-Webster Dictionary defines "unequivocal" as "leaving no doubt;" "expressing only one meaning;" "lending to only one conclusion;" "clear, unambiguous;" "not open to challenge." *See Unequivocal*, *Webster's Third New International Dictionary* (3rd ed. 2002). By contrast, "might" is defined as "be in some degree likely to." *See May*, *Webster's Third New International Dictionary* (3rd ed. 2002).

the enlarged graphic images that Defendant now challenges on appeal. Thus, defense counsel's cross-examination did not trigger the invited error doctrine.

Finally, defense counsel did not trigger the invited error doctrine by requesting another extraction of data from Defendant's phone. It came to light during trial that the Randolph County Sheriff's Office "did not make a mirror image of the contents of [Defendant's] phone, as could have been done at the time the . . . download was accomplished." The Sheriff's Office did not download audio files, specifically, short, recorded audio messages that may be sent instead of text messages. Defense counsel was not aware prior to trial there were audio texts that the State did not collect from Defendant's phone. For that reason, he requested a further extraction from Defendant's phone:

> [S]ince I do have an expert who can be here tomorrow, I would ask that -- that the phone be available to him for an extraction. I think that's what they call it. I've been calling it a cell phone dump, but I think it's an extraction. . . . But now that we know -- now that we know for sure that -- well, I don't think that we know for sure there's something on there, but we know there's a possibility there's something on there and that a decision was made not to include that in -- in the selected items. I think it's incumbent on me to ask for that.

The trial court ordered that Defendant's cellphone be subject to a further download. With this second extraction performed, the State sought to admit the extraction into evidence as State's Exhibit 214. Defense counsel acknowledged that the Prosecutor had given him the extraction, but defense counsel had not had a chance to examine it because he was "trying to pay attention to [the Prosecutor's direct examination of] Detective Sibbett to prepare for the cross-examination." Defense counsel explained his position on the admission of the second extraction:

> I am not going to object to the extraction and I'll go ahead and put on the record my reason for that.
>
> First of all, I didn't object. It's already in evidence as the State -- as Mr. Sherriff said, State moved to admit the extraction, itself. So it's in evidence. It's in evidence because I asked the Court to order an extraction to be performed yesterday. So for better or for worse I'm the one who caused this extraction and this new evidence to come forward.

> I don't think I'm in a position to object to it. I'm not inclined to object to it. There are things in there that I will be using I expect.

Defense counsel's request of the second extraction does not demonstrate that he sought to introduce all of the contents of Defendant's phone to the jury or to publish unredacted texts or enlarged, graphic images to the jury. Rather, it was an act of due diligence in seeking to uncover potentially exculpatory evidence. On appeal, Defendant does not challenge State's Exhibit 214, the extraction containing the audio texts. Defendant's request of the second extraction does not trigger the invited error doctrine nor otherwise support its application.

Accordingly, we hold the invited error doctrine does not apply under the facts of this case. We will review the challenged State's Exhibits 174 and 175 for plain error.

Plain error refers to fundamental error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). A trial court commits plain error "where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks and citations omitted).

Our Supreme Court recently elaborated that the prejudice standard, which requires a "showing that a jury *probably would have* reached a different result[,]" means that the standard "requires a showing that the outcome is *significantly more likely than not*." *State v. Reber*, 386 N.C. 153, 159–60, 900 S.E.2d 781, 787–88 (2024) (second emphasis added) (holding that the prosecutor's cross-examination of the defendant was not plain error where there was "plenty of surrounding evidence that supported [the sole eyewitness'] credibility."). The Court in *Reber* explained, "the analysis is whether, without that evidence, the jury probably would have reached a *different* result." *Id.* at 160, 900 S.E.2d at 788 (emphasis in original). Stated slightly differently, "the question on plain error is" whether, absent the challenged evidence, "the jury probably would have returned a *different* verdict." *Id.* at 162, 900 S.E.2d at 789 (emphasis in original). To make this determination, this Court must "examine[] the state of all the evidence except for the challenged evidence and ask[] whether, in light of that remaining evidence, the jury probably would have done something different." *Id.* The Court further

explained, "a close case is not enough to prevail on the prejudice prong of plain error." *Id.*

B. Exhibits 174 and 175

[2] Defendant argues the trial court plainly erred when it allowed Exhibit 174 to be admitted into evidence and in allowing the text messages contained in the exhibit to be published to and held by the jury. Specifically, Defendant argues many of the text messages were irrelevant to the determination of her guilt and highly prejudicial to her. We agree.

Generally, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2023). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2023). Even if evidence is otherwise 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, . . . or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2023). "Unfair prejudice has been defined as an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (quotation marks omitted).

Evidence that is not pertinent to the guilt of the accused may be unduly prejudicial and should be excluded. *See State v. Lopez*, 188 N.C. App. 553, 557, 655 S.E.2d 895, 898 (2008) (trial court properly excluded testimony of two witnesses where their testimony did not point to the guilt of anyone other than the defendant and was "not inconsistent with the guilt of Defendant"); *see also State v. Cuevas*, 121 N.C. App. 553, 556–58, 468 S.E.2d 425, 427–28 (1996) (the trial court erred in admitting the defendant's passport indicating he recently visited Colombia because of the country's "widely known" association with the drug trade, and ownership of a passport showing travel to Colombia was "not probative of a fact at issue" in the defendant's trial for trafficking cocaine); *Browning v. Carolina Power & Light Co.*, 114 N.C. App. 229, 232–33, 441 S.E.2d 607, 609–10 (1994) (trial court prejudicially erred in admitting an officer's testimony that he discovered two bottles of liquor in the driver's purse because the officer also testified "he had no reason to believe that alcohol consumption contributed to the accident"); *Sheppard v. Sheppard*, 38 N.C. App. 712, 713–14, 248 S.E.2d 871, 873 (1978) (in a

custody proceeding by natural mother against deceased husband's family, trial court properly excluded letter written by the deceased husband asking the mother not to prosecute an assault charge against him where the character of the husband was "not in issue"). In sum, our Supreme Court has held that it may be prejudicial error for a trial court to admit evidence that does not have "probative value" but rather has "potential only for inflaming the jurors." *State v. Hennis*, 323 N.C. 279, 286, 372 S.E.2d 523, 528 (1988).

A trial court errs when it admits highly inflammatory evidence that is not relevant to the question of a defendant's guilt. In *State v. Temples*, this Court addressed the admissibility of a letter, allegedly written by a defendant, which referenced contemplating suicide and her purported "experiences with drugs, abortion, and incest." *State v. Temples*, 74 N.C. App. 106, 108, 327 S.E.2d 266, 267 (1985). The defendant in *Temples* was convicted of second-degree murder of her husband with whom she had a "tumultuous" marriage. *Id.* at 107, 327 S.E.2d at 267. Defendant was inside her bathroom, holding a pistol and contemplating suicide when her husband opened the bathroom door and told her, "You put that gun up to your god damn head and I'll help you pull it, I'll help you pull that trigger, you just hold it up there and I'll put my hand on it and pull it." *Id.* Defendant testified she believed her husband intended to kill her, so she shot him three times. The evidence at trial tended to show the fatal bullet was fired from a distance of more than two feet. The trial court admitted the letter along with an instruction to the jury that it could be considered only for impeachment purposes. *Id.* at 108, 327 S.E.2d at 267. This Court reasoned that the "the State's argument as to [the letter's] relevance for impeachment purposes [was] totally unpersuasive" and that "in addition to [the letter's] collateral nature, . . . the contents of this document are inflammatory, with the potential prejudicial impact under the circumstances far outweighing any conceivable probative value of this evidence." *Id.* at 108, 327 S.E.2d at 268. The Court ordered a new trial due to the trial court's cumulative errors. *Id.* at 110, 327 S.E.2d at 268.

The manner in which an exhibit is presented to the jury also may constitute error. In *State v. Hennis*, the defendant was convicted of three counts of first-degree murder. *Hennis*, 323 N.C. at 279, 372 S.E.2d at 523. The trial court admitted thirty-five photographs of the crime scene and autopsies. *Id.* at 282, 372 S.E.2d at 525. The State presented the photographs to the jury by erecting "an unusually large screen on a wall directly over [the] defendant's head such that the jury would continually have him in its vision as it viewed the slides." *Id.* at 286, 372 S.E.2d at 528. Our Supreme Court concluded this "was a manner of presentation that in itself quite probably enhanced the prejudicial impact of the slides

themselves." *Id.* The Court further reasoned, "the thirty-five duplicative photographs published to the jury one at a time just before the state rested its case were excessive in both their redundancy and in the slow, silent manner of their presentation." *Id.* The Court in *Hennis* held that admitting the redundant, "grotesque and macabre" photographs constituted prejudicial error where the evidence of the defendant's guilt was not overwhelming. *Id.* at 286–87, 372 S.E.2d at 528.

Here, the trial court admitted State's Exhibits 174 and 175 into evidence without objection. State's Exhibit 174 contained a download of text messages from Defendant's phone dated 5 March 2017 through 16 June 2017. The trial court did not give the jury any limiting instruction regarding how the jury was to consider such "evidence." The trial court allowed the prosecutor to publish to each member of the jury "a duplicate copy of [State's Exhibits] 174 and 175."

Exhibit 174 contained numerous irrelevant and prejudicial text messages. The prosecutor had Detective Sibbett read large portions of Defendant's text exchanges having no relevance at all to the alleged crime of second-degree murder. Examples include Defendant asking April and Caleb if they had seen her new Facebook profile picture; Defendant's son asking Defendant if he could get his physical; details of Defendant's and Caleb's relationship such as her telling him that he was "the best thing that ever happened to" her, they needed "[c]lear communication" and "whole truths" in order to stay "on track" in their relationship, "True love is so hard to find, and they say once you find it you [lose] your mind," and "I'm sorry that I keep hurting you and your family"; Defendant telling her son where she was sitting for April's graduation; and incoming texts telling Defendant about concerns regarding April's mental health.

These texts were irrelevant to the jury's determination of whether Defendant committed second-degree murder and prejudicial because they could only serve to cause "confusion of the issues" in the minds of the jurors and constituted "needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. The text messages had the probable impact of causing confusion by shifting the focus of the case from the question of whether Defendant acted in self-defense to whether she was someone of whom the jurors should approve personally. The only conceivable purpose for the State to admit texts providing every intimate detail of Defendant's relationship with Caleb, as displayed through their text messages, was to demonstrate the tumultuous nature of their relationship. The jury would have heard plenty of such evidence. Defendant testified that: she began having an affair with Caleb and continued it

after learning that he was married; she carried on affairs with three different men simultaneously; even though Defendant protested at first, she eventually consumed methamphetamine at Caleb's urging because he believed it would improve their sex; at Caleb's suggestion, Defendant performed oral sex on Caleb's supplier to pay for their methamphetamine; and Defendant's drug use made him angry and volatile toward Defendant. Clearly, providing printed handouts of the text messages so that the jurors could "follow along" while Detective Sibbett read them aloud from the witness stand posed a "danger of . . . needless presentation of cumulative evidence" and substantially outweighed the texts' probative value because the jury would have been aware of the tumultuous nature of Defendant's and Caleb's relationship even without them. N.C. Gen. Stat. § 8C-1, Rule 403.

We further note that these largely irrelevant text exchanges were unfairly prejudicial to Defendant because of their likelihood to turn the jurors against her based on their personal distaste for her lifestyle. *See* N.C. Gen. Stat. § 8C-1, Rule 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"). Defendant's and other witnesses' testimony demonstrating numerous sordid details about Defendant's life does not excuse the texts being published to the jury nor allowing them to retain the texts for the duration of trial. This is because the text messages likely would have made Defendant even more contemptible in the jury's mind than she already would have been due to the other testimony presented at trial. The texts constituted additional confusing, needlessly cumulative, and unfairly prejudicial evidence regarding Defendant's life, serving only to inflame the jurors' emotions and causing them to convict her based on their distaste of Defendant rather than the relevant facts and law.

Moreover, the State published text message exchanges to the jury that were grossly prejudicial and carried a high propensity to inflame the emotional reaction of the jurors. State's Exhibit 174 contained a text exchange between Defendant and her mother regarding how someone they knew was stabbed with an eight-inch steak knife, and Defendant's mother stated, "[t]hat crazy bitch stab[bed] him in the back of the neck"; text messages from Defendant describing Caleb as "the main one" and "the married one" among the other individuals with whom Defendant was having an affair; texts discussing the propriety of Defendant having an intimate relationship with a married man; a text exchange between Defendant and her son in which Defendant's son told her that he was pulled over for a traffic stop and that the police officer was "an old guy so he'll probably be a dick head," and Defendant responded, "Well he's

[in] the wrong"; and another text exchange between Defendant and her son in which her son explained he was going to get in trouble because he skipped school to be with a girl, and Defendant asked him, "Was your dick in you[r] pants or in her mouth" and told him he should have lied about where he was; a text exchange from Defendant to another woman in which Defendant asked the woman if she wanted to see a "picture of [Defendant] in restraints"; a text exchange from Defendant to a woman in which Defendant asked, "guess who's coming over to play with me in an hour," and the woman suggested that Defendant use candles and hot wax; and a text message from a previous sexual partner in which he told Defendant, "Next time when you get ready to call be ready to suck dick."

These text messages were inflammatory and unduly prejudicial because they probably caused the jurors to convict Defendant based on their emotional revulsion toward her rather than acquit her based on the evidence of self-defense. *Mason*, 315 N.C. at 731, 340 S.E.2d at 435; *Lopez*, 188 N.C. App. at 557, 655 S.E.2d at 898. Defendant's mother's comment regarding a "crazy bitch" stabbing someone in the back of the neck portrays Defendant's family as callous toward one being seriously injured. Defendant's text stating that an officer was in the wrong for pulling over her son portrays Defendant as antagonistic toward law enforcement officers. Defendant's text regarding her son's possible sexual activity and encouraging him to lie to school authorities about why he was absent in class depicts her as exercising poor parenting choices, encouraging dishonest and sexually questionable behavior to her minor son, being disrespectful toward authority figures, and being morally unprincipled. Defendant's text messages regarding her sex life further depict her as sexually profligate and having a cavalier attitude about having affairs.[3] It is not difficult to foresee that such inflammatory information would lodge at the forefront of the jurors' minds when deciding whether to convict Defendant.

Moreover, although testimony from Defendant herself as well as others already demonstrated she lived a morally questionable personal life, these texts constitute additional, irrelevant information that the jurors were allowed to hold indefinitely after publication to the jury, further adding to their unduly prejudicial effect. *Hennis*, 323 N.C. at 286–87, 372 S.E.2d at 528.

We conclude the introduction of State's Exhibit 174 had a probable impact on the outcome of the trial by needlessly making the jurors more

3. We note this does not reflect the opinion of this Court. Rather, we explain the likely prejudicial effect the texts created in the minds of the jurors.

disgusted with her, whereas the jury probably would have acquitted her without such inflammatory and prejudicial texts when considering all the other evidence presented. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

The State compares the admission of the texts contained in Exhibit 174 to the admission of an officer's testimony in *State v. Peterson*. 205 N.C. App. 668, 695 S.E.2d 835 (2010). In *Peterson*, the defendant shot his live-in girlfriend and was convicted of assault with a deadly weapon inflicting serious injury. *Id.* at 668–69, 695 S.E.2d at 837. On appeal, the defendant argued the trial court erred in allowing an officer to testify the defendant told him that a week prior to the shooting, he had told a friend that he could have sexual intercourse with his girlfriend and that his girlfriend had caught him cheating on her. *Id.* at 674, 695 S.E.2d at 840. Specifically, the defendant argued the officer's testimony was irrelevant and unfairly prejudicial pursuant to Rule 403 of the North Carolina Rules of Evidence. *Id.* at 673, 675, 695 S.E.2d at 840–41. This Court held that "[e]vidence of what precipitated the argument" between the defendant and his girlfriend and "what the argument was about is part of the account of the assault" and was "necessary to complete the story of that assault for the jury." *Id.* at 674, 695 S.E.2d at 840–41. This Court further held that while the officer's testimony "certainly cast[] defendant in a negative light," it was "supportive of defendant's claim of self defense" because it showed that the girlfriend had reason "to be very angry with defendant." *Id.* at 675, 695 S.E.2d at 841.

The State argues Exhibit 174 was relevant because it contained texts between Defendant and Doug, which were relevant to Caleb's drug use, and therefore relevant to Defendant's self-defense theory because Caleb's drug use was known to make him act aggressively. However, *Peterson* is distinguishable from the case *sub judice*. In *Peterson*, the officer's testimony was directly relevant to why the girlfriend started the physical fight, as the defendant testified. *Id.* at 670, 695 S.E.2d at 838. Here, however, Defendant testified at trial regarding Caleb's drug use, and the jury was aware that Defendant called Dana to inform her of his drug use and that she was concerned for her safety around Caleb. An expert witness also testified that using methamphetamine can cause one to become aggressive. Therefore, the jury already was aware that the amphetamine and methamphetamine found in Caleb's system after the shooting potentially caused him to become aggressive at the time of the shooting. Moreover, even if the texts regarding Caleb's drug use had some relevance to his possible state of mind at the time of the shooting, they had no bearing on *why* he broke into Defendant's home or what he intended to do while there. Most importantly, and as explained *supra*, the texts in Exhibit 174 revealed far more than Caleb's drug use and

had no relevance whatsoever to either Defendant's or Caleb's state of mind or whether Defendant acted in self-defense. Rather, they revealed weeks' worth of Defendant's personal conversations, and many of them served only to confuse the jury, needlessly present cumulative evidence, and unfairly prejudice Defendant. N.C. Gen. Stat. § 8C-1, Rule 403; *see also Lopez*, 188 N.C. App. at 557, 655 S.E.2d at 898; *Cuevas*, 121 N.C. App. at 556–58, 468 S.E.2d at 427–28; *Browning*, 114 N.C. App. at 232–33, 441 S.E.2d at 609–10; *Sheppard*, 38 N.C. App. at 713–14, 248 S.E.2d at 873 (a trial court should exclude evidence not pertinent to the defendant's guilt and that serves to unfairly prejudice the defendant).

Likewise, the trial court's admission of Exhibit 175 into evidence and the like manner in which it was published to each member of the jury posed the same issues pertaining to confusion of the issues, presentation of cumulative evidence, and unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403.

State's Exhibit 175 is a "phone examination preview report for" multimedia messages, meaning communications other than written text messages; in other words, photographs taken from Defendant's cell phone. Exhibit 175 contained at least four photographs of Defendant and Caleb kissing, while appearing to be unclothed, a very close-up "resized" image of a vagina, a very close-up "resized" image of anal sex sent by Defendant to Caleb, a very close-up "resized" image of vaginal sex sent by Defendant to Caleb, and a very close-up "resized" image of oral sex showing Defendant's face also sent by Defendant to Caleb. These images, published to each individual juror, were "enlarged" in that they were printed on "8x10" pieces of paper, occupying most of the space on the page. The images appeared much larger than they would have on a cell phone, a fraction of the size of a normal sheet of paper, or in a normally sized photograph. The Prosecutor referred specifically to these graphic images, asking Detective Sibbett to identify the type of sexual activity taking place in each photograph.

Admitting these photos into evidence and publishing a copy for each juror to keep throughout the trial raises many of the issues mentioned in Rule 403. Presenting the images to the jury and focusing on them in the State's direct examination of Detective Sibbett confused the issues because the jury essentially was asked to determine whether Defendant was a good or bad person rather than whether she acted in self-defense when she shot Caleb. The images constituted needless presentation of cumulative evidence because the jury already would have been aware of the licentious nature of Defendant's personal life from other witnesses at trial, including from Defendant herself. The testimonial evidence

made crystal clear Defendant entertained simultaneous affairs with multiple men. Further, there is nothing that perhaps one photo of oral, anal, *or* vaginal sex could not have accomplished that submitting *all three* types of photos to the jury purportedly accomplished. In other words, the State needlessly presented cumulative evidence that Defendant and Caleb engaged in sexual activity, although the jury already was aware that they engaged in sexual activity from other testimony presented at trial. Moreover, it does not follow that the images were indeed relevant to the question of the overall "intensity" of Defendant's and Caleb's relationship. Some people have "intense"—perhaps emotionally tumultuous—relationships without having sex, while others engage in all manners of sexual activity without any emotional attachment. The photos had little, if any, probative value on the question of how Defendant and Caleb felt about each other or treated each other outside of their sexual relationship.

We conclude the admission of the photos meets the high threshold for plain error because, but for their admission, the jury probably would have acquitted Defendant. It is one matter for Defendant to testify that she had affairs with and/or engaged in sexual activity with multiple men. It is another matter entirely for the jurors each to be given a packet visually—and viscerally—depicting Defendant engaging in such activity and to have one of the State's witnesses identify the type of sexual activity involved.[4] Unless the jurors were accustomed to looking at pornography, the close-up images of Defendant engaging in sexual activity with a married man only served the purpose of shocking and disgusting the jury. *See Hennis*, 323 N.C. at 286, 372 S.E.2d at 528 ("Given this absence of additional probative value, these photographs—grotesque and macabre in and of themselves—had potential only for inflaming the jurors."); *see also Lopez*, 188 N.C. App. at 557, 655 S.E.2d at 898; *Cuevas*, 121 N.C. App. at 556–58, 468 S.E.2d at 427–28; *Browning*, 114 N.C. App. at 232–33, 441 S.E.2d at 609–10; *Sheppard*, 38 N.C. App. at 713–14, 248 S.E.2d at 873 (evidence that is not pertinent to the defendant's guilt and is unfairly

4. Photos may illustrate testimony in a manner that is more shocking and inflammatory than mere testimony. Photos of victims' bodies is one example. Our Supreme Court stated in *Hennis*, "this Court has repeatedly warned against the redundant or excessive use of photographs of victims' bodies." 323 N.C. at 284, 372 S.E.2d at 527. In other words, trial courts must be particularly aware of the number of and manner in which graphic photos are presented to the jury. The court in *Hennis* noted that even where prejudicial photos are relevant and competent, and are therefore otherwise admissible, "the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors." *Id.* at 284–85, 372 S.E.2d at 527 (citations omitted).

prejudicial to the defendant should be excluded). The admission of the photographs into evidence and their publication to each member of the jury to hold for the duration of the trial, without a limiting instruction, probably had the effect of convincing the jury that Defendant was morally reckless and sexually profligate. She would have appeared careless regarding the impact that having an affair with a married man might have on Defendant's family. The jurors only needed to open up the photocopied exhibit and view the photos contained within it to be reminded that Defendant callously engaged in various manners of sexual activity with a married man. Therefore, Exhibit 175 plainly fails the Rule 403 balancing test in that the photos were not pertinent to the question of second-degree murder or self-defense *and* encouraged the jury to base its decision on an improper basis of emotion. *Mason*, 315 N.C. at 731, 340 S.E.2d at 435; *Lopez*, 188 N.C. App. at 557, 655 S.E.2d at 898. We hold the admission of Exhibit 175 into evidence and its publication to each member of the jury probably impacted the jury's deliberation and conviction of Defendant, and but for the error, the jury would have reached a different result. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

The State argues the photographs are comparable to those which this Court held were properly admitted in *State v. Shannon*. 182 N.C. App. 350, 642 S.E.2d 516 (2007). In *Shannon*, the defendant was convicted of first-degree murder and conspiracy to commit first-degree murder of her husband. *Id.* at 351, 642 S.E.2d at 518. On appeal, the defendant argued "the trial court erred by admitting three sexually suggestive photographs of" her. *Id.* at 354, 642 S.E.2d at 520. The defendant specifically argued "the photographs were irrelevant and, alternatively, unduly prejudicial." *Id.* The defendant and her deceased husband were members of a "swingers" club, and the defendant invited a man named "Wilson" to be a member of the club. *Id.* at 351, 642 S.E.2d at 519. The three photos portrayed the defendant engaging in sexual activity with Wilson, among others. *Id.* at 355, 642 S.E.2d at 521. First, this Court held the photos were relevant because they "helped support the State's contention that defendant wanted to be with Wilson and that this constituted a motive to kill Shannon," and because they "illustrated the chain of events leading up to Shannon's murder, and corroborated the existence of Wilson's sexual relationship with defendant." *Id.* Second, this Court held "the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice." *Id.* at 356, 642 S.E.2d at 521. This Court reasoned the trial court admitted only three out of the eight photos the State sought to introduce "and directed that the photographs would be passed around to the jurors in a folder and not shown on an overhead projector." *Id.*

Shannon is distinguishable from the case *sub judice*. First, the link of relevance between the photos and the shooting is much more tenuous in this case than in *Shannon*. In *Shannon*, the defendant "told Wilson she loved him and could see herself being with him." *Id.* at 352, 642 S.E.2d at 519 (quotation marks omitted). She then instructed her daughter to shoot the deceased in his sleep. *Id.* at 353, 642 S.E.2d at 519–20. Here, there is no evidence demonstrating Defendant planned to kill Caleb. Therefore, the photographs in this case are not relevant to a conspiracy to shoot Caleb due to romantic jealousy or anger. Second, unlike the trial court in *Shannon* admitting only three out of eight photos, here, the trial court did not admit selected photos. Rather, the trial court admitted the entirety of Exhibit 175, unredacted, including photos portraying Defendant engaging in various manners of sexual activity with Caleb. Third, the trial court in this case did not have the photos put into a folder and passed among the jurors. Rather, the trial court allowed an identical copy of Exhibit 175 to be published to and retained by each juror. Therefore, the manner of publication in this case is unfairly prejudicial because the jurors presumably could open the packet of photos throughout the trial to view the inflammatory photographic evidence of Defendant's sexual activities.

The admission of Exhibits 174 and 175 and allowing the jurors to hold the texts for the duration of trial are comparable to trial courts' errors in *Temples* and *Hennis*. The Court in *Temples* held the trial court's admission of the letter detailing the defendant's experiences with drugs, abortion, and incest was irrelevant, inflammatory, and prejudicial. Here, as in *Temples*, the question for the jury was not whether Defendant was a good or bad person, but rather whether Defendant committed second-degree murder or acted in self-defense. Like the letter in *Temples*, the texts in Exhibit 174 contained information about Defendant's personal life that would have disgusted a jury and caused them to vote based on passion, whereas absent the evidence, the jury probably would have acquitted Defendant. The same is true for Exhibit 175. Like the letter containing controversial information about the defendant in *Temples*, here, the photos were of a "collateral nature" and "inflammatory, with the potential prejudicial impact under the circumstances far outweighing any conceivable probative value of this evidence." 74 N.C. App. at 108, 327 S.E.2d at 268.

Moreover, as in *Hennis*, the way the texts and photos were published to the jury "quite probably enhanced the prejudicial impact of the [texts] themselves." 323 N.C. at 286, 372 S.E.2d at 528. Neither the texts nor photos were redacted; the State did not select specific texts or only one photo to demonstrate the "tumultuous" nature of Defendant's

and Caleb's relationship. Like "the thirty-five duplicative photographs published to the jury one at a time just before the state rested its case [which] were excessive in both their redundancy and in the slow, silent manner of their presentation," here, the publication to the jurors of numerous, highly sensitive photos and over three weeks' worth of texts between Defendant and Caleb and allowing them to hold copies of the texts for the duration of trial was redundant, excessive, and highly prejudicial. *Id.* Comparable to the graphic photos shown on a projector behind Defendant's head in *Hennis*, the photos portraying sexual activity in Exhibit 175 were far larger than they would appear on a cell phone.

As a final note, our conclusion that the trial court plainly erred in admitting Exhibits 174 and 175 is further supported by a review of *Sheffield*, where this Court held the alleged error did not reach the level of plain error. *State v. Sheffield*, 282 N.C. App. 667, 872 S.E.2d 122 (2022). In that case, the defendant was convicted of first-degree sex offense with a child after he forced the child victim to watch pornography and then sexually assaulted him. At trial, the State admitted three photographs into evidence without objection, including: one photograph depicting a dresser drawer containing a condom and two dildos; and two photographs depicting a Ziploc bag of condoms, one of which showed a dildo in the background. On appeal, the defendant argued the trial court plainly erred in admitting the photos, as "these items were unrelated to the alleged offense and found in a separate room." *Id.* at 671, 872 S.E.2d at 126. This Court held that the photographs were erroneously admitted; however, because of the absence of an objection, the error did not rise to the level of plain error.

Sheffield is distinguishable from the present case, specifically, in two dispositive ways. First, the defendant in *Sheffield* argued that the trial court barred the State from introducing evidence about the defendant's sexuality, and the admitted photographs carried implications pertaining to defendant's sexuality. This Court disagreed with the defendant's argument, as unchallenged evidence was previously introduced at the trial regarding the defendant's sexuality, so "the implication would have been before the jury regardless of any error." *Id.* at 677, 872 S.E.2d at 130. The same cannot be held here. In Exhibit 174, the implication that Defendant lived a morally questionable personal life was before the jury regardless of any error. However, the personal conversations in the text messages had implications that *would not* have otherwise been before the jury: that Defendant's family was callous toward one being seriously injured; Defendant was antagonistic toward law enforcement officers; Defendant exercised poor parenting choices, encouraged dishonest and sexually questionable behavior to her minor son; and she was sexually

profligate and had a cavalier attitude about affairs. Unlike *Sheffield*, these prejudicial implications exposed the jury to irrelevant information that was not previously introduced.

Second, the defendant in *Sheffield* argued "the erroneous admission of a photograph with dildos in the background suggested Defendant was immoral and/or a sexual deviant more likely to sexually assault a child." *Id.* at 677, 872 S.E.2d at 130. In response, this Court noted that the photographs were only referenced in the presence of the jury when the State laid the foundation and when the defendant commented on the photographs during closing arguments. There, this Court held "[t]he evidence properly introduced at trial and the evidence that is not the subject of this appeal *is sufficiently strong* that the improperly admitted evidence, *in light of its minimal emphasis*, did not have a probable impact on the jury." *Id.* at 678, 872 S.E.2d at 130 (emphasis added). Thus, because of the overwhelming evidence of guilt, and the lack of emphasis on the improperly admitted evidence, the error did not rise to plain error.

By contrast, here, it cannot be held that the evidence was "sufficiently strong" nor that the State only placed a "minimal emphasis" on the improperly admitted evidence. First, we have acknowledged the discrepancies in Defendant's accounts of the shooting; however, she consistently stated in *four* accounts: "Mr. Adams arrived angry, came into the house, and then came into her bedroom to obtain her phone. When she refused to give him her phone, Mr. Adams grabbed her gun from the nightstand, which was in its holster." *Hicks*, 385 N.C. at 56, 891 S.E.2d at 239. Although her accounts differed from that point, there was substantial evidence presented at trial demonstrating that she acted in self-defense. Therefore, the evidence was not "sufficiently strong" as in *Sheffield*.

Second, it can hardly be concluded that the State placed only a "minimal emphasis" on Exhibits 174 or 175. Exhibit 174 was admitted without a limiting instruction; each member of the jury was provided printed handouts of the text messages; the text messages were read aloud, while the jury followed along on the handout; and the jurors kept the evidence for the remainder of the trial. Likewise, Exhibit 175 was published to each individual juror; the photographs were enlarged and unredacted so that the picture occupied most the space on the page; the State specifically referred to the photographs and identified the type of sexual activity taking place; and the jurors retained the packet of photographs for the remainder of the trial. For these reasons, the present case is easily distinguishable from S*heffield*, where the evidence was only referenced while laying the foundation and during closing arguments. Considering

how the evidence was presented to the jury, how it was published to the jury, and the manner in which it was discussed during the witnesses' testimony, we cannot conclude that the State placed a minimal emphasis on Exhibits 174 and 175. Thus, the evidence properly introduced at trial was *not* sufficiently strong and the State's emphasis on the improperly admitted evidence had a probable impact on the jury.

C. The State of All the Evidence

We reach this holding—that, absent the admission of Exhibits 174 and 175, the jury probably would have acquitted Defendant—after examining the state of all the evidence absent the challenged evidence. *Reber*, 386 N.C. at 159, 900 S.E.2d at 787. April was home for the duration of the altercation and testified that Defendant burst into the home. She testified that she heard *Caleb tell Defendant he was going to kill her*, and she could hear a physical struggle. Despite the seeming discrepancies in Defendant's various accounts of the shooting, the evidence tended to show that Caleb burst into Defendant's home, after Defendant texted him not to come to her home, and told her he was going to kill her. In all of Defendant's accounts, she stated that Defendant initiated physical contact with her. She told the two deputies that it was Caleb who grabbed her while he was holding the gun, he dropped it, and she picked it up and shot him. She told the detectives that after she refused to hand over her phone, a wrestling match ensued (presumably, Defendant did not initiate physical contact with an armed man who wanted to take her phone), the gun and phone switched hands, and she shot him. At trial, she testified that Caleb pointed the gun at her, and although she threw her phone at him, Caleb was the one who physically grabbed her and stomped on her feet, prohibiting her from walking past him, and when she tried to break free, Caleb pinned her arm. Defendant then shot Caleb.

We note especially that even though the physical evidence tends to show Caleb was shot in the back from more than six inches away, possibly indicating that he was leaving Defendant's room, April was in the home during the encounter. Therefore, even if Caleb turned around to leave Defendant's room, she had no way of knowing whether Caleb intended to harm April. We further note that Caleb recreationally consumed methamphetamine, Defendant told Dana she was concerned for her safety after Caleb threatened her, and an expert witness testified at trial that methamphetamine can cause heightened aggression. Therefore, Defendant reasonably would have believed that Caleb burst into her home and intended to cause her serious bodily harm.

We conclude there was substantial and persuasive evidence presented at trial demonstrating Defendant acted in self-defense. Therefore,

absent the admission of Exhibits 174 and 175 into evidence, it is significantly more likely the jury would have acquitted rather than convicted her. *Reber*, 386 N.C. at 159, 900 S.E.2d at 787. As explained *supra*, the highly inflammatory and prejudicial information presented in the exhibits that were held by the jurors throughout the trial probably caused them to ignore the substantial evidence of self-defense. The jurors probably would have acquitted Defendant if the exhibits did not cause them to reach their decision based on passion, namely, a personal revulsion toward Defendant.

We do not reach our holding because of a conclusion that this was a "close case." *Reber*, 386 N.C. at 162, 900 S.E.2d at 788–89. Rather, we hold that, absent the character assassination of Defendant through the admission into evidence of Exhibits 174 and 175, the jury probably would have reached a different result due to the substantial and persuasive evidence demonstrating she acted in self-defense.

III. Conclusion

For the foregoing reasons, we hold the trial court plainly erred in admitting into evidence voluminous, unredacted text messages and photos without a limiting instruction and in publishing identical copies and enlarged sexually explicit photos to each member of the jury. Accordingly, we vacate the judgment entered against Defendant and remand for a new trial. It is so ordered.

VACATE AND REMAND FOR NEW TRIAL.

Judge FLOOD concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

I agree with the Majority that the trial court erred in admitting Exhibits 174 and 175. However, when disregarding the challenged evidence from Exhibits 174 and 175, the conflicting evidence would make this a "close case" for the jury, which our Supreme Court unequivocally removed from the realm of plain error in *Reber*. *See State v. Reber*, 386 N.C. at 162. Instead, *Reber* clarified that in conducting plain error analysis we "examine[] whether absent the error, the jury *probably would*

have returned a different verdict." *Id.* at 159. Furthermore, our Supreme Court went on to hold:

> This wording is important because this standard—showing that a jury *probably would have* reached a different result—requires a showing that the outcome is significantly more likely than not. In ordinary English usage, an event will "probably" occur if it is "almost certainly" the expected outcome; it is treated as synonymous with words such as "presumably" and "doubtless."

Id.

Here, I cannot conclude that a jury probably, almost certainly, presumably, or doubtlessly would have reached a different result if Exhibits 174 and 175 were properly excluded. Defendant gave inconsistent accounts of the events leading up to Caleb's shooting death, and the evidence indicated that Caleb was shot twice in the back from more than six inches away. Furthermore, the Majority recognizes that the jury heard "plenty" of evidence demonstrating the tumultuous nature of Defendant's relationship with Caleb, *Majority* at 26, and "testimony demonstrating numerous sordid details about Defendant's life[.]" *Majority* at 27. Although the trial court erroneously admitted "needlessly cumulative[] and unfairly prejudicial evidence regarding Defendant's life," *Majority* at 27, when "disregarding the challenged evidence, this was a fairly close case for the jury[.]" *Reber*, 386 N.C. at 162. Here, as discussed in *Reber*, the Majority focuses "on the highly prejudicial impact of the challenged evidence" and, recognizing the admission of unchallenged evidence that demonstrated the sordid details of Defendant's life, effectively shows how the erroneously admitted evidence merely "made it more likely that the jury would convict[.]" *Id.* (cleaned up). Based on the contradictory evidence, in the absence of the erroneously admitted Exhibits 174 and 175, I would characterize this as a "close case" for the jury; I cannot say that, "disregarding the challenged evidence," *id.*, the jury "almost certainly" would have accepted Defendant's claim of self-defense. *Id.* at 159. For these reasons, under *Reber*'s recently articulated plain error standard, I respectfully dissent.

STATE v. LACURE

[297 N.C. App. 486 (2024)]

STATE OF NORTH CAROLINA
v.
ROLAND WAYNE LACURE AND ELIJAH UMELO

No. COA23-975

Filed 31 December 2024

1. Evidence—authentication—surveillance videos—product of automated process—reliability

In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, there was no error in the introduction into evidence of surveillance videos from multiple businesses that were used to track defendants' movements on the night of the shooting. The videos were properly authenticated by witness testimony relating the reliability of the recording processes used to produce the videos and stating that the videos at trial accurately depicted the events recorded by the surveillance systems.

2. Evidence—cell tower data—officer's testimony—general location of suspect—lay versus expert testimony

In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, there was no prejudicial error in the introduction of an officer's testimony regarding data from cell phone towers that tended to show defendants' locations and movements on the night of the shooting. Testimony regarding the general location of a perpetrator using cell tower data constituted lay testimony rather than expert testimony, since it did not involve the use of scientific, technical, or other specialized knowledge. To the extent that any of the officer's testimony constituted expert testimony (concerning more technical aspects of a cell tower's function), defendants were not prejudiced in light of other evidence placing each of them in front of the victim's home that night.

3. Sentencing—special condition—prohibition on training during imprisonment—lack of authority to impose

In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, the trial court exceeded its authority during sentencing by imposing, as a special condition, a prohibition on educational or vocation training for both defendants during the first twenty-two years of their imprisonment. Since that special condition was not an allowable punishment pursuant to the relevant sentencing statutes, those portions of defendants' judgments were reversed.

4. Constitutional Law—effective assistance of counsel—first-degree murder trial—faulty defense

In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, there was no merit to one of the defendant's argument that he received ineffective assistance of counsel for purportedly conceding defendant's guilt during closing argument by discussing aspects of defendant's involvement in the shooting. Based on the totality of the record, defendant failed to show that his counsel's performance was so unprofessional as to be deficient and that any deficient performance prejudiced defendant.

5. Criminal Law—motion to sever—two defendants tried for murder—no abuse of discretion

In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, the trial court did not abuse its discretion by denying one defendant's motion to sever his trial from his co-defendant's where, although defendant argued that they were antagonistic to each other and that during closing arguments each defense counsel accused the other defendant of being the perpetrator, closing arguments do not constitute evidence.

Appeal by defendants from judgment entered 2 May 2022 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 25 September 2024.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for Defendant Elijah Umelo.

Anne Bleyman for Defendant Roland Lacure.

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

DILLON, Chief Judge.

Defendants Roland Lacure and Elijah Umelo were each indicted for first degree murder for the death of Desmond Jenkins.

The State's evidence showed as follows: On the night of 9 August 2019, Mr. Jenkins was fatally shot as he was about to enter his home after being dropped off by a friend. Unbeknownst to Mr. Jenkins, Defendants, driving separate vehicles but FaceTiming each other, followed Mr.

Jenkins to his home. Immediately following the shooting, Defendants sped off from the scene in their separate vehicles.

The trial court ordered Defendants' cases to be consolidated for trial over Defendants' objections. During trial, the State presented thirty-three witnesses and admitted sixty-four exhibits into evidence. At the close of trial, Defendant Lacure's attorney argued that Defendant Umelo had shot and killed the victim. Inversely, Defendant Umelo's counsel argued that Defendant Lacure shot and killed the victim.

The jury found both Defendants guilty as charged. The trial court sentenced both men to life in prison without the possibility of parole with an additional special condition stating Defendants were not allowed to receive vocational or educational classes for the first twenty-two years of their sentences. Both Defendants appealed.

I. Analysis

Some of the issues were raised by both Defendants, while some were raised by one Defendant. We address each issue in turn.

A. Admission of Video Evidence

[1] Both Defendants argue, in their respective briefs, that the trial court erred in allowing surveillance videos to be admitted into evidence, contending the witnesses had no personal knowledge of the videos to prove authenticity.

We review authentication of evidence *de novo*. *State v. Clemons*, 274 N.C. App. 401, 409 (2020).

There are multiple ways in which video can be authenticated for trial. In *State v. Snead*, our Supreme Court recognized the example listed in Rule 901(b)(9) applies to surveillance videos: "Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process under Rule 901(b)(9)." 368 N.C. 811, 814 (2016). "Evidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence." *Id.*

Here, Defendants contend that five surveillance videotapes were not properly authenticated: (1) the Speedway gas station, (2) Star Bar, (3) Stone Systems, (4) Tobacco House, and (5) 64 Business Center. All five surveillance videos were introduced during different witness testimony and tended to track Defendants' movements on the night of Mr. Jenkins's killing. Each witness testified to the reliability of

the surveillance videotaping systems and that the videos that were at trial accurately depicted the original videos recorded by the surveillance systems. According to the rule set by our Supreme Court in *Snead*, we conclude the information provided by each witness was sufficient to authenticate the surveillance videos. Therefore, we hold the trial court did not err in concluding that the video evidence was properly authenticated.

B. Officer Morton's Testimony

[2] Both Defendants contend that the trial court erred by admitting an officer's testimony regarding data from cell towers showing their movements on the night of Mr. Jenkins's killing, because the information went beyond the knowledge of a lay person and the officer was not tendered as an expert witness.

Expert testimony is governed by Rule 702 and states that:

> If *scientific, technical or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise . . . .

N.C.G.S. § 8C-1, Rule 702(a) (2019) (emphasis added). Based on this rule, a witness need only be tendered as an expert if the topic which they speak on is scientific, technical, or required specialized knowledge.

Neither party cites a published case from North Carolina determining whether an officer's testimony regarding the general location of a suspect based on cell tower data constitutes lay testimony or expert testimony. We note that in an unpublished opinion, a panel of our Court held that such testimony did not constitute expert testimony as it "did not require the use of 'scientific, technical, or other specialized knowledge.' " *State v. Joyner*, 280 N.C. App. 561 (2021) (quoting Rule 701(a)) (unpublished).

The Iowa Supreme Court considered the issue and wrote a lengthy opinion detailing how courts around the country have handled the issue. That Court concluded that an officer's testimony about the general location of a suspect at a particular time based on cell tower data is lay testimony, whereas testimony about how a cell tower functions or why cell phones ping off a particular tower is expert testimony:

> Having surveyed the various approaches, we agree with the growing majority of jurisdictions that draw the line

> between lay and expert testimony involving historical cell site data based on the underlying information supporting the testimony. If the witness conveys inferences that can be drawn from factual information contained in the phone records using "a process of reasoning familiar in everyday life," such as plotting data on a map, the testimony qualifies as lay testimony. This includes opinions about the generalized location of a phone within the coverage area of the pinged tower—as long as the opinion is premised on factual information from the phone company. However, when a witness relies on specialized knowledge about how a cell tower functions, such as the numerous factors that determine why a phone pings off one cell tower instead of another, to opine about the coverage area of a tower or a cell phone's location, that witness must first be qualified as an expert.

State v. Boothby, 951 N.W.2d 859, 876 (Iowa 2020). The Court concluded that an officer's testimony that a suspect was in the general area at a particular time and then moved to another general area, all based on reviewing cell tower data, constituted lay testimony. *Id.*

We are persuaded by the opinions in *Joyner* and *Boothby*. We expressly adopt the analysis and holding in *Boothby* and conclude that much of Officer Morton's testimony was properly admitted as lay testimony. Portions of Officer Morton's testimony, however, goes beyond what may be considered lay testimony. However, to the extent said portions constituted expert testimony, we conclude Defendants were not prejudiced, given the other evidence—including the video evidence addressed in the previous section of this opinion—which tended to place each Defendant in front of Mr. Jenkins's home on the night of the shooting.

C. Special Sentencing Condition

[3] Each Defendant argues that the trial court erred during sentencing by prohibiting him from receiving educational or vocational training during the first twenty-two years of his imprisonment. The State concedes this error. We agree.

Whether or not the trial court is acting within its authority under statute is a question of statutory interpretation. "The interpretation of a statute, which is a question of law, is reviewed de novo." *State v. Rollinson*, 383 N.C. 528, 531 (2022).

The statutes which govern a trial court's authority in sentencing are found in the North Carolina General Statutes. Rule 15A-1340.13 *et seq.* provides proper procedures and guidelines for sentencing, whereas Rule 15A-1340.17 provides a list of punishments available to a sentencing judge.

Here, during sentencing, the trial court stated that "[God] placed it on [his] heart to tell [Defendants] for the first 22 years of their sentence" they were not to think about engaging in vocational training or educational classes.

Nowhere in our General Statutes is there language providing a trial judge the authority to restrict a defendant's rights to vocational training or educational classes while incarcerated. Privileges and restrictions of an incarcerated person are determined by the department of adult corrections. *See* N.C.G.S. §§ 148-11(a), 148-13, 148-22.1. We conclude the trial court went beyond its scope of authority and, therefore, reverse the special condition in the judgments restricting Defendants' ability to engage in vocational training or educational classes.

D. Ineffective Assistance of Counsel

[4] Defendant Umelo argues in his brief that he received ineffective assistance of counsel, contending that his counsel's theory of defense had no basis in law and his closing argument admitted guilt without his consent.

To obtain relief based on an argument of ineffective assistance of counsel, a defendant "is required to demonstrate that his trial counsel's performance was deficient and that the deficient performance prejudiced the defense." *State v. Pemberton*, 228 N.C. App. 234, 240 (2013) (internal citations omitted).

The United States Supreme Court has stated that a defendant must satisfy a two-part test to have a valid claim for ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). A defendant is prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The North Carolina Supreme Court has also stated that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482 (2001).

We have stated that

> [i]n general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. This is so because on direct appeal, review is limited to the cold record, and the Court is without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief.
>
> Only when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing will an ineffective assistance of counsel claim be decided on the merits on direct appeal.

State v. Edgar, 242 N.C. App. 624, 632 (2015) (internal citations and marks omitted).

Here, Defendant Umelo argues that his trial counsel was ineffective for two reasons: (1) counsel's theory of defense has no basis of law and (2) his closing argument amounted to an implied admission of guilt. Defendant Umelo contends that the following argument made in his counsel's closing argument implicated guilt:

> You've got to step out of circumstantial evidence and delve into conjecture to come up with, oh, the communication going on between those two that evening was coming up with their common plan to murder someone. For all we know, goofball over here is saying, her, let's just go out there and cause some mischief. He's not paranoid. He's just an idiot. He's an idiot who walks around with his gun, takes selfies with his dogs and his gun, acting like a complete moron. He's not paranoid, he's stupid.

> For all we know, he said let's go up there and raise a little hell. Mr. Lacure and his girlfriend had been robbed. It's like, um-hmm, yeah, sure. Let's go. Let's go. For all we know, he's got one plan, and he's got another plan for all we know. They've got to prove to you that that plan is the same plan, and they haven't done it because we don't have the technology to be able to -- I don't think they do. We don't have the evidence of knowing what the communication was between the two of them. We just don't. That's going to give you some kind of doubt.
>
> . . .
>
> What I would suggest to you is that the bang, bang, bang, bang, 16 times, those shell casings right there that were on the floor came from here. That's been proven. But what's going on over here? Idiot goofball over there with his .40 that he likes to walk around with, acting the idiot, he's, like, 'Whoa, what's going on?'
>
> He pulls his gun out, and he starts firing his gun all over the place. We don't know where he fired the gun.
>
> . . .
>
> But it's interesting to me that -- clearly, that the firing that starts this thing -- the firing thing is Mr. Lacure's right here, bang, bang, bang. Okay? Bang. And then idiot over here [referring to Mr. Umelo], like, "Whoa, I'm just going to start firing my gun too." Is he also firing at Desmond Jenkins? Can he even see Desmond Jenkins from where he is? Is that aiding him with something he's already started doing? Is it encouraging him in something he's already started doing? No. There's no evidence of the aiding or the encouraging. The best that they have got -- again, I'm not conceding anything. I refuse to concede anything; right?
>
> The best they've got is that Elijah Umelo was out there, might have been out there. You determine that.

Based on our review of the cold record, we conclude that Defendant Umelo failed to meet the burden of proof to show that his counsel acted in such an unprofessional manner that Defendant was prejudiced. For the foregoing reasons, we overrule Defendant's ineffective assistance of counsel claim.

E. Defendant Lacure's Motion to Sever

[5] Finally, Defendant Lacure argues that the trial court erred by denying his motion to sever his trial from that of Defendant Umelo. We review this argument for abuse of discretion. *State v. Carson*, 320 N.C. 328, 335 (1987).

Defendant Lacure contends that Defendants were antagonistic towards each other. However, our Supreme Court has stated that "antagonistic defenses [do] not, standing alone, warrant severance." *State v. Golphin*, 352 N.C. 364, 400. Rather, the test for whether to deny joinder or grant severance is determined by looking at "whether the conflict in defendants' respective positions at trial is of such nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Lowery*, 318 N.C. 54, 59 (1986). Our Supreme Court has also stated that:

> To determine whether the positions of the defendants are so antagonistic, or conflicting, as to be prejudicial, this Court has stated the trial court should grant severance when necessary to avoid an evidentiary battle between the defendants where the state simply stands by and witnesses a combat in which the defendants [attempt] to destroy each other.

Golphin, 352 N.C. at 400 (internal quotations omitted).

Defendant Lacure argues that in closing arguments, each defense counsel accused the other defendant of being the one who was guilty of murder. However, it is well established that "[c]losing arguments are not evidence." *State v. Reber*, 386 N.C. 153, 163 (2024) (citation omitted).

We conclude that the trial court did not abuse its discretion in denying Defendant Lacure's motion to sever.

II. Conclusion

We reverse the portions of the judgments which impose the special condition restricting Defendants' ability to participate in vocational training or educational classes. We, otherwise, conclude Defendants received a fair trial, free of reversible error.

NO ERROR IN PART, REVERSED IN PART.

Judges MURPHY and THOMPSON concur.

STATE v. PRESSLEY

[297 N.C. App. 495 (2024)]

STATE OF NORTH CAROLINA
v.
DAVID B. PRESSLEY, DEFENDANT

No. COA24-411

Filed 31 December 2024

Appeal and Error—preservation of issues—defendant's right to open closing arguments

In a prosecution that resulted in defendant being convicted on charges including first-degree forcible rape and first-degree forcible sexual offense—where defendant initially proceeded with counsel but part way through the trial was permitted to represent himself with his former attorneys acting as standby counsel—his argument that the trial court erred in failing to advise defendant at the charge conference of his right to open closing arguments (as provided by Rule 10 of the General Rules of Practice for Superior and District Courts) was not preserved for appellate review by a timely request, objection, or motion. Further, the Court of Appeals declined to invoke Appellate Rule 2 to reach the merits of defendant's argument because the authority he cited only concerned the right of criminal defendant to give the final closing argument—as defendant did—a right deemed of critical importance under existing precedent.

Appeal by defendant from judgments entered 16 November 2023 by Judge George Cooper Bell in Henderson County Superior Court. Heard in the Court of Appeals 23 October 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason Caccamo, for the State.

Attorney Drew Nelson for defendant-appellant.

THOMPSON, Judge.

David Pressley (defendant) appeals his convictions of first-degree forcible rape, first-degree forcible sex offense, and violent habitual felon, contending that the trial court erred by failing to inform defendant that he had the right to both open and close during closing arguments to the jury. After careful consideration, defendant's appeal is dismissed for failure to preserve the issue for appellate review.

I. Factual Background and Procedural History

On 6 January 2022, Sierra Stahr (Sierra) and her father Ralph (Mr. Stahr) found defendant waiting for them outside their home in Hendersonville upon returning from dinner. Sierra and Mr. Stahr knew defendant, but it had been nearly two years since they had last seen him. Defendant, who was walking with a limp, told Mr. Stahr he'd been in a motorcycle accident and Mr. Stahr invited defendant into the residence. Mr. Stahr offered defendant food and medicine for his leg and visited with defendant while Sierra went to her room to go to bed.

Mr. Stahr was going in to work the evening of 6 January 2022 and offered to give defendant a ride on the way to his job. Shortly after 9:00 p.m., Mr. Stahr woke up Sierra to let her know he was leaving for work, then Mr. Stahr dropped defendant off "down the road . . . down past my house . . . . where [defendant] said his girlfriend lived." After arriving at work, Mr. Stahr and Sierra spoke once on the phone briefly; later that evening, Mr. Stahr received word that someone had called, asked to speak to him, and reported that Mr. Stahr needed to go home because there was a family emergency at Mr. Stahr's residence. When Mr. Stahr was unable to reach Sierra by phone, he left work and went home to check on Sierra. Upon his arrival, Mr. Stahr found the screen door to the residence uncharacteristically locked, so he called for Sierra to come and open the door. When Mr. Stahr entered the residence, he stated that "it was like a cyclone went through it[,]" and Sierra immediately began apologizing to him for "tearing the house up" because she had been looking for her cell phone and her debit card.

Sierra testified that after she fell asleep, she awoke to someone knocking on the door. Assuming it was her father coming home for "lunch," Sierra opened the door to find defendant asking to come in to retrieve some items he had left in the residence. According to Sierra, she turned to look for the items to which defendant was referring and could remember nothing after that. Sierra stated that the next thing she remembered was her father knocking on the door and she got up to let him in. Sierra recounted feeling "anxious" and "different, like something happened" to her, as well as experiencing pain in her knees, her jaw and neck, and her vaginal area. When Sierra told her father she felt like she had been attacked, Mr. Stahr called 911.

EMS transported Sierra to the hospital where she was evaluated, a rape kit was performed by a sexual assault nurse examiner (SANE), and Sierra was interviewed by law enforcement officers. The results of the rape kit revealed male DNA present on the vaginal and anal swabs

taken from Sierra. The DNA profile "obtained from . . . the vaginal swabs was approximately 6.90 octillion times more likely [to have] originated from [Sierra] and [defendant] than . . . from [Sierra] and an unknown person." The DNA profile "obtained from . . . the rectal swabs was . . . . approximately 332 octillion times more likely [to have] originated from [defendant] than . . . from an unknown, unrelated individual."

Defendant was indicted for first-degree forcible rape and obtaining the status of violent habitual felon on 24 January 2022 and first-degree forcible sexual offense on 5 May 2023. Defendant's case came on for hearing at the 6 November 2023 criminal session of Henderson County Superior Court. At the beginning of the trial, defendant made a motion to continue and a motion to release his trial attorneys due to ineffective assistance of counsel. The trial court denied defendant's motion to continue, informing defendant he could fire his attorneys and represent himself if that was defendant's preference. Defendant initially proceeded with his attorneys but halfway through the trial, defendant advised the court that he wished to fire his counsel and proceed pro se. The trial court appointed defendant's attorneys to act as standby counsel. After choosing to represent himself, defendant made several inquiries of the court regarding his ability to maintain the final closing argument to the jury.

The jury returned verdicts of guilty for the charges of first-degree forcible rape and first-degree forcible sex offense, as well as guilty of being a violent habitual felon. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

On appeal, defendant contends that he is entitled to a new trial because "the trial court erred by failing to inform [defendant] that he had the right to open the [closing] argument before the jury," as proscribed by Rule 10 of the North Carolina General Rules of Practice for Superior and District Courts.

As a preliminary matter, we must address appellate jurisdiction. Defendant failed to preserve his argument for appellate review. Rule 10 of the North Carolina Rules of Appellate Procedure states, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2023).

Here, after both parties rested, the trial court conducted the charge conference. Following the charge conference, the trial court stated,

"[i]n this case [ ] defendant has not presented any evidence. So that means that he has the opportunity to close last. And I assume that[is] what you would like to do. Is that correct, sir?" Defendant responded, "[y]es." The trial court then indicated that the State would go first, followed by defendant. Defendant failed to object, request, or make a motion regarding his opportunity to both *open* and close the closing arguments to the jury, and therefore, this issue is unpreserved. Accordingly, we lack jurisdiction to review defendant's appeal.

III. Suspension of Rules

As an alternative argument, defendant contends that this Court should invoke Rule 2 of the North Carolina Rules of Appellate Procedure should we determine that defendant has failed to preserve the issue for appellate review. Rule 2 states that this Court may "suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative" in order to "prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2.

Defendant cites to case precedent that exclusively emphasizes the importance of a defendant receiving the *final* closing argument to the jury if the defendant did not put on any evidence. This Court has expressed that Rule 10 of the North Carolina General Rules of Practice for Superior and District Courts imposes a right that "has been deemed to be critically important and the improper deprivation of this right entitles a defendant to a new trial." *State v. English*, 194 N.C. App. 314, 317, 669 S.E.2d 869, 871 (2008). However, in *English*, the defendant received a new trial because the "trial court erroneously deprived defendant of his right to make the *final* closing argument to the jury." *Id.* at 321, 669 S.E.2d at 873 (emphasis added). In the present matter, defendant gave the *final* closing argument. Furthermore, defendant has failed to cite to any case precedent that indicates that he is entitled to a new trial because he was not informed of his right to *open* the closing arguments, nor has defendant pointed to any case precedent that indicates the trial court had an affirmative duty to inform him of such right.

After careful review, we decline to invoke Rule 2 because defendant gave the final closing argument to the jury and that is what our case precedent places "critical importance" on. Moreover, defendant has failed to demonstrate how his proposed issue on appeal constitutes "exceptional circumstances" or how "manifest injustice" would be prevented.

IV. Conclusion

For the foregoing reasons, defendant's appeal is dismissed as he failed to preserve the issue for appellate review in accordance with Rule 10 of the North Carolina Rules of Appellate Procedure. Moreover, we decline to invoke Rule 2 of the North Carolina Rules of Appellate Procedure.

DISMISSED.

Judges GORE and STADING concur.

STATE OF NORTH CAROLINA
v.
AARON LANCE STEPHEN, DEFENDANT

No. COA24-106

Filed 31 December 2024

1. Evidence—expert opinion—scope of expertise—impact of high-velocity projectile—plain error analysis

In a prosecution for murder, concealing death, and possession of a firearm by a felon, where defendant admitted to hiding his dead girlfriend's remains after dismembering her but claimed that she died by shooting herself in the head inside her bathtub, the trial court did not plainly err in allowing a forensic anthropology expert to testify that the chances of a high-velocity projectile causing no defects to a fiberglass bathtub would be "slim." Although the trial court did not require the expert to explain the rationale behind her opinion—thus failing to properly exercise its gatekeeping function under Evidence Rule 702(a)—this failure did not amount to plain error, since the expert's testimony did not prejudice defendant where: the expert explained the analyses she performed on the victim's skull and the factors that led her to conclude that the victim likely suffered a high-velocity gunshot wound; she was qualified to testify about the trajectory, velocity, and impact force of a bullet upon exiting the victim's skull; and her testimony "did not amount to baseless speculation."

2. Criminal Law—prosecutor's closing argument—reference to plea of not guilty—permissible purpose—not grossly improper

In a prosecution for murder, concealing death, and possession of a firearm by a felon, where defendant admitted to hiding his dead girlfriend's remains after dismembering her but claimed that she died by committing suicide, the trial court did not err in declining to intervene ex mero motu during the State's closing argument, where the prosecutor stated "defendant didn't plead guilty to [murder] because he's going to stand up here and ask you to only find him guilty of [the other charges]. It's a distraction." The prosecutor's comments did not violate defendant's constitutional right to plead not guilty—and, therefore, were not grossly improper—because they were not an attack on defendant's failure to plead guilty; rather, they were made within the context of explaining to the jury all of the distraction tactics the prosecutor anticipated defense counsel would use during closing arguments.

Chief Judge DILLON concurring by separate opinion.

Appeal by defendant from judgments entered 31 January 2023 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 25 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

THOMPSON, Judge.

Defendant Aaron Stephen (defendant) appeals his convictions for first-degree murder, concealing death by disturbing or dismembering human remains, and possession of a firearm by a felon. After careful consideration of the record, we find no error by the trial court.

I. Factual Background and Procedural History

On 21 July 2020, defendant was indicted for first-degree murder in the death of Kelly Diane Johnson (Kelly). On 14 September 2021, defendant was indicted for concealing a death by disturbing or dismembering human remains in the death of Kelly. On 13 December 2022, defendant was indicted for possession of a firearm by a felon. Defendant's case came on for trial at the 23 January 2023 Criminal Session of Wake County Superior Court, and the evidence presented at trial tended to show the following:

In December of 2019, defendant and Kelly began dating and shortly thereafter, in March of 2020, Kelly moved in with defendant.

Danielle Cameron (Cameron), the Medicaid case worker assigned to Kelly in 2018, testified that when she spoke with Kelly in February 2020, Kelly advised Cameron that her relationship with defendant was not working out, and in response to Kelly's inquiry about domestic violence counseling, Cameron referred her to the Compass Center.[1]

A neighbor who lived across the street from defendant's house revealed that the neighbor's Ring camera recorded Kelly and defendant outside the residence on 31 May 2020 at 7:29 a.m., and defendant was screaming obscenities at Kelly and telling her to "[p]ack [her] f***ing bags."

On 6 June 2020, Kelly worked her shift at Walmart but failed to report for her next scheduled workday on 10 June 2020. Based on cell phone records obtained by law enforcement, Kelly called her mother from the home she shared with defendant on 7 June 2020. On 8 June 2020, the neighbor's Ring camera recorded Kelly arriving home at 9:02 a.m., and cell phone records showed defendant placed two calls to Kelly's phone and sent a text that same afternoon. Another neighbor of defendant's testified at trial that he was outside in the early morning hours of 9 June 2020 and heard a woman screaming, "No, no. Stop. No." A third neighbor who lived behind the house where Kelly and defendant resided heard the couple arguing loudly and angrily while that neighbor walked her dog between 2:00 a.m. and 3:30 a.m. on 9 June 2020. As that individual walked through her back yard, she observed the couple in their home arguing for "seven to ten minutes" before they disappeared from her view of their window.

Kim Johnson (Kim), Kelly's mother, called and texted Kelly several times between 7 June 2020 and 9 June 2020, but Kelly never responded. Kim testified that she and Kelly had a close relationship, and they spoke to each other on a daily basis. However, after not hearing from Kelly for a few days, Kim began to worry about Kelly. Based on her concern for her daughter, Kim decided to travel to defendant's house to check on Kelly. When Kim arrived, she saw Kelly's car in the driveway, but it did not appear that anyone was home. Kim knocked on the front door and rang the doorbell to no avail.

---

1. The Compass Center offers counseling, financial education, and domestic violence counseling.

On the morning of 13 June 2020, Kim finally spoke with defendant who told Kim that he did not know where Kelly was and had "been trying to find her [him]self." At that point, Kim contacted the Wake County Sheriff's Office (WCSO).

Investigator Midgette (Midgette) from the WCSO went to defendant's home on the morning of 13 June 2020 and found Kelly's car in the driveway. Midgette called and spoke with defendant, who told Midgette that he had not seen Kelly since 9 June 2020 and that he was at work in Chapel Hill (Orange County). However, defendant's cellphone records revealed that defendant had not been in Chapel Hill when he spoke with Midgette on the morning of 13 June 2020 but had been in the area of Interstate 40 and Highway 42 (Johnston County). By early afternoon that same day, the records showed defendant's phone in Virginia—first in Emporia and then moving east to Franklin, Virginia. Officers from the WCSO traveled to Virginia in an attempt to locate defendant.

At approximately 9:20 p.m. on 13 June 2020, the WCSO officers found defendant at a Quality Inn, and he was arrested by the Southampton County, Virginia Sheriff's Office. Once defendant was taken into custody, a search of defendant's vehicle revealed a large trash can in the trunk in which blood and a pickaxe were found.

Investigators interviewed defendant over the course of several days. After some time had passed, defendant told investigators that he came home to find "the chick blew her brains out in the bathroom . . . with a handgun[,]" and he had lied about not knowing where Kelly was because he felt that law enforcement would never believe him. During the interview when defendant was asked if there was blood everywhere, defendant responded, "Nah, when [Kelly] shot herself, some pieces went everywhere. But the majority of the blood went down the drain. And [defendant] could tell it was a lot."

The investigators continued to question defendant about the location of Kelly's body, and while defendant was initially evasive and uncooperative, he eventually gave the officers detailed directions to where he left her body. Kelly's dismembered body was subsequently recovered in Franklin, Virginia; her partially decapitated torso, missing both hands, was found in a "very secluded, very rural" area—with one of her hands located several yards away from the body—while her head and her other hand, as well as a gun, were removed from a dumpster behind a Walmart in Franklin. Thereafter, defendant was charged with the murder of Kelly Johnson.

Relevant to this appeal are the theories discussed in the State and defendant's opening statements to the jury, as well as evidence

introduced during the State's case in chief. During its opening statement, the State gave a summary of everything that led up to trial—Kim losing contact with Kelly which ultimately prompted her decision to get law enforcement involved, law enforcement making contact with defendant, defendant offering law enforcement several stories as to what happened to Kelly, and defendant eventually leading law enforcement to Kelly's remains—and the State gave a forecast of the evidence that would be presented during the trial. The State proclaimed to the jury that in its closing argument, it would "put all the pieces" of the story together for the jury and ask them to find defendant guilty of murder, dismemberment and concealment of human remains, and possession of a firearm by a felon.

In contrast, during defendant's opening statement to the jury, his counsel indicated to the jury that defendant did not kill Kelly, but instead, he came home from work one day to find "Kelly lying in the bathtub, dead, with a gunshot wound to her head" and defendant assumed that Kelly committed suicide. Defendant's counsel told the jury that, after finding Kelly this way and experiencing a traumatic event such as this, defendant went on a "multi-day bender," drinking heavily, trying to figure out what to do with Kelly's body. Due to defendant's prior "run-ins with law enforcement[,]" defendant did not trust the government and believed that if he called law enforcement, he would be blamed for Kelly's death. Based on defendant's mistrust of the government and law enforcement, defense counsel explained that defendant "realize[d] that there[was] really nothing that c[ould] be done at th[at] point," and because Kelly's body was still at defendant's house and it was summer, defendant needed to dispose of Kelly's body. Defendant decided to drive Kelly's body to Virginia, dig a hole and bury her. However, defendant abandoned that plan and dismembered her instead. Finally, defense counsel emphasized to the jury that the forensic pathologist who conducted the autopsy on Kelly could not definitively say whether Kelly's cause of death was homicide or suicide, and that based on the evidence that would be presented, the jury should return a verdict that defendant was not guilty of murdering Kelly.

In its case in chief, the State called twenty witnesses to testify and introduced fifty-three exhibits. These exhibits included, *inter alia*: photos of Kelly's dismembered body parts in the locations where they were found; photos from defendant's house, including blood-stained carpet in the living room, and the bathtub in which Kelly allegedly shot herself; and photos of Kelly's skull and the multitude of bone fragments from the back of her skull.

Especially relevant to defendant's purported theory of Kelly committing suicide in the bathtub was the crime scene investigator's testimony. The State called Hannah Weenick, the City-County Bureau of Identification (CCBI) crime scene investigator in Kelly's case, to testify regarding her investigation of defendant's house. Weenick testified that when she arrived on scene, WCSO advised her that defendant "reported that [Kelly] had shot herself in the head in the hall bathroom and that [defendant] cleaned up the scene[.]" Weenick testified that while processing the bathtub—where defendant allegedly found Kelly—she used orange triangles as indicators of particularly small specks of blood so that they were more easily seen in photographs. Weenick testified that, as seen in State's Exhibit 28, slide 8, there was no real concentration of blood spatter, rather "it[was] in a very random distribution, across multiple surfaces of [the] bathroom," even after the use of BlueStar.[2] Moreover, State's Exhibit 28, slide 8, tended to show that the random distribution of blood spatter was scattered on the front, back, and sidewalls of the bathtub.

As it relates to defendant's case in chief, defendant did not testify, nor did he put on any witnesses. On 31 January 2023, the jury returned guilty verdicts on all three charges against defendant. The court sentenced defendant to life imprisonment without parole on the first-degree murder conviction, a term of 121 months minimum and 158 months maximum for destroying a body and concealing an unnatural death, and a term of 19 months minimum and 32 months maximum for possession of a firearm by a felon, with the sentences to run consecutively. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Rule 702

[1] On appeal, defendant contends that the trial court "plainly erred by allowing the State's forensic anthropologist, Dr. Tal Simmons, to give an opinion beyond her scope of expertise" in violation of Rule 702. We disagree.

1. Standard of review

Generally, "[a] trial court's ruling on Rule 702(a) is reviewed for abuse of discretion." *State v. Phillips*, 268 N.C. App. 623, 634, 836 S.E.2d

2. Weenick testified that BlueStar is a chemical sprayed on surfaces in search of blood that cannot be seen with the naked eye. Weenick testified further that BlueStar "react[s] with hemoglobin in blood[,]" and it can detect blood even if it has been diluted or cleaned up.

866, 873 (2019). However, "an unpreserved challenge to the performance of the trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review." *State v. Gray*, 259 N.C. App. 351, 354, 815 S.E.2d 736, 739 (2018). Thus, we review defendant's Rule 702(a) argument for plain error because defendant failed to object to the challenged testimony at trial, and therefore the issue is unpreserved.

"To show plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Figueroa*, 291 N.C. App. 610, 612, 896 S.E.2d 188, 190 (2023) (internal quotation marks and citation omitted). In order to demonstrate that an error was fundamental, "a defendant must establish prejudice[,]" meaning that, "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 612, 896 S.E.2d at 191 (citation omitted). "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.* at 612–13, 896 S.E.2d at 191 (brackets and citation omitted). Moreover, "[t]he standard is so high[,] in part at least[,] because the defendant could have prevented any error by making a timely objection." *Id.* (internal quotation marks and citation omitted).

2. Analysis

According to the Evidence Code,

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

N.C. Gen. Stat. § 8C-1, Rule 702(a)(1-3) (2023) (emphases added). Moreover, "[i]n order to assist the trier of fact, expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *Phillips*, 268 N.C. App. at 634–35, 836 S.E.2d at 874 (citation omitted).

"When an expert witness moves beyond reporting what [s]he saw or experienced through her senses, and turns to interpretation or

assessment to assist the jury based on h[er] specialized knowledge, she is rendering an expert opinion." *Id.* at 635, 836 S.E.2d at 874 (brackets and citation omitted). "Determining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context." *Id.* (brackets and citation omitted).

Defendant contends that Dr. Simmons' testimony regarding the fiberglass bathtub was beyond her scope of expertise. Conversely, the State argues that Dr. Simmons' testimony was within her scope of expertise. Because Dr. Simmons' testimony "move[d] beyond reporting what she [had] s[een] or experienced through her senses, and turn[ed] to interpretation or assessment to assist the jury based on her specialized knowledge," *id.* at 635, 836 S.E.2d at 874 (brackets and citation omitted), her testimony constitutes "expert opinion testimony and interpretations subject to the requirements of Rule 702(a)." *Id.*

At trial, Dr. Simmons was tendered and qualified as an expert in forensic anthropology without objection from defendant. After being qualified as an expert, Dr. Simmons testified that after reconstructing Kelly's skull, she was able to determine that the "trauma to the cranium, the upper part of the head, represents a single gunshot injury that, again, entered slightly to the left of center in the frontal bone and exited slightly to the right of center in the occipital bone in the rear of the skull." Dr. Simmons further testified that because the gunshot wound to Kelly's skull was a "through-and-through wound[,]" and because of the "very large degree of fragmentation of the skull," the type of trauma caused to Kelly's skull was either the result of (1) a "very high-velocity gunshot injury[,]" or, in the alternative, (2) a lower-velocity weapon was used but Kelly's head must have been positioned tightly against a hard surface.[3] Dr. Simmons testified that she was able to make this deduction—regarding the trauma to Kelly's skull—due to her extreme familiarity with high-velocity gunshot injuries from investigating war crimes overseas.

Dr. Simmons went on to explain that the gunshot wound to Kelly's skull "caused extensive damage at the exit, which is fairly normal, and that damage extended all the way down onto the base of the skull,

3. When asked for examples of what constitutes a "hard surface" for the purpose of her analysis of the exceptional degree of fragmentation to the back of Kelly's skull, Dr. Simmons explained that it would have to have been something such as "standing against a wall, lying on the floor, but definitely not a soft surface, such as a bed or a couch or something along those lines."

including the first cervical vertebra, because that first cervical vertebra is attached very tightly to the bottom of the skull with ligaments." Explaining further, Dr. Simmons testified that "if there is gunshot trauma and the radiating fractures from the projectile reach the base of the skull and break it, they will also break that first cervical vertebra, which is what happened in this case." As it relates to the timing, because Kelly sustained a gunshot wound to the head and her head was later severed from her body, Dr. Simmons testified that, based on her experience, "the gunshot injury occurred first because of that damage to the first cervical vertebra." Dr. Simmons further opined that, in order for the damage to extend to the first cervical vertebra, it would have been necessary for there to have been "muscle tone [in Kelly's head] at the time that that injury occurred[,]" and if Kelly's head had been severed prior to the gunshot wound, Dr. Simmons did not believe the damage would have extended down to that vertebra.

Finally, the following is the challenged portion of Dr. Simmons' testimony:

> [STATE]: And based on seeing this through-and-through wound and it being rendered by a projectile and the caliber of weapon that you theorize, in your opinion, what would be the likelihood that a projectile, through-and-through projectile, would render zero defects in a fiberglass bathtub?
>
> [DR. SIMMONS]: I think that would be slim.

Defendant concedes that Dr. Simmons was eminently qualified in the field of forensic anthropology but argues that "the State did not show that Dr. Simmons was also an expert in materials science, construction, civil engineering, or another related field such that she could offer a reliable answer to the question" regarding defects to a fiberglass bathtub. Because of this, defendant contends that he should receive a new trial. We reject defendant's argument.

This Court rejected a similar argument in *State v. Figueroa*, 291 N.C. App. 610, 896 S.E.2d 188 (2023). In *Figueroa*, the defendant was charged with several drug-related offenses after a brown paper bag—containing a white, powdery substance suspected to be methamphetamine—was recovered from the defendant's vehicle and sent off for forensic drug testing. *Id.* at 611, 896 S.E.2d at 190. At trial, Brittany Meyers, the forensic scientist who examined the suspected methamphetamine, and was tendered and qualified as an expert, "gave expert testimony that she performed a preliminary color test known as the marquis color test and a

confirmatory infrared spectrophotometer test from which she identified the evidence in this case to be methamphetamine." *Id.* at 614, 896 S.E.2d at 192 (internal quotation marks omitted). And, "[a]lthough Meyers identified the analysis that she performed, she did not explain the methodology of that analysis[, t]hus the trial court erred by failing to exercise its gatekeeping function." *Id.* In concluding such, this Court held that the error "d[id] not amount to plain error because Meyers identified the tests she performed and the result of those tests[,]" *id.*, and her testimony, therefore, "did not amount to baseless speculation, and thus[,] was not so prejudicial that justice could not have been done." *Id.* at 614–15, 896 S.E.2d at 192 (internal quotation marks and citation omitted).

Here, applying the rationale used in *Figueroa*, we reach the same conclusion. We conclude that the trial court erred by not properly exercising its gatekeeping function of Rule 702(a)—because it did not require Dr. Simmons to testify to the rationale supporting her opinion regarding the potential for defects to the fiberglass bathtub caused by a high-velocity gunshot injury—but this error does not amount to plain error. *See Figueroa*, 291 N.C. App. at 614–15, 896 S.E.2d at 192 (explaining that at the defendant's trial, the forensic scientist gave expert testimony about the scientific tests that she performed on the narcotics, but she did not explain the methodology of her analysis). This error does not amount to plain error because Dr. Simmons explained the analyses she performed on Kelly's skull and the factors that led to her opinion. Dr. Simmons was absolutely qualified to testify about the trajectory, velocity, and impact force of a bullet upon exit, and her testimony "did not amount to baseless speculation, and thus, was not so prejudicial that justice could not have been done." *Id.* at 614–15, 896 S.E.2d at 192 (internal quotation marks and citation omitted). Dr. Simmons did not testify about the chemical compound, structure, makeup, etc. of a fiberglass bathtub. Rather, she offered expert testimony, in the form of an opinion based on her knowledge, skill, experience, training, and education, about the likelihood of a high-velocity projectile—like the bullet that entered and exited Kelly's skull—rendering defects on a substrate, such as a fiberglass bathtub. Thus, we conclude that the trial court did not commit plain error.

B. Closing Argument

[2] In his second argument, defendant contends that the trial court committed reversible error by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

1. Standard of review

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Storm*, 228 N.C. App. 272, 279, 743 S.E.2d 713, 718 (2013) (citation omitted). "Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Degraffenried*, 262 N.C. App. 308, 310, 821 S.E.2d 887, 888 (2018) (brackets and citation omitted). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* (citation omitted).

2. Analysis

According to N.C. Gen. Stat. § 15A-1230,

> [d]uring a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2023). "We tender this statute to all counsel for review and compliance therewith as officers of the court." *Degraffenried*, 262 N.C. App. at 310, 821 S.E.2d at 889.

"A criminal defendant has a constitutional right to plead not guilty and be tried by a jury[, and r]eference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *Id.* (brackets and citation omitted). "This Court's job is to determine whether the prosecutor['s] comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Branche*, 291 N.C. App. 214, 233, 895 S.E.2d 597, 610–11 (internal quotation marks and citation omitted). Here, defendant challenges a portion of the State's closing argument as violating his constitutional right to plead not guilty.

As the State correctly articulated in its brief, defendant challenged a portion of the State's thirty-six page closing argument that came after the prosecutor briefly reminded the jury of his opening statement and

then, at great length, outlined the "red herrings" or distractions that he expected defense counsel to argue in closing, such as: unsupported allegations of mistrust in law enforcement; defendant's inebriation; missing gunshot residue; emphasis on other stories told by defendant; Kelly's mental health diagnoses; the medical examiner's conclusion of "undetermined"; and defendant's stipulation to other crimes. Within this same context, the prosecutor argued:

> This is what you're actually going to be tasked with going through.
>
> The offenses that are charged: [t]he defendant's been charged with possession of [a] firearm by a felon. And the State has to carry the burden on each of these offenses. First the State has to show that the defendant was a convicted felon. That's an easy check box. [Defendant] stipulated to it. You heard him talk about how he was a convicted felon.
>
> Second, that the defendant possessed a firearm. Again, easy. You know it. He took the firearm to the dumpster where he disposed of Kelly's remains, and then he took the police there. You know that's the case.
>
> Concealment of human remains. There's going to be three elements to this offense that you will have to go through: First, the defendant knowingly and willfully dismembered or destroyed human remains by removing body parts or by obliterating any portion; second, that doing so, the defendant intended to conceal the death of another person; and, third, that the defendant knew the human remains were of a person that did not die of natural causes.
>
> [Defendant has] admitted to every one of those things. It's before you today. The *defendant didn't plead guilty* to [murder] because he's going to stand up here and ask you to only find him guilty of [possession of a firearm by a felon and concealment of human remains]. *It's a distraction.*

(Emphases added). Therefore, the prosecutor did not reference defendant's decision to plead not guilty as "a targeted attack on [d]efendant's failure to plead guilty[,]" *id.* at 233, 895 S.E.2d at 611, but instead, it was to illuminate to the jury another distraction tactic the prosecutor anticipated defense counsel utilizing in closing—and the prosecution said as much: "It's a distraction." Additionally, defendant has failed to demonstrate how the challenged commentary "so infected the trial

with unfairness that [it] rendered the conviction fundamentally unfair." *Degraffenreid*, 262 N.C. App. at 310, 821 S.E.2d at 888 (2018) (citation omitted). Thus, we conclude that the prosecutor's commentary regarding defendant's decision to plead not guilty was not improper, much less grossly improper, and the trial court did not commit reversible error by failing to intervene *ex mero motu*.

III. Conclusion

Based on the foregoing reasons, we conclude that the trial court did not commit plain error by admitting Dr. Simmons' expert testimony regarding the likelihood of a high-velocity projectile, such as a bullet, to cause defects to a fiberglass bathtub. We further conclude that the trial court did not commit reversible error with regard to the State's commentary during its closing argument.

NO ERROR.

Chief Judge DILLON concurs by separate opinion.

Judge MURPHY concurs in Part II-A and concurs in result only in Part II-B.

DILLON, Chief Judge, concurring.

I concur in the majority opinion. I write separately regarding the admission of portions of Dr. Simmons' expert testimony which Defendant argues was outside the scope of his expertise. Defendant failed to properly object to this testimony, and I do not believe the trial court had a duty to intervene to strike the testimony. Accordingly, I do not believe the trial court erred, much less plainly erred. In any event, I agree with the majority there was, otherwise, no prejudice to Defendant from this testimony.

STATE OF NORTH CAROLINA
v.
ALLEN JHALIL WILLIAMS, DEFENDANT

No. COA24-50

Filed 31 December 2024

1. Appeal and Error—notice of appeal—Appellate Rules violations—intent to appeal fairly inferred—certiorari allowed

In a criminal defendant's appeal from judgments entered upon his convictions for voluntary manslaughter and possession of a firearm by a felon, where his notice of appeal failed to designate the judgments being appealed and the court to which the appeal was taken, his petition for a writ of certiorari was allowed because his intent to appeal the judgments could be fairly inferred from the notice, since it was timely filed on the same day as the judgments' entry, it included the case numbers associated with those judgments, and there were no other judgments from which defendant could have taken appeal. Furthermore, the State did not object to certiorari review of defendant's appeal.

2. Homicide—jury instruction—castle doctrine—occupant of motor vehicle—need not be physically inside—prejudicial error

After defendant was convicted of voluntary manslaughter for killing a man during an altercation—during which the man, armed with a gun, broke into defendant's car and repeatedly punched defendant; defendant disarmed the man and then exited the vehicle in an attempt to retreat; the man ran to where defendant stood so he could resume the attack; and defendant, also armed with a gun, fatally shot the man—defendant was entitled to a new trial where the trial court failed to instruct the jury on the statutory castle doctrine (N.C.G.S. § 14-51.2). At the time when defendant used deadly force, he met the statute's definition of a lawful "occupant" of a motor vehicle, which included persons who are forced to exit a vehicle due to an ongoing attack. Further, as a lawful "occupant," defendant was presumptively justified in using deadly force where the record showed that the man had unlawfully and forcibly entered the vehicle and that defendant was aware of the entry. Finally, the court's failure to give the instruction prejudiced defendant where, absent the error, there was a reasonable possibility that the jury would have reached a different verdict.

Judge STROUD concurring in result only.

Appeal by defendant from judgment entered 1 March 2023 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 22 October 2024.

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

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

FLOOD, Judge.

Defendant Allen Jhalil Williams appeals from the trial court's judgment after a jury found him guilty of voluntary manslaughter and possession of a firearm by a felon.[1] Defendant argues on appeal that the trial court reversibly erred in failing to instruct the jury on the castle doctrine theory of self-defense under N.C. Gen. Stat. § 14-51.2, and if Defendant was entitled to a castle doctrine instruction, the trial court erred in instructing the jury on the consequences of using excessive force in self-defense. Upon careful review, we conclude Defendant has demonstrated by competent evidence that he was entitled to a castle doctrine instruction, and the trial court's failure to provide such instruction was prejudicial to Defendant's case. We therefore reverse and remand for a new trial, and as such, do not reach Defendant's remaining argument on the excessive force instruction.

I. Factual and Procedural Background

In the summer of 2020, Defendant and Miracle Lewis—both of whom were residents of Raleigh, North Carolina—met on Facebook, and Defendant expressed interest in meeting her in-person. After exchanging messages on Facebook for a few weeks, the pair agreed that they would meet on the evening of 1 August 2020.

The Shooting

On the agreed-upon day, at approximately 10:15 p.m., Defendant drove his car—a black Cadillac sedan—to Lewis' home. Lewis came out of her home, the pair talked on the front porch, and they then talked in

1. On appeal, Defendant does not challenge his conviction or separate judgment for possession of a firearm by a felon.

Defendant's car. The pair eventually decided to drive around, and after stopping at a local gas station, they returned and parked in the street outside of Lewis' home and continued to converse in Defendant's car.

Approximately ten minutes after the pair returned to Lewis' home, a white pickup truck occupied by Martin Penny and driven by his brother, Tyrell Peguese, pulled up in front of Lewis' home. Lewis had recently ended an eight-month "on-again-off-again" romantic relationship with Penny, and prior to the night of 1 August 2020, Defendant had met neither Penny nor Peguese.

After pulling in front of Lewis' home, Penny exited the passenger's side of the truck and walked to the front door of the home. Penny then saw Defendant's car and began walking towards it. The evidence tends to show that, after Penny reached Defendant's car, Defendant and Penny had a hostile verbal exchange, Defendant exited his car, Defendant and Penny then had a physical altercation, and Defendant lethally shot Penny. After being shot, Penny stumbled backwards towards Lewis' home and collapsed in her back yard. Defendant—keeping on his person the gun he used to shoot Penny—then got in his car and drove away. Following Defendant's departure, Lewis called 9-1-1; first responders eventually arrived on the scene, and they found Penny with no signs of life. Penny had been shot twice, and upon transport to WakeMed Hospital, he was pronounced dead.

Soon after the first responders' arrival, police officers arrived on the scene. Lewis informed the officers that the shooting was the result of a conflict between Defendant and Penny, and explained that she knew Defendant only by his Facebook pseudonym of "Sleazy So." While attempting to aid the officers in identifying Defendant, however, Lewis discovered that Defendant's Facebook profile had been deactivated and was no longer accessible. Despite this, using Lewis' Facebook account and surveillance footage from the gas station she and Defendant had visited, police were able to ascertain Defendant's identity. The following day, police located Defendant's black Cadillac in a cul-de-sac near the scene of the shooting. Police conducted a search of the car, which revealed a .22 caliber revolver loaded with four unfired rounds, out of a possible six.

For the remainder of August, police were unable to locate and apprehend Defendant, as following the shooting, Defendant fled to New York, where he spoke with "John Gotti's hitman's lawyer" about self-defense. In early September, however, Defendant returned to North Carolina to meet with another potential romantic interest at a hotel on

Glenwood Avenue in Raleigh, and on 10 September 2020, he was apprehended within minutes of his arrival at the hotel.

On 14 September 2020, Defendant was charged by two bills of indictment for murder and possession of a firearm by a felon. On 20 February 2023, this matter came on for hearing before the trial court.

Testimonial Evidence

During the presentation of evidence, the State presented the witness testimonies of Lewis and Peguese, who recounted, in relevant part, the events that transpired between the moment Penny approached Defendant's car, and when Defendant fled the scene.

According to Lewis, after Penny approached the passenger's side of Defendant's car, Penny tapped on the window and asked Defendant to identify himself, and Defendant did not answer. Penny then opened the passenger door, again asked Defendant to identify himself, and leaned into the car and over Lewis, and punched Defendant. After throwing this punch, Penny withdrew from inside the passenger's side of the car, and walked around the front of the car toward the driver's side. Lewis also exited the car, but remained on the passenger's side. When Penny reached the driver's side, Defendant exited the car, stood, and "scuffl[ed]" with Penny in the street. Soon after, within "[s]econds," Lewis heard "[t]wo or three" gunshots, followed by Penny stumbling towards Lewis' home and collapsing in her back yard. Lewis never saw a gun during the entire incident, either on Penny or Williams.

Peguese's account of these events was partially consistent with that of Lewis, but according to Peguese, when Defendant exited his car, he already had a gun in hand, immediately "started shooting," and fired three or four shots at Penny. Peguese further testified that, before the shooting, there was no fighting or "scuffling" between Defendant and Penny.

Following the State's evidence, Defendant also testified as to the events surrounding the shooting. According to Defendant, after Penny approached Defendant's car, Penny opened the passenger's side door and asked Lewis, "[w]ho the fuck is this?" Lewis did not respond, and Penny leaned halfway into the car and asked Defendant, "[w]ho the fuck are you?" Before Defendant could answer, Penny, while still leaning into the car, began punching Defendant in the face. Defendant tried to block the punches and open his driver's side door, but had trouble opening the door, as the inside door handle was broken. Penny eventually stopped punching Defendant, whereupon Defendant observed Penny had a gun in his hand. Defendant, while seated, managed to disarm

Penny, who then resumed punching Defendant; amidst these punches, Defendant successfully opened the driver's side door, exited the car, and stood up.

Immediately after Defendant exited the car, Penny withdrew from the passenger's side, went around the front of the car, and met Defendant on the driver's side. Defendant then pointed the gun at Penny and asked him, "[w]hat the hell are you doing?" Penny did not respond, and instead "rushe[d]" at, and began to physically attack, Defendant. Penny grabbed Defendant's wrist, repeatedly punched him, and yelled profanities, all while Defendant tried to prevent Penny from obtaining the gun. Eventually, Penny punched Defendant in the eye, and Defendant began to hear ringing in his ears. At this point, according to Defendant, "for fear of [Penny] . . . knocking [him] out and taking the gun back[,]" Defendant shot Penny a single time. Despite being shot, Penny continued to attack Defendant and again punched him in the eye, and in "fear for [his] life[,]" Defendant once more shot Penny. After firing the second shot, Defendant was able to break free from Penny, and Penny stumbled away.

Upon recounting these events, Defendant testified that he got in his car and fled the scene because he heard yelling from someone in Peguese's pickup truck, and feared its occupant may be armed. Defendant further testified that he deactivated his Facebook account because he was afraid the altercation may have been a "setup situation" orchestrated by Lewis, and that he fled to New York because he felt he should "talk to a lawyer" before "turn[ing] [him]self in," though he acknowledged that he never did, ultimately, turn himself in.

In support of his testimony, Defendant also presented the testimony of a bystander, Kenneth Blocker, who lived across the street from Lewis. Blocker testified that, at the time of the incident, he was in his bedroom, heard a loud argument for about ten to fifteen minutes, and then heard "two to three gunshots."

Jury Instructions and Sentencing

The hearing came to the charge conference, whereupon the trial court informed the parties that it would instruct the jury on self-defense. Defendant requested an instruction under the "castle doctrine" statute, N.C. Gen. Stat. § 14-51.2. The State objected to Defendant's request, arguing that, per the language of the statute and the facts of this case, Defendant was not entitled to an instruction under this theory of self-defense.

After hearing the parties' arguments, the trial court denied Defendant's request, reasoning that, while the statute, in defining

"home," specifically includes the home's "curtilage," the statute's definition of "motor vehicle" includes no such description. The trial court further reasoned that the statute applies only to an "occupant" of a motor vehicle, and the evidence suggested there were "no occupant[s]" in Defendant's vehicle at the time of the shooting; rather, Penny had exited Defendant's vehicle, was no longer attempting to enter the vehicle, and Defendant and Penny had "reenter[ed] an affray" in the street. While noting that Defendant "still [had] the right of self-defense," the trial court concluded that granting Defendant's instructional request "would essentially be a [rewriting] of the statute."

The trial court thereafter instructed the jury on first degree murder, the lesser-included offenses of second degree murder and voluntary manslaughter, self-defense, and possession of a firearm by a felon. As part of its voluntary manslaughter instruction, the trial court provided, "[i]f the State proves beyond a reasonable doubt that . . . [D]efendant, though otherwise acting in self-defense, used excessive force, . . . [he] would be guilty of voluntary manslaughter."

On 28 February 2023, following jury deliberations, Defendant was found guilty of voluntary manslaughter and possession of a firearm by a felon. Defendant stipulated to an aggravating factor, and on 1 March 2023, the trial court entered judgment, sentencing Defendant in the aggravated range to a term of 105 to 138 months' imprisonment for voluntary manslaughter, and in the presumptive range to a consecutive term of 19 to 35 months' imprisonment for possession of a firearm by a felon. Defendant timely appealed.

II. Jurisdiction

[1] In filing written notice of appeal, Defendant's counsel failed to identify the judgments from which Defendant appeals, as well as the court to which appeal is taken, and Defendant's appeal therefore fails to comply with Rule 4(b) of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 4(b) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]"). Defendant has therefore filed with this Court a petition for writ of certiorari ("PWC"), requesting we issue our discretionary writ should Defendant's notice be found insufficient to confer upon this Court jurisdiction. *See State v. Rouson*, 226 N.C. 562, 563–64, 741 S.E.2d 470, 471 (2013) ("A [PWC] . . . must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." (citation and internal quotation marks omitted)).

Even where a defendant's appeal fails to comply with Rule 4(b), this Court has provided that "a mistake in designating the judgment 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." *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006) (citation and internal quotation marks omitted). Further, "this Court has noted that failure to . . . identify the court to which the appeal is taken [is] not the sort[] of defect[] requiring dismissal of an appeal on a jurisdictional basis[,]" and we "have also granted *certiorari* review . . . where . . . the State lodges no substantive argument against such review." *State v. Hammond*, 288 N.C. App. 58, 62, 884 S.E.2d 767, 770 (2023) (citations and internal quotation marks omitted).

Here, while Defendant's notice of appeal did not designate the judgments from which Defendant takes appeal, the intent to appeal from these judgments may be fairly inferred because the notice was timely filed on the same day as the judgments' entry, the notice included the case numbers for the judgments, and there are no other judgments from which Defendant could have taken appeal. *See Stephenson*, 177 N.C. App. at 241, 628 S.E.2d at 443. Further, as set forth above, Defendant's failure to identify the court to which he takes appeal is not the sort of defect requiring dismissal on a jurisdictional basis, and the State, in its response to Defendant's PWC, lodges no substantive argument against our granting of certiorari. *See Hammond*, 288 N.C. App. at 62, 884 S.E.2d at 770. Accordingly, in our discretion, we allow Defendant's PWC in 20CRS211814 and proceed to the merits of his appeal. *See Rouson*, 226 N.C. at 563–64, 741 S.E.2d at 471.

III. Standard of Review

We review "a challenge to a trial court's decision regarding jury instructions *de novo*," *State v. Wirt*, 263 N.C. App. 370, 376, 822 S.E.2d 668, 673 (2018) (citation omitted), and under such review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Clapp*, 235 N.C. App. 351, 359–60, 761 S.E.2d 710, 717 (2014) (citation and internal quotation marks omitted).

In reviewing the denial of a defendant's request for a self-defense instruction, we must be heedful of the trial court's duty "to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case[, and f]or this reason,

a defendant is entitled to an instruction on self-defense when he . . . presents competent evidence of such." *State v. Parks*, 264 N.C. App. 112, 115, 824 S.E.2d 881, 884 (2019) (citations and internal quotation marks omitted).

"In determining whether a defendant has presented competent evidence sufficient to support an instruction for self-defense, we take the defendant's evidence as true and consider it in the light most favorable to the defendant." *Id.* at 115, 824 S.E.2d at 884 (citation omitted). Even where this Court finds the trial court committed instructional error, we reverse and remand for a new trial only upon a defendant's demonstration of prejudice, whereby he must show "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. Dilworth*, 274 N.C. App. 57, 61, 851 S.E.2d 406, 409 (2020) (citation and internal quotation marks omitted); *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884.

IV. Analysis

[2] Defendant argues on appeal: the trial court reversibly erred in failing to instruct the jury on the castle doctrine theory of self-defense under N.C. Gen. Stat. § 14-51.2 (2023); and, if Defendant was entitled to a castle doctrine instruction, the trial court erred in instructing the jury on the consequences of using excessive force in exercising self-defense. We address Defendant's castle doctrine instruction argument, and as explained in further detail below, need not reach Defendant's remaining argument.

In alleging reversible error, Defendant contends, (A) viewing the evidence in the light most favorable to Defendant, the trial court's denial of his request for a castle doctrine instruction was instructional error, and (B) the error was prejudicial to his case. We first address his allegation of instructional error.

A. Instructional Error

Under the North Carolina common law right to self-defense, a defendant may be altogether excused for killing another if the killing was done in perfect self-defense, which requires a showing that,

> at the time of the killing, these four elements existed:
>
> (1) it appeared to [the] defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

> (2) [the] defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) [the] defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) [the] defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. McLymore, 380 N.C. 185, 190–91, 868 S.E.2d 67, 72 (2022) (citation omitted).

Distinct from common law perfect self-defense is the common law "castle doctrine"—or "defense of habitation"—which excepts one "assaulted while in his dwelling house or within the curtilage thereof" from having a duty to retreat. *State v. Stevenson*, 81 N.C. App. 409, 412, 344 S.E.2d 334, 335 (1986) (citation omitted) (cleaned up); *see also State v. Vaughn*, 293 N.C. App. 770, 774, 901 S.E.2d 260, 265 (2024) (referring to the castle doctrine as "defense of habitation"). In 1993, the General Assembly enacted N.C. Gen. Stat. § 14-51.1 (2011) (repealed 2011), which codified and broadened the common law castle doctrine "to make the use of deadly force justifiable whether to *prevent* unlawful entry into the home or to *terminate* an unlawful entry by an intruder[,]" *State v. Blue*, 356 N.C. 79, 89, 565 S.E.2d 133, 139 (2002), and provided, in relevant part, that a "lawful occupant within a home or other place of residence is justified in using any degree of force . . . against an intruder[.]" N.C. Gen. Stat. § 14-51.1(a) (repealed 2011).

In 2011, however, the General Assembly repealed N.C. Gen. Stat. § 14-51.1 and "replaced it with a more detailed statutory scheme that expanded and clarified use of force protections." *State v. Philips*, 386 N.C. 513, 520, 905 S.E.2d 23, 29 (2024) (citation omitted). Included in this enacted statutory scheme was N.C. Gen. Stat. § 14-51.2, which again codified the common law castle doctrine, and while not repealing or limiting the common law standard, further broadened it to include self-defense executed in a home, workplace, or motor vehicle. *See State v. Austin*, 279 N.C. App. 377, 378, 865 S.E.2d 350, 352 (2021) ("[T]he castle doctrine defense . . . is codified in [N.C. Gen. Stat.] § 14-51.2."); *see also Vaughn*, 293 N.C. App. at 776, 901 S.E.2d at 265 ("N.C. Gen. Stat. § 14-51.2 codifies the defense of habitation[.]"); *State v. Benner*, 380 N.C. 621, 629, 869

S.E.2d 199, 205 (2017) (providing that N.C. Gen. Stat. § 14-51.2 was "not intended to repeal or limit any other defense that may exist under the common law" (internal quotation marks omitted)).

The statutory castle doctrine standard, articulated in N.C. Gen. Stat. § 14-51.2(b), functions as a burden-shifting provision, whereby, in addition to having no duty to retreat, "the defendant no longer has the burden to prove key elements of the traditional self-defense doctrine." *Austin*, 279 N.C. App. at 380, 865 S.E.2d at 353; *see also* N.C. Gen. Stat. § 14-51.2(f). Pursuant to the statute,

> [t]he lawful occupant of a home, motor vehicle, or workplace is *presumed* to have held a reasonable fear of imminent death or serious bodily harm to himself . . . or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b)(1)–(2) (emphasis added). Further, "[a] person who uses force as permitted by [N.C. Gen. Stat. § 14-51.2(b)] . . . is justified in using such force and is immune from civil or criminal liability for the use of such force[.]" N.C. Gen. Stat. § 14-51.2(e). While the castle doctrine affords a defendant the presumption of justified deadly force, this presumption is rebuttable and does not apply under certain circumstances, including those where "[t]he person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace." N.C. Gen. Stat. § 14-51.2(c)(5).

Here, the uncontroverted Record evidence demonstrates that Defendant, for much of the night of the incident, was lawfully in and operating his car—a motor vehicle—meaning that, if Defendant was an "occupant" of a motor vehicle, such occupancy was "lawful[.]" N.C. Gen.

Stat. § 14-51.2(b). As such, for Defendant to have been entitled to a castle doctrine instruction, the Record must demonstrate: (1) at the time Defendant used lethal force against Penny, Defendant was an "occupant" of a motor vehicle; and (2) Penny was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, the motor vehicle, and Defendant knew or had reason to believe such unlawful and forcible entry was occurring or had occurred. *See* N.C. Gen. Stat. § 14-51.2(b)(1)–(2).

1. Occupant of a Motor Vehicle

Our analysis of whether Defendant was an "occupant" of his motor vehicle reveals "a question of statutory interpretation, which is a question of law reviewed de novo." *State v. Campbell*, 285 N.C. App. 480, 486, 878 S.E.2d 312, 317 (2022) (citation omitted).

"In addressing issues of statutory interpretation, our Supreme Court has stated that 'the principal goal of statutory construction is to accomplish the legislative intent.' " *Id.* at 486–87, 878 S.E.2d at 318 (quoting *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853 (2018)). "While we have acknowledged that we can infer legislative intent from the language of the statute, the spirit of the act[,] and what the act seeks to accomplish, our Supreme Court has held that statutory interpretation begins with an examination of the plain words of the statute." *Id.* at 487, 878 S.E.2d at 318 (citation and internal quotation marks omitted) (cleaned up). Where "statutory language is clear and unambiguous, th[is C]ourt eschews statutory construction in favor of giving the words their plain and definite meaning." *Id.* at 487, 878 S.E.2d at 318 (citation and internal quotation marks omitted).

Where this Court concludes statutory language is ambiguous or unclear as to its meaning, however, we "must further interpret the statute to give effect to the legislative intent, which includes employing canons of statutory interpretation." *Id.* at 487, 878 S.E.2d at 318 (citation and internal quotation marks omitted). In construing a statute, "[p]arts of the same statute dealing with the same subject matter must be considered and interpreted as a whole[,]" *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) (citation and internal quotation marks omitted), and we will "normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." *Romulus v. Romulus*, 216 N.C. App. 28, 34, 715 S.E.2d 889, 893 (2011) (citation omitted).

a. *Plain Language Meaning*

To determine the meaning of the word "occupant" as used in the statutory castle doctrine, we first look to the plain language of the statute itself. *See Campbell*, 285 N.C. App. at 487, 878 S.E.2d at 319. Under N.C. Gen. Stat. § 14-51.2(a), the General Assembly provided definitions of the material statutory terms, but not included among these defined terms is the word "occupant." N.C. Gen. Stat. § 14-51.2(a)(3), however, provides that "[m]otor vehicle" is afforded its meaning as defined under N.C. Gen. Stat. § 20-4.01 (2023), which sets forth the definitions of terms used throughout the North Carolina motor vehicle statute. *See* N.C. Gen. Stat. § 20-4.01(23). For the purposes of our review, though, N.C. Gen. Stat. § 20-4.01 is not elucidative; while the words "[o]perator" and "[o]wner" are included as defined terms, the word "occupant"—although mentioned four times throughout the statute—is not afforded a definition. *See* N.C. Gen. Stat. § 20-4.01(1), (23a), (27)b., (46a).

As a pertinent use of the word "occupant" is undefined within the current statutory scheme, we next consider whether the word has been given meaning by judicial decision. *See In re Oak Meadows Cmty. Ass'n*, 293 N.C. App. 92, 96, 899 S.E.2d 404, 407 (2024) (providing that where a word "has not been defined by statute or judicial decision[,] . . . we look to its natural, approved and recognized meaning" (citation and internal quotation marks omitted)). In *State v. Tripp*, our Supreme Court considered whether, under the relevant facts of the case—where, at the time police officers executed a search warrant of the defendant's residence, he was outside "on a wheelchair ramp on the neighboring property"—the defendant could be considered an "occupant" of his residence. 381 N.C. 617, 619, 631–32, 873 S.E.2d 298, 302, 308–09 (2022) (citation and internal quotation marks omitted). Upon review, the Court concluded that—though "not within the lawful limits of his residence"—where the defendant was within the "immediate vicinity" of, and "close enough" such that he could have "had access to[,]" the residence, he was indeed a legal "occupant[.]" *Id.* at 631–32, 873 S.E.2d at 308–09 (citations and internal quotation marks omitted). The facts of *Tripp*, however, concerned Fourth Amendment protections and real estate jurisprudence, and our Supreme Court set forth its interpretation of "occupant" under the context of a defendant's reasonable expectations of privacy, officer safety, and property ownership. *See id.* at 630–31, 873 S.E.2d at 308–09; *see also State v. Wilson*, 371 N.C. 920, 925, 821 S.E.2d 811, 815 (2018) (defining "occupant" in the context of Fourth Amendment Rights, and whether a defendant poses "a real threat to the safe and efficient execution of [a] search warrant" (citation and internal quotation

marks omitted)). As such, this meaning of "occupant" is not germane to the instant case, in the context of entitlement to a statutory castle doctrine instruction.

Where a word "has not been defined by statute or judicial decision[,] . . . we look to its natural, approved and recognized meaning[,]" and in doing so, "courts may look to dictionaries to determine the ordinary meaning of words within a statute." *In re Oak Meadows Cmty. Ass'n*, 293 N.C. App. at 96, 899 S.E.2d at 407 (citations and internal quotation marks omitted). Per Black's Law Dictionary, "occupant" may be defined, in relevant part, as "[s]omeone who has . . . control over[] certain property or premises." *Occupant*, Black's Law Dictionary (12th ed. 2024).

Applying this definition of "occupant" to the statutory castle doctrine, for a defendant to have been an "occupant" of a motor vehicle, competent evidence must demonstrate he had "control over" the vehicle. *See* N.C. Gen. Stat. § 14-51.2(b); *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884; *Occupant*, Black's Law Dictionary (12th ed. 2024). From this interpretation, one may reasonably conclude a defendant was an "occupant" of a motor vehicle where he had the ability to exercise actual, physical control of said vehicle. *See State v. Hoque*, 269 N.C. App. 347, 353, 837 S.E.2d 464, 470–71 (2020) (providing that "actual physical control of a vehicle" may be demonstrated where a defendant was seated "behind the wheel of [the vehicle] with the engine running"); *see also* N.C. Gen. Stat. § 20-4.01(25). As applied to the instant case, where Defendant exercised deadly force after exiting through, and while standing directly outside of, the driver's side door of his motor vehicle, Defendant would not be considered an "occupant" of the vehicle. *See Hoque*, 269 N.C. App. at 353, 837 S.E.2d at 470–71.

Conversely, per our Supreme Court's prior consideration of "control" over a location, another reasonable conclusion is that a defendant may be considered an "occupant" of a motor vehicle where he had the opportunity and ability to access and enter, and therefore control, the vehicle. *See State v. Chekanow*, 370 N.C. 488, 497–98, 809 S.E.2d 546, 553 (2018) (providing that indicators of a defendant's "control" over a location include his "opportunity to place contraband" on the premises, and his "possess[ion of] a key to" the location). As applied to the instant case, per the material facts delineated above, Defendant *would* be considered an "occupant" of his motor vehicle, which is an outcome irreconcilable with that of the first interpretation. *See id.* at 497–98, 809 S.E.2d 553.

As the dictionary definition of "occupant" yields two reasonable, but contradictory, conclusions on whether Defendant was an "occupant" of

a motor vehicle, this Court is unable to ascertain legislative intent from the natural, approved, and recognized meaning of the term. *See In re Oak Meadows Cmty. Ass'n*, 293 N.C. App. at 96, 899 S.E.2d at 407; *see also Campbell*, 285 N.C. App. at 487, 878 S.E.2d at 319; *Occupant*, Black's Law Dictionary (12th ed. 2024). We therefore find the statutory castle doctrine's use of the term "occupant" to be ambiguous and unclear in its meaning, and to give effect to legislative intent, we must employ additional canons of statutory interpretation. *See Campbell*, 285 N.C. App. at 487, 878 S.E.2d at 318; *see also* N.C. Gen. Stat. § 14-51.2(b).

b. *Language, Object, and Spirit of the Castle Doctrine*

To effectuate legislative intent, we assess the language, object, and spirit of the statutory castle doctrine. *See id.* at 487, 878 S.E.2d at 318; *see also Rankin*, 371 N.C. at 889, 821 S.E.2d at 792.

As to the language of the statutory castle doctrine, it is well established that the common law castle doctrine governs only defensive force exercised "while in [one's] . . . dwelling house or within the curtilage thereof[.]" *Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; *see also Blue*, 356 N.C. at 86–87, 565 S.E.2d at 138. In codifying the castle doctrine, however, the General Assembly broadened its applicability to include defensive force exercised in a home, motor vehicle, *or* workplace, and set forth that the presumption of reasonable fear is afforded to a lawful occupant "of" the aforementioned locations. *See* N.C. Gen. Stat. § 14-51.2(b). This differs from the common law standard and that of N.C. Gen. Stat. § 14-51.1, which afford the presumption to a lawful occupant "within" a home or dwelling. *See Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; *see also* N.C. Gen. Stat. § 14-51.1 (repealed 2011). Additionally, in setting forth the requisite conditions for a statutory castle doctrine instruction, the General Assembly provided that a lawful occupant of a home, motor vehicle, or workplace is afforded the presumption of reasonable fear, where, in relevant part: "(1) The person against whom the defensive force was used . . . had unlawfully and forcibly entered, . . . [or] *had removed* . . . another against that person's will from[,] the home, motor vehicle, or workplace"; and "(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or . . . act . . . *had occurred*." N.C. Gen. Stat. § 14-51.2(b)(1)–(2) (emphasis added).

As to the object of the statutory castle doctrine, per the relevant statutory language set forth above, considered and interpreted as a whole, it is apparent that the statute's purpose was to expand the common law standard, such that it governs defensive force in a motor vehicle or workplace—not just in a home. *See* N.C. Gen. Stat. § 14-51.2(b). It

is also evident that, by including governance over conditions where an assailant "had removed" a lawful occupant from his home, motor vehicle, or workplace, the General Assembly contemplated circumstances where one exercises justified force while not physically "within" those locations. *See* N.C. Gen. Stat. § 14-51.2(b)(1); *see also Rankin*, 371 N.C. at 889, 821 S.E.2d at 792. This interpretation is strengthened by the statute's applicability to the lawful occupant "of" a home, motor vehicle, or workplace, indicating that—unlike the standard at common law and under the N.C. Gen. Stat. § 14-51.1—one need not necessarily be "within" these locations to be granted the benefits of the statutory castle doctrine. *See* N.C. Gen. Stat. § 14-51.2(b); *see also Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; N.C. Gen. Stat. § 14-51.1 (repealed 2011).

This interpretation of N.C. Gen. Stat. § 14-51.2(b) also adheres to the spirit of the castle doctrine, which is informed by our appellate courts' prior expositions of the common law standard. Specifically, this Court has provided that the common law " 'castle doctrine' is derived from the principle that one's home is one's castle and is based on the theory that if a person is bound to become a fugitive from [his] own home, there would be no refuge for [him] anywhere in the world." *Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; *see also Austin*, 279 N.C. App. at 378, 865 S.E.2d at 352; *Vaughn*, 293 N.C. App. at 775–76, 901 S.E.2d at 265. Consistent with this foundational principle, regarding the common law castle doctrine standard, our Supreme Court has articulated the following:

> When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by taking the life of the intruder. Under those circumstances, the law does not require such householder to flee *or to remain in* his house until his assailant is upon him, but he may open his door and shoot his assailant[.]

Blue, 356 N.C. at 86–87, 565 S.E.2d at 138 (citation and internal quotation marks omitted) (emphasis added); *see also Benner*, 380 N.C. at 629, 869 S.E.2d at 205.

As aforesaid, the enactment of N.C. Gen. Stat. § 14-51.2(b) served as a codification of the common law castle doctrine, while expanding the common law standard to govern defensive force exercised in a motor

vehicle or workplace, as well as the home. *See Austin*, 279 N.C. App. at 378, 865 S.E.2d at 352; *see also Vaughn*, 293 N.C. App. at 776, 901 S.E.2d at 265; *Benner*, 380 N.C. at 629, 869 S.E.2d at 205. The common law castle doctrine's foundational principle, as well as its relevant standard articulated by our Supreme Court, may therefore instruct the spirit of the broader, statutory castle doctrine: as a person is not bound to become a fugitive from his own home, motor vehicle, *or* workplace, *see Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335, he is under no requirement to flee *or to remain in* such location until his assailant is upon him. *See Blue*, 356 N.C. at 86–87, 565 S.E.2d at 138.

Upon our assessment of the statutory castle doctrine's language, object, and spirit, considering and interpreting as a whole the material provisions of N.C. Gen. Stat. § 14-51.2, we conclude the following interpretation of the statutory castle doctrine to be consistent with its legislative intent: the lawful occupant "of" a home, motor vehicle, or workplace is not bound to become a fugitive from these locations, and therefore is not required to flee *or remain in* his home, motor vehicle, or workplace until his assailant is upon him. *See* N.C. Gen. Stat. § 14-51.2(b); *see also Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; *Blue*, 356 N.C. at 86–87, 565 S.E.2d at 138; *Austin*, 279 N.C. App. at 378, 865 S.E.2d at 352; *Vaughn*, 293 N.C. App. at 776, 901 S.E.2d at 265; *Benner*, 380 N.C. at 629, 869 S.E.2d at 205; *Rankin*, 371 N.C. at 889, 821 S.E.2d at 792. Rather, the lawful occupant, under specific circumstances—including those where he is *no longer within* the home, motor vehicle, or workplace—may exercise deadly defensive force against his assailant. *See* N.C. Gen. Stat. § 14-51.2(b)(1); *see also Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; N.C. Gen. Stat. § 14-51.1 (repealed 2011).

c. *Application to the Instant Case*

Here, in support of its denial of Defendant's request for a castle doctrine instruction, the trial court reasoned that, as N.C. Gen. Stat. § 14-51.2 does not include "curtilage" in its definition of a motor vehicle, Defendant could not have exercised force in the "curtilage" of the vehicle. The trial court further reasoned that, at the time Defendant exercised deadly force, he was no longer an "occupant" of the vehicle. While the trial court was correct in its finding regarding "curtilage,"[2] the

2. Under N.C. Gen. Stat. § 14-51.2(a), the statutory castle doctrine's use of "home" is defined as meaning, in relevant part, "[a] building or conveyance of any kind, to include its *curtilage*[.]" N.C. Gen. Stat. § 14-51.2(a)(1) (emphasis added). While "curtilage" is left undefined by the statute, our appellate courts have provided that, under the castle doctrine, "curtilage" includes a home's porch or driveway. *See Austin*, 279 N.C. App. at 382,

same cannot be said regarding its "occupant" reasoning. *See* N.C. Gen. Stat. § 14-51.2(a); *see also Campbell*, 285 N.C. App. at 486, 878 S.E.2d at 317; *Wirt*, 263 N.C. App. at 376, 822 S.E.2d at 673. Treating Defendant's account of the incident as true, upon our review of the material facts, and per our interpretation of the statutory castle doctrine, it cannot be said that Defendant was not an "occupant" of a motor vehicle at the time he exercised lethal force against Penny. *See* N.C. Gen. Stat. § 14-51.2(b); *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884.

As explicated above, N.C. Gen. Stat. § 14-51.2(b) expanded the applicability of the castle doctrine to the lawful occupant "of"—as opposed to "within"—a motor vehicle, and authorizes deadly force against an assailant who "had . . . entered" or "had removed" the lawful occupant from the vehicle. N.C. Gen. Stat. § 14-51.2(b), (b)(1); *see also Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; N.C. Gen. Stat. § 14-51.1 (repealed 2011). From this language—considered and interpreted as a whole—it is apparent that the General Assembly, in effecting expansion of the castle doctrine's governance, contemplated situations where the lawful occupant "of" a motor vehicle uses justifiable force while no longer "within" the vehicle. *See* N.C. Gen. Stat. § 14-51.2(b), (b)(1); *see also Rankin*, 371 N.C. at 889, 821 S.E.2d at 792. This reading of N.C. Gen. Stat. § 14-51.2(b) is also consistent with the spirit of the statutory castle doctrine, informed by our appellate courts' prior, binding expositions: that a person is not bound to become a fugitive from his own motor vehicle, and as such, he is under no requirement to flee *or to remain in* his motor vehicle until his assailant is upon him. *See Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; *see also Blue*, 356 N.C. at 86–87, 565 S.E.2d at 138.

Here, taking Defendant's account of the incident as true and considering the evidence in the light most favorable to Defendant, Penny opened the passenger's side door of Defendant's vehicle and began to repeatedly punch Defendant in the face; Defendant observed Penny was armed with a gun; and Defendant managed to disarm Penny, who then resumed punching Defendant. *See Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884. These facts demonstrate that, throughout this stage of the incident, Defendant was seated in the driver's seat of his vehicle, and at such time, Defendant was certainly a lawful occupant of his motor

---

865 S.E.2d at 355 ("The statute's definition of 'home' includes the home's curtilage, such as the driveway at issue in this case[.]" (citing N.C. Gen. Stat. § 14-51.2(a)(1))); *see also State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955) ("[T]he 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." (citations omitted)).

vehicle. *See* N.C. Gen. Stat. § 14-51.2(b). Defendant therefore was not bound to become a fugitive from his motor vehicle, and while under no obligation to flee, was *not* required to *remain in* the vehicle until Penny was "upon him." *See Blue*, 356 N.C. at 86–87, 565 S.E.2d at 138; *see also Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; *Austin*, 279 N.C. App. at 378, 865 S.E.2d at 352; *Vaughn*, 293 N.C. App. at 776, 901 S.E.2d at 265; *Benner*, 380 N.C. at 629, 869 S.E.2d at 205.

Next, after disarming Penny, and in retreat from Penny's relentless punches, Defendant exited through the vehicle's driver's side door and stood up; Penny came around to where Defendant stood and resumed his attack; and Defendant, while standing directly next to the driver's side door and still under attack from Penny, eventually discharged two lethal shots at Penny. Although Defendant was not "within" the vehicle when he shot Penny, as set forth above, Defendant was not required to remain in the vehicle to suffer Penny's attack, and the language and object of the statutory castle doctrine are such that, under certain circumstances, a defendant not "within" a motor vehicle may be afforded the benefits of the statute as a lawful occupant "of" the vehicle. *See* N.C. Gen. Stat. § 14-51.2(b), (b)(1); *see also Blue*, 356 N.C. at 86–87, 565 S.E.2d at 138; *Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; *Austin*, 279 N.C. App. at 378, 865 S.E.2d at 352; *Vaughn*, 293 N.C. App. at 776, 901 S.E.2d at 265; *Benner*, 380 N.C. at 629, 869 S.E.2d at 205.

Applying our statutory interpretation of the castle doctrine to the material facts of this case, under these *specific* circumstances—where Defendant retreated from his vehicle amidst an enduring attack, and exercised deadly force while standing directly next to the driver's side door, and still under attack—and viewing the evidence in the light most favorable to Defendant, we conclude that it would contravene the legislative intent of the statutory castle doctrine to find that Defendant was not an "occupant" of his vehicle when he exercised deadly force. *See Campbell*, 285 N.C. App. at 486–87, 878 S.E.2d at 318; *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884. Moreover, as this Court presumes "that the legislature acted in accordance with reason and common sense and did not intend untoward results[,]" *see Romulus*, 216 N.C. App. at 34, 715 S.E.2d at 893, where the purpose of the statutory castle doctrine was to *expand* the circumstances under which one may use justified force, it cannot be the intended result of the legislature that Defendant, in exercising restraint and initially attempting to withdraw from Penny's attack, would be deprived the benefit of the statute. *See* N.C. Gen. Stat. § 14-51.2(b); *see also Stevenson*, 81 N.C. App. at 412, 344 S.E.2d at 335; *Blue*, 356 N.C. at 86–87, 565 S.E.2d at 138; *Austin*, 279 N.C. App. at

378, 865 S.E.2d at 352; *Vaughn*, 293 N.C. App. at 776, 901 S.E.2d at 265; *Rankin*, 371 N.C. at 889, 821 S.E.2d at 792. This Court will not adopt an interpretation that yields this "absurd and bizarre consequence[,]" *see Romulus*, 216 N.C. App. at 34, 715 S.E.2d at 893, and we find the trial court's denial of Defendant's instructional request on the ground that he was not an "occupant" to be in error. *See* N.C. Gen. Stat. § 14-51.2(b); *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884.

2. Unlawful and Forcible Entry

In determining instructional error, we next assess whether (1) Penny was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, Defendant's vehicle; and (2) Defendant knew or had reason to believe that an unlawful and forcible entry or act was occurring or had occurred. *See* N.C. Gen. Stat. § 14-51.2(b)(1)–(2). Upon our de novo review of the Record, we conclude that both of these factors are met. *See Wirt*, 263 N.C. App. at 376, 822 S.E.2d at 673; *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884.

Treating Defendant's account of the incident as true, the Record demonstrates that Penny, without Defendant's invitation or consent, opened the passenger's side door of Defendant's car and began attacking Defendant, and after Defendant exited his vehicle, Penny came around the vehicle and continued to attack Defendant. *See Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884. Viewing this evidence in the light most favorable to Defendant, we conclude the Record demonstrates: (1) at different points in time throughout the incident, Penny was forcefully and unlawfully entering, and had forcefully and unlawfully entered, Defendant's vehicle; and (2) Defendant knew, and had reason to believe, such entry was occurring and had occurred. *See* N.C. Gen. Stat. § 14-51.2(b)(1)–(2); *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884. As the Record demonstrates the existence of these two factors, Defendant was entitled to a statutory castle doctrine instruction, and the trial court's failure to provide such instruction amounted to instructional error. *See* N.C. Gen. Stat. § 14-51.2(b)(1)–(2); *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884.

B. Prejudicial Error

Having concluded the trial court erred in failing to grant Defendant's request for a statutory castle doctrine instruction, we now determine whether the instructional error was prejudicial to Defendant's case. *See Dilworth*, 274 N.C. App. at 61, 851 S.E.2d at 409; *see also Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884. Upon our review of the Record, we discern this error to be prejudicial.

Regarding a statutory castle doctrine instruction, this Court has provided that, where a defendant shows by competent evidence that he was entitled to such instruction, he is "prejudiced by the trial court's failure to provide the requested instruction, because a person who uses permissible defense force pursuant to N.C. Gen. Stat. § 14-51.2 'is justified in using such force and is *immune from civil or criminal liability* for the use of such force.' " *State v. Kuhns*, 260 N.C. App. 281, 288, 817 S.E.2d 828, 832 (2018) (quoting N.C. Gen. Stat. § 14-51.2(e)) (cleaned up) (emphasis added); *see also* N.C. Gen. Stat. § 14-51.2(b). Per this standard, Defendant was prejudiced by the trial court's failure to provide the requested instruction.

The State, however, contends that there was no prejudicial error, as the Record demonstrates Penny had "discontinued all efforts" to enter Defendant's vehicle, and there was no question for the jury's consideration. *See* N.C. Gen. Stat. § 14-51.2(c)(5). This is a patently false statement of law. As explained above, the statutory castle doctrine functions as a burden-shifting provision, whereby "the defendant no longer has the burden to prove key elements of the traditional self-defense doctrine[,]" *Austin*, 279 N.C. App. at 380, 865 S.E.2d at 353, and is "*presumed* to have held a reasonable fear of imminent death or serious bodily harm to himself[.]" N.C. Gen. Stat. § 14-51.2(b) (emphasis added). Where a defendant demonstrates he is entitled to a statutory castle doctrine instruction, the burden of proof shifts to the State, and "if the State presents substantial evidence from which a reasonable juror could conclude that [the] defendant did not have a reasonable fear of imminent death or serious bodily harm, the State can *overcome* the presumption and *create a fact question for the jury*." *Austin*, 279 N.C. App. at 384, 865 S.E.2d at 356 (emphasis added).

As such, whether the State presented substantial evidence in support of a finding that Penny "discontinued all efforts" to enter Defendant's vehicle is a question of fact reserved for the jury, and one which we will not consider on appeal. *See id.* at 384, 865 S.E.2d at 356; *see also* N.C. Gen. Stat. § 14-51.2(c)(5). Rather, we find that because Defendant has shown by competent evidence he was entitled to a statutory castle doctrine instruction, but for the trial court's instructional error, there is a reasonable possibility a different result would have been reached by the jury. *See Dilworth*, 274 N.C. App. at 61, 851 S.E.2d at 409; *see also Kuhns*, 260 N.C. App. at 288, 817 S.E.2d at 832; *Parks*, 264 N.C. App. at 115, 824 S.E.2d at 884. We therefore reverse the trial court's judgment and remand for a new trial, and we need not address Defendant's remaining argument regarding the trial court's excessive force

instruction.[3] *See Kuhns*, 260 N.C. App. at 288, 817 S.E.2d at 832 ("[W]e reverse the judgment entered upon the jury's verdict finding [the] defendant guilty of voluntary manslaughter and remand for a new trial. Because we have reversed and remanded for a new trial, we need not address [the] defendant's remaining arguments on appeal.").

V. Conclusion

Upon careful review, we conclude Defendant has demonstrated by competent evidence that the trial court reversibly erred in denying his request for a statutory castle doctrine instruction. We therefore reverse the trial court's judgment, remand for a new trial on voluntary manslaughter and any lesser included offenses, and need not address Defendant's remaining argument.

NEW TRIAL.

Judge MURPHY concurs.

Judge STROUD concurs in result only by separate opinion.

STROUD, Judge, concurring in result only.

I concur in result only of the majority opinion. The majority opinion goes beyond what is necessary to resolve this case and may needlessly complicate the future interpretation and application of North Carolina General Statute Section 14-51.2. The statute states the instances when the presumption established by Section 14-51.2(b) should apply and under the evidence presented here, Defendant was entitled to the instruction. *See* N.C. Gen. Stat. § 14-51.2(b) (2023).

The majority opinion unnecessarily analyzes the definition of an "occupant" in determining whether Defendant should be afforded castle doctrine protections after he exited the vehicle. The statute itself is straightforward. Defendant was a "lawful occupant" of the vehicle as envisioned by the statute itself and there is no need for extensive

3. While we do not address Defendant's excessive force argument, we note that "in Castle Doctrine scenarios, unless the State rebuts the Castle Doctrine presumption, a jury cannot find that a defendant used excessive force." *State v. Phillips*, 290 N.C. App. 660, 664, 893 S.E.2d 256, 260 (2023) (citation omitted), *rev'd on other grounds*, 386 N.C. 513, 905 S.E.2d 23 (2024).

statutory interpretation. Though Defendant was outside the vehicle when he fired the weapon, based on the evidence, taken in a light most favorable to Defendant, he was still protected as a lawful "occupant" of the vehicle under the statute when the shooting occurred because he was forced to get out of the vehicle by Penny's entering the vehicle to attack him and Penny had not abandoned the attack.

Essentially, the statute outlines three scenarios in which the lawful occupant of a motor vehicle may use defensive and potentially deadly force: (1) someone is "in the process of unlawfully and forcefully entering" the occupant's motor vehicle; (2) someone had already "unlawfully and forcibly entered" the occupant's motor vehicle; or (3) someone has "removed or was attempting to remove another against that person's will" from the motor vehicle. *See* N.C. Gen. Stat. § 14-51.2(b)(1). Based on the language of the statute alone, an "occupant" of a motor vehicle is a person inside a motor vehicle at the time of an unlawful and forceful entry of the vehicle by another person. The statute addresses three scenarios which could be described as before, during, and after the unlawful and forceful entry into the motor vehicle by an intruder.

The evidence presented meets all the requirements under the second and third scenarios, during and after the entrance of the vehicle by the intruder. For the third scenario, the only question is if the "removal" of the occupant "against that person's will" must be the physical removal of the occupant from the vehicle, e.g., physically dragging him out of the car, or if the removal could occur because the occupant got out of the car to better protect himself during the attack. The State argues that Defendant may have the right to the instruction as to the presumption afforded to an "occupant" only if he was still inside the car:

> Defendant could have stayed in the driver seat after capturing the gun and fired either immediately or if [Penny] exited and relaunched his attack from outside the driver door. But [D]efendant instead elected to exit and engage [Penny] in the street. In such circumstances, [D]efendant was no longer an "occupant" for purposes of the defense of motor vehicle statute.

Based upon the State's argument, a lawful occupant would lose the protection of the statute by getting out of the vehicle even if the intruder pointed a gun at him from outside the car and demanded that he get out of the car. Even upon proper jury instructions, the jury could agree with the State and decide that Penny had abandoned the attack before Defendant got out of the car, but for purposes of jury instructions on

a defense, we must view the evidence in the light most favorable to Defendant. "In determining whether the evidence is sufficient to entitle the defendant to jury instructions on a defense, the trial court must consider the evidence in the light most favorable to the defendant." *State v. Kuhns*, 260 N.C. App. 281, 284, 817 S.E.2d 828, 830 (2018) (citation omitted). And in that light, Defendant was the lawful occupant of the vehicle and Penny was physically entering the vehicle and began attacking him. Defendant saw Penny had a gun, the attack was ongoing, and Defendant got out of the vehicle not because he wanted to get out; the removal from the vehicle was against his will because he was still under attack and believed he would be in a better position to protect himself from Penny. Defendant's "removal" from the vehicle was forced by Penny's actions and he was entitled to the instruction on the presumption under North Carolina General Statute Section 14-51.2(b)(1).

Under these circumstances, the majority opinion's statutory interpretation of "lawful occupant" is unnecessary because the language of the statute is clear and unambiguous. The discussion as to Defendant's "ownership" of the vehicle for purposes of determining whether castle doctrine protections should apply is unnecessary. The result would be the same had Defendant, for example, only been the passenger in someone else's car and Penny attacked him while inside that vehicle. And the discussion of "curtilage" is not relevant to a case dealing with a motor vehicle; motor vehicles are not stationary objects that can have a "curtilage" as a residence does. *See State v. Grice*, 367 N.C. 753, 759, 767 S.E.2d 312, 317 (2015) ("The curtilage is the area 'immediately surrounding and associated with the home.' " (quoting *Florida v. Jardines*, 569 U.S. 1, 6, 185 L. Ed. 2d 495 (citation and quotation marks omitted))). In non-Fourth Amendment cases, our North Carolina Supreme Court has stated that "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." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955) (citations omitted).

The statute envisions the person claiming the presumption established by Section 14-51.2(b) starts as an "occupant" inside a car when someone forcefully and unlawfully enters from outside the vehicle. However, the statute also envisions a situation where an occupant may need to use force *outside* the car if he is removed in the course of the attack. The State agrees this is true but contends there was no question for the jury in this case because "the evidence [was] undisputed that [Penny] had discontinued his entry and exited." But the evidence was not so clear as the State contends. As the majority notes, this evidence was disputed. Defendant argues that "the factual determination

of whether Penny had discontinued all efforts to enter [Defendant's] car should have been decided by the jury." Viewed in the light most favorable to Defendant, Penny's assault outside the car was a direct continuation of an attempt to enter the car and to attack Defendant inside the car and a jury could reasonably have found that Penny had not "discontinued" all efforts to enter Defendant's car. Here, Defendant started as an occupant of the vehicle but was "removed" from the vehicle against his will because Penny forcefully entered the vehicle and attacked him. He did not lose his status as an "occupant" of the car for purposes of the instruction. A jury may or may not believe that Defendant would still have the benefit of the presumption after he got out of the car, since the jury may not believe Penny had a gun, or they may believe Penny had discontinued his attack before Defendant got out, but Defendant was entitled to the instruction.

For these reasons, I concur in result only.

STATE OF NORTH CAROLINA
v.
JERRY DARRELL WILSON, DEFENDANT

No. COA23-1031

Filed 31 December 2024

Criminal Law—kidnapping—jury instructions—conviction upon theory not included in indictment—plain error shown

In a prosecution for multiple sexual offenses and one count of kidnapping, the trial court plainly erred by instructing the jury on a theory of kidnapping (based on involuntary servitude as defined in N.C.G.S. § 14-43.12) that differed from the one alleged in the indictment (based on sexual servitude as defined in N.C.G.S. § 14-43.13). The erroneous instruction rose to the level of plain error because the two theories constitute distinct crimes per the kidnapping statute (N.C.G.S. § 14-39) and, where the jury could have found defendant guilty of first-degree kidnapping based on the commission of a sexual assault but instead found defendant guilty of the lesser-included offense of second-degree kidnapping based on involuntary servitude and further found defendant not guilty of four counts of sexual servitude of a child, the jury's decisions clearly demonstrated that it considered involuntary servitude to be something entirely different from sexual servitude. Thus, the error had a probable impact on

the verdict. Defendant's kidnapping conviction was vacated and the matter was remanded for a new trial on the kidnapping charge only.

Appeal by defendant from judgment entered 2 December 2022 by Judge Alma L. Hinton in Superior Court, Beaufort County. Heard in the Court of Appeals 14 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Justin Isaac Eason, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction for felony second-degree kidnapping entered after a jury found him guilty of kidnapping and four counts of felony indecent liberties with a child. Defendant argues that the trial court plainly erred in its jury instructions and he is entitled to a new trial on the kidnapping charge. The State concedes error in the jury instructions but contends the instructions did not prejudice Defendant. Because the trial court instructed the jury as to kidnapping theories not included in the indictment and Defendant has demonstrated this instructional error rises to the level of plain error, we vacate Defendant's second-degree kidnapping conviction and remand for a new trial on the kidnapping charge only.

I. Factual and Procedural Background

In December 2017, the Beaufort County Sheriff's Office began investigating allegations of sexual misconduct occurring over a period of years by Defendant against Claire,[1] his step-granddaughter. The allegations centered around a pattern of inappropriate sexual behavior during the years when Claire was ages ten to fourteen. The investigation began in 2017 because Claire had not previously disclosed the abuse for fear of disrupting her family life. Ultimately, Defendant was charged with many sexual offenses committed over a period of years against three females, two of whom were minors. As to Claire, he was charged with four counts of sexual servitude of a child victim in violation of North Carolina General Statute Section 14-43.13; five counts of indecent

1. We have used a pseudonym to protect the identity of Claire.

liberties with a child; statutory first-degree sex offense with a child by an adult; one count of first-degree kidnapping by unlawful confinement "for the purpose of subjecting and maintaining her for sexual servitude[;]" and two counts of sex offense in a parental role. Fourteen charges were submitted to the jury; all but one of these charges related to offenses involving Claire.

At trial, Claire testified about many occasions Defendant had sexually abused her in various ways over a period of several years. We will not discuss most of this evidence but will limit our discussion to the evidence relevant to the issue on appeal as to second-degree kidnapping based on a theory of sexual servitude in 2015. The evidence tended to show that in 2015, Defendant entered Claire's bathroom while she was changing and told her she "couldn't come out of the bathroom until [she] took pictures of . . . [her] breasts." Claire testified Defendant gave her his phone to take the pictures and stood outside the locked bathroom door for about 25 or 30 minutes until she took them. Claire testified she felt "[f]orced" to take the pictures and that "I did what he told me to do so I could come out, but on the inside I wanted to stay in because I was so ashamed." Claire's mother testified she had suffered similar abuse when, at one point, her "dad wanted a picture of [her] breasts and . . . got it." She testified that he took her into a bedroom, closed and locked the door, stood between her and the door, and made her hold up her shirt so he could take a picture. A Beaufort County detective also testified to the results of his investigations that supported these claims. Defendant testified in his own defense but offered no further evidence outside of certain *voir dire* proceedings.

The trial court instructed the jury as to the first-degree kidnapping charge based on "serious injury" with a lesser included offense of second-degree kidnapping based on a theory of involuntary servitude, not sexual servitude as alleged in the indictment. In the closing arguments, the State argued Defendant should be convicted of kidnapping based on involuntary servitude, arguing that "[t]he involuntary servitude is making her take the photograph of herself. And you'll hear the Judge define that for you. But having her take a photograph of herself, a sexual photograph, a photograph she did not want to take, qualifies as involuntary servitude." The trial court instructed the jury to find Defendant guilty of second-degree kidnapping if it determined in relevant part that he did not "seriously injure" Claire but kidnapped her "for the purpose of holding . . . [her] in involuntary servitude[.]" Defendant did not object to either the State's argument or the trial court's instruction as to "involuntary servitude."

The jury found Defendant guilty of one count of second-degree kidnapping and five counts of indecent liberties. Defendant also pled guilty to one additional count of indecent liberties.[2] Relevant to the issues on appeal, the jury found Defendant "not guilty of sexual servitude" for the "alleged dates of 3/1/15 through 6/1/15" and "guilty of indecent liberties with a child" for the same alleged dates. The jury also found Defendant guilty of second-degree kidnapping for the "alleged dates of 3/01/15 through 6/01/15." Defendant gave oral notice of appeal from the judgment.

II. Jurisdiction

Under North Carolina General Statute Sections 7A-27 and 15A-1444, this Court has jurisdiction to hear Defendant's appeal of the trial court's entry of final judgment for his convictions. N.C. Gen. Stat. § 7A-27(b)(1) (2023) (superior court's final judgment); N.C. Gen. Stat. § 15A-1444(a)(1) (2023) (pled not guilty but found guilty).

III. Standard of Review

Defendant did not object to the jury instructions at trial, so review on appeal is limited to plain error. A defendant may appeal "an issue . . . not preserved by objection noted at trial" only if he "specifically and distinctly contend[s]" that the "judicial action questioned . . . amount[s] to plain error." N.C. R. App. P. 10(a)(4). Defendant bears the burden of showing "a fundamental error . . . at trial" that so "prejudice[d]" him as to have "a probable impact on the jury's" guilty verdict. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Our Supreme Court has further discussed the "probable impact" prong as "meaning that absent the error, the jury probably would have returned a different verdict." *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024). Generally, the error should "be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (quotation marks and brackets omitted).

We review the jury instructions in their entirety to determine if the jury may have been misled or misinformed about the applicable law:

> The charge of the court must be read as a whole, in the same connected way that the judge is supposed to have

---

2. Fourteen charges were submitted to the jury and Defendant was convicted of six charges. Five of the counts of indecent liberties involved Claire; one involved another victim. The charges of indecent liberties arose from various incidents when Defendant touched Claire on her breasts. Only one of the charges for which Defendant was convicted, second-degree kidnapping, is at issue in this appeal.

> intended it and the jury to have considered it. It will be construed contextually, and isolated portions will not be held prejudicial when the charge as whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Tadeja, 191 N.C. App. 439, 448, 664 S.E.2d 402, 409-10 (2008) (citations omitted).

IV. Jury Instructions on Kidnapping

On appeal, Defendant contends the trial court plainly erred by instructing the jury that it could convict him of the kidnapping charge based on a theory not alleged in the indictment. The indictment alleged first-degree kidnapping in violation of North Carolina General Statute Section 14-39 based on sexual servitude, but the trial court instructed the jury on first-degree kidnapping based on involuntary servitude, a different element of the crime of kidnapping as defined by North Carolina General Statute Section 14-43.12. *See* N.C. Gen. Stat. § 14-39 (2023); N.C. Gen. Stat. § 14-43.12 (2023). The indictment alleged Defendant had kidnapped Claire "by unlawfully confining her . . . without the consent of [Claire's] parent or legal guardian, and for the purpose of subjecting and maintaining her for sexual servitude. [Claire] was sexually assaulted."

The State "acknowledges that the trial court gave an instruction covering involuntary servitude" and "[i]nsofar as the instructions given allowed the jury to convict on grounds other than those charged in the indictment, they were error." Although the indictment was based on sexual servitude, the trial court instructed the jury on kidnapping based on "holding the person in involuntary servitude, which is the unlawful holding of a person against her will by coercion or intimidation for the performance of labor." The State notes that "there currently does not appear to be any pattern jury instruction available for kidnapping for the purpose of sexual servitude, so the trial court gave the only kidnapping instruction involving servitude." But the State contends that the erroneous jury instruction was not a "fundamental error" and the jury probably would not have reached a different verdict but for this instructional error.

We first note that the State's claim that the pattern jury instructions do not address sexual servitude is not entirely correct. It is true that North Carolina Pattern Instruction Criminal 210.26, entitled "First Degree Kidnapping (involuntary servitude) covering second degree kidnapping as a lesser included offense" (capitalization altered), does not

include an option as to sexual servitude; it includes only involuntary servitude. N.C.P.I. Crim. 210.26. But other pattern jury instructions do address the crime of sexual servitude and sexual servitude of a minor, *see* N.C.P.I. Crim. 210.70 ("Sexual Servitude") and 210.72 ("Sexual Servitude of a Minor"), and the instructions refer to the statutes defining both involuntary servitude and sexual servitude. And the trial court actually instructed the jury on the crime of sexual servitude, based upon North Carolina Pattern Instruction 210.70, as four counts of this offense were submitted to the jury. The kidnapping statute also refers directly to North Carolina General Statute Section 14-43.13 for the definition of "sexual servitude" and the same definition applies for both the crime of sexual servitude and the element of sexual servitude regarding the kidnapping charge. *See* N.C. Gen. Stat. § 14-39 ("Kidnapping"); N.C. Gen. Stat. § 14-43.13 ("Sexual servitude") (2023). The fact that the trial court instructed the jury as to sexual servitude and the jury found Defendant not guilty of all four charges tends to indicate that the jury considered the uncharged "involuntary servitude" to be something different from "sexual servitude," contrary to the State's argument on appeal.

We also note that the absence of a particular instruction in the pattern instructions is not an excuse to not give the correct legal instructions to the jury. As our Supreme Court has noted, the pattern jury instructions direct that "all pattern instructions should be carefully read and adaptations made, if necessary, before any instruction is given to the jury." *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (citation and emphasis omitted). If the issues in a particular case call for an instruction not addressed in the pattern instructions, the trial court must adapt the instructions based upon the relevant law.

First, it is clear, as the State admits, the trial court erred in instructing the jury as to a theory not alleged in the indictment. Defendant was not charged with the crime of involuntary servitude in violation of North Carolina General Statute Section 14-43.12 or with kidnapping for the purpose of involuntary servitude in violation of North Carolina General Statute Section 14-39(a)(4). He was charged with the crime of sexual servitude in violation of North Carolina General Statute Section 14-43.13 and with kidnapping for the purpose of sexual servitude based on North Carolina General Statute Section 14-39(a)(6). These are two different crimes and both are defined by statutes specifically referenced in the kidnapping statute. *See* N.C. Gen. Stat. § 14-39 ("Kidnapping").

Defendant was charged with the crime of kidnapping based on "sexual servitude" under North Carolina General Statute Section 14-39. This statute defines kidnapping:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.[3]
>
> . . . .
>
> (6) *Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.*
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. *If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree* and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39 (emphasis added).

Although involuntary servitude is one of the potential bases for a conviction of kidnapping, *see id.*, Defendant was not indicted based on a theory of involuntary servitude. We also note Defendant was convicted of *second-degree* kidnapping, demonstrating the jury found Defendant was not guilty of committing "serious[ ] injury" to Claire, based upon the trial court's instructions, which did not instruct the jury as to the option of sexual assault upon Claire as one of the elements of first-degree kidnapping. The second-degree kidnapping conviction could be based only on "involuntary servitude" under the jury instructions as given.

For purposes of crimes set forth in Chapter 14, Subchapter 3, Article 10A of the General Statutes, "involuntary servitude" is defined as:

---

3. The crime of involuntary servitude is defined by North Carolina General Statute Section 14-43.12: "a) A person commits the offense of involuntary servitude when that person knowingly and willfully or in reckless disregard of the consequences of the action holds another in involuntary servitude." N.C. Gen. Stat. § 14-43.12 (2023).

> a. The performance of labor, whether or not for compensation, or whether or not for the satisfaction of a debt; and
>
> b. By deception, coercion, or intimidation using violence or the threat of violence or by any other means of coercion or intimidation.

N.C. Gen. Stat. § 14-43.10(a)(3) (2023).

"Sexual servitude" is defined to include:[4]

> a. Any sexual activity as defined in G.S. 14-190.13 for which anything of value is directly or indirectly given, promised to, or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years; or
>
> b. Any sexual activity as defined in G.S. 14-190.13 that is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years.

N.C. Gen. Stat. § 14-43.10(a)(5) (2023).

The kidnapping statute specifically refers to other statutes that define both "sexual servitude" and "involuntary servitude." *See* N.C. Gen. Stat. § 14-39(a). North Carolina General Statute Section 14-43.13 defines the crime of sexual servitude:

> A person commits the offense of sexual servitude when that person knowingly or in reckless disregard of the consequences of the action subjects, maintains, patronizes, solicits, or obtains another for the purposes of sexual servitude.

N.C. Gen. Stat. § 14-43.13.

Defendant was charged with four counts of sexual servitude in violation of North Carolina General Statute Section 14-43.13, including a count occurring in 2015, during the same dates as alleged for kidnapping

---

4. The terms "coercion" and "deception" as used in the statute are also defined for purposes of Article 10A in North Carolina General Statute Section 14-43.10(a)(1) and (a)(2). *See* N.C. Gen. Stat. § 14-43.10(a)(1) (2023); *see also* N.C. Gen. Stat. § 14-43.10(a)(2) (2023).

based on sexual servitude, but the jury found Defendant not guilty of all four counts of sexual servitude.

The jury found Defendant guilty of the lesser included offense of second-degree kidnapping, although he was charged with first-degree kidnapping based upon commission of a sexual assault. During the charge conference, the trial court and counsel discussed which parentheticals in North Carolina Pattern Instruction 210.26 should be given to the jury. On the "fourth element" of the instruction on first-degree kidnapping, the State requested that the trial court use "sexually assault." We note that sexual assault was the element specifically included in the indictment for the first-degree kidnapping. But the trial court noted, based upon the evidence presented at trial as to the 2015 incident, that "[t]he picture is not a sexual assault." Defendant's counsel agreed that "this was related to the photograph incident and there was no contact whatsoever." The State then requested that the trial court instruct as to the option of "serious injury," arguing that Claire had a

> serious injury that she sustained as a result and that she still continues to suffer from today as a result of the sexual abuse perpetuated on her by [Defendant]. . . . And so I would argue to Your Honor based on that, that she has been seriously injured based on that whole spectrum of abuse that she suffered in taking the photographs, being locked -- you know, locked in this room, forced to take photographs of herself certainly . . . locked in the bathroom for about 30 minutes and only when she took the photographs was she released.

Based upon the years of sexual abuse, the State argued that Claire had suffered a "pretty significant emotional injury" as indicated by the evidence of "her cutting herself, being admitted to the hospital, seizures, therapy dog, about how this has totally altered her self-worth, her body image, everything, and how it has fractured her entire family of which she's still, you know, suffering the effects today." Ultimately, the trial court decided to give the instruction as to first-degree kidnapping based upon "serious injury," although it would "not define seriously injured," and to instruct on the lesser-included offense of second-degree kidnapping based upon "the purpose of involuntary servitude, which was the production of the picture."

The trial court instructed the jury on all the crimes charged. Several portions of the instructions are relevant to the issues on appeal. First, the trial court's instruction on the charges of sexual servitude was

based on North Carolina Pattern Instruction 210.70. Although the jury found Defendant not guilty of all four charges of sexual servitude, these instructions correctly define sexual servitude:

> The defendant has been charged in 17-CRS-52280, 17-CRS-52281, 17-CRS-52282 and 17-CRS-52283 with -- has been charged with sexual servitude.
>
> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant, by coercion of another person for the purpose of any sexual activity for which anything of value is directly or indirectly given or promised to any person for the purpose of any sexual activity that is performed or provided.
>
> And second, that the defendant did so knowingly.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged dates, the defendant knowingly, by coercing another person for the purpose of any sexual activity for which anything of value is directly or indirectly given or promised to any person for the purpose of sexual activity that is performed or provided it would be your duty to return a verdict of guilty.

The trial court's instruction on the charge of kidnapping was based on North Carolina Pattern Instruction 210.26, which refers to involuntary servitude, not sexual servitude; the trial court instructed the jury on the charge of first-degree kidnapping as follows:

> In 17-CRS-52285, the defendant has been charged with first degree kidnapping.
>
> For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant unlawfully confined a person, that is, imprisoned her within a given area.
>
> Second, that the person had not reached her sixteenth birthday and her parent did not consent to this confinement. Consent obtained or induced by fraud or fear is not consent.
>
> Third, that the defendant did this for the purpose of holding the person in involuntary servitude, which is the

> unlawful holding of a person against her will by coercion or intimidation for the performance of labor.
>
> And fourth, that the person had been seriously injured.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant unlawfully confined a person and that the person had not reached her sixteenth birthday and her parent did not consent to this confinement and that this was for the purpose of holding that person in involuntary servitude, and that the person had been seriously injured, it would be your duty to return a verdict of guilty of first degree kidnapping.
>
> If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree kidnapping, you must determine whether defendant is guilty of second degree kidnapping.
>
> Second degree kidnapping differs from first degree kidnapping in that it is -- it is unnecessary for the State to prove that the person confined had been seriously injured.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant unlawfully confined a person and that the person had not reached her sixteenth birthday and that her parent did not consent to this and that this was for the purpose of holding that person in involuntary servitude, it would be your duty to return a verdict of guilty of second degree kidnapping.

Here, the trial court erred, as the State concedes, because it instructed the jury as to "a theory under [14-39(a)] totally distinct from the theory alleged in the indictment[.]" *State v. Brown*, 312 N.C. 237, 247, 321 S.E.2d 856, 862 (1984). The indictment specified "sexual servitude" but instead of an instruction based upon the indictment and the evidence presented, the jury was instructed upon a theory not charged, involuntary servitude. In addition, the jury's verdicts of not guilty as to the specific charge of sexual servitude alleged for the same dates as the kidnapping charge indicate it must have considered the "involuntary servitude" to be something entirely different from "sexual servitude," the crime for which Defendant was indicted.

In *Brown*, our Supreme Court found plain error in jury instructions where the defendant was convicted upon a theory not included in the indictment:

> This Court has consistently held that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment. *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)[.] Unlike the short-form indictments authorized for homicide (N.C. Gen. Stat. § 15-144 (1983)) and rape (N.C. Gen. Stat. § 15-144.1 (1983)), an indictment charging first-degree kidnapping *must* include information "regarding the factual basis under which the State intends to proceed and, under the authority of *Taylor* and cases cited therein the State is limited to that factual basis at trial." *See also State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983) (indictment for kidnapping will not support conviction unless all elements of crime accurately and clearly alleged in indictment).

312 N.C. at 248-49, 321 S.E.2d at 863 (emphasis in original) (citations omitted).

In accord with *Brown* and *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986), the trial court plainly erred in instructing the jury on a theory not charged in the indictment and Defendant has demonstrated that the instructional error may have "tilted the scales and caused the jury to reach its verdict convicting . . . [D]efendant." *Tucker*, 317 N.C. at 539, 346 S.E.2d at 421 (citation and quotation marks omitted); *see also Brown*, 312 N.C. at 248-49, 321 S.E.2d at 863. "Defendant must, therefore, receive a new trial on the kidnapping charge for plain error in the jury instructions." *Tucker*, 317 N.C. at 540, 346 S.E.2d at 422. The trial court's erroneous instruction "had a probable impact on the jury's finding of guilt" and "absent the error, the jury probably would have returned a different verdict." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (emphasis omitted); *Reber*, 386 N.C. at 158, 900 S.E.2d at 786. Thus, we conclude the trial court erred in its jury instructions and that instructional error rises to the level of plain error requiring a new trial on the kidnapping charge.

V. Conclusion

We conclude the trial court plainly erred in the jury instructions as to kidnapping and for the reasons stated above, Defendant is entitled to a new trial on the charge of first-degree kidnapping.

NEW TRIAL.

Judges CARPENTER and THOMPSON concur.

STATE v. WOMBLE

[297 N.C. App. 547 (2024)]

STATE OF NORTH CAROLINA
v.
COREY ANTWAN WOMBLE, DEFENDANT

No. COA23-642

Filed 31 December 2024

1. Appeal and Error—motion to withdraw by appellate counsel —no constitutional right implicated—denied

In an appeal from convictions for attempted first-degree murder and other felonies where defendant had the Appellate Defender appointed as new appellate counsel after his initial appellate counsel was allowed to withdraw—but then supported a motion by the Appellate Defender to withdraw—the Court of Appeals denied the motion to withdraw (as well as any alternative motion for substitution of appointed counsel), noting the lack of any constitutional right for a criminal defendant to proceed pro se on appeal, control the arguments of appointed appellate counsel, or obtain substitute appointed appellate counsel. The appellate court also dismissed without prejudice additional motions that defendant filed, pro se, after the appointment of the Appellate Defender.

2. Evidence—hearsay—residual exceptions—statement recanted by victim—no abuse of discretion—Confrontation Clause inapplicable

In a prosecution that resulted in defendant being convicted of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by felon—arising from defendant shooting the victim in the neck in a convenience store parking lot following a verbal altercation between the two men—where the victim recanted his identification of defendant as his assailant after reporting a fear of retribution by defendant and testified on defendant's behalf at trial, the trial court did not abuse its discretion in admitting a recording of the victim's statement to a law enforcement officer pursuant to either Evidence Rule 803(24) (the residual hearsay exception that applies if the declarant is available) or Evidence Rule 804(b)(5) (the residual hearsay exception that applies if the declarant is unavailable), each of which requires the same six determinations to be made by the trial court. Despite the absence of findings by the trial court regarding the circumstantial guarantees of trustworthiness of the statements sought to be admitted, upon review of the record the appellate court was

able to determine that the recording satisfied each of the six requirements and could be deemed sufficiently trustworthy. Further, defendant's challenge to the statement on Confrontation Clause grounds failed as the trial court placed no limitations upon what defendant could ask the victim during his testimony as a witness for the defense.

3. Evidence—hearsay—present sense impression exception—no plain error

In a prosecution that resulted in defendant being convicted of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by felon—arising from defendant shooting the victim in the neck in a convenience store parking lot following a verbal altercation between the two men—defendant could not establish plain error in the trial court's admission of a hearsay statement identifying defendant as the shooter, which was made by the store cashier to a law enforcement officer at the scene, where, even assuming that the statement was admitted erroneously, the remaining evidence (including other eyewitness testimony, video surveillance footage, and defendant's own testimony) was sufficient to support the jury verdicts.

Appeal by Defendant from judgments entered 15 November 2022 by Judge Stephan R. Futrell in Richmond County Superior Court. Heard in the Court of Appeals 7 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for defendant-appellant.

MURPHY, Judge.

The trial court did not abuse its discretion in admitting the victim's statement under the residual hearsay exception. Defendant's right to confrontation was not violated where the victim served as a witness for Defendant at trial and Defendant was not limited in his scope of questioning.

Defendant cannot show that the trial court committed plain error in admitting the witness Navy Stancil's out-of-court statement.

BACKGROUND

A. At Trial

Defendant appeals from convictions of attempted first-degree murder, armed habitual felon, possession of a firearm by felon, and assault with a deadly weapon with intent to kill inflicting serious injury.

The record before us tends to show that, around 2:00 a.m. on 17 August 2019, Defendant and a group of friends visited a convenience store, where he encountered Victor Lindsey. At some point during this encounter, Defendant and Lindsey engaged in a verbal altercation. Sometime after this exchange, Lindsey entered his vehicle, where a woman was waiting in the passenger seat, and attempted to back out of his parking spot. Afterwards, Bobby Martin, a patron, and Navy Stancil, a cashier on duty, witnessed Defendant pull out a gun from behind his back, approach the driver's side of Lindsey's vehicle, and shoot Lindsey in the neck. Defendant then returned to his own vehicle and left the scene with a woman.

After Defendant left the scene, Martin approached Lindsey and attempted to slow his bleeding. Martin instructed Lindsey's passenger to assist until an ambulance arrived. Corporal Donovan Williams was the first law enforcement officer to respond to the scene, where he observed Lindsey and spoke to witnesses. Corporal Williams first interviewed Stancil, who told him what she witnessed and showed him a Facebook photo of Defendant, who she identified as the shooter. Corporal Williams also took statements from Martin and three other individuals before driving to the hospital to speak to Lindsey. However, Lindsey did not provide a statement at that time.

On 7 June 2021, Defendant was indicted for one count of attempted first-degree murder in connection with the events on 17 August 2019. On 6 December 2021, Defendant was further indicted for one count of assault with a deadly weapon with intent to kill inflicting serious injury. On 10 October 2022, Defendant was indicted for one count of possession of a firearm by a convicted felon and one count of armed habitual felon.

On 13 October 2022, the trial court presided over a pretrial hearing in Defendant's case. During this hearing, the State submitted the following to the trial court:

> And for the Court's record and of note, I did want to express that there was some information that was brought to the District Attorney's Office in reference to this particular Defendant reaching out via a third party to our victim

> in the case by way of a potential bribe [of $10,000.00], and so the State is not going to proceed on that by way of an additional charge, but however, I would like for the Defendant to understand the seriousness of that and that he is set for trial [7 November 2022] and needs to have no contact with the witness either directly or through third parties.

Defendant responded that "he believe[d] that [the] third party acted on their own volition" and not "at his direction" and that he was "fully aware that he can't have direct contact . . . or request that a third party reach out to any of the victims or witnesses in this matter."

The State filed a motion in limine alleging that, on 26 October 2022, Stancil met with the State and notified the State that "[Defendant] contacted her approximately two weeks after the shooting on [17 August 2019] and asked her why she was going to snitch on him." During this meeting, "Stancil expressed concern for her safety[.]" The State also alleged that, on 2 November 2022, approximately one week before trial was scheduled to begin, Lindsey communicated to the State that Defendant had told Lindsey's family member that "he was going to shoot up [Lindsey's] house." After numerous unsuccessful attempts to reach him, the State reached Lindsey, who "said that he was done and that he wouldn't be coming into court" and that he was "doing it for his family." Lindsey's nephew confirmed to law enforcement officers that "[Defendant] came to his home and said[,] 'Tell your people if anyone testifies against me, I will shoot up their house[,]' while making a gun gesture with his hand." Law enforcement officers subsequently obtained a warrant for Defendant's arrest for intimidating a witness, but they were unable to serve it until Defendant was seen speaking with Lindsey in the courthouse on 7 November 2022. The State further alleged that, on 3 November 2022, law enforcement officers received a call from a woman who identified herself as the girlfriend of Ben Forbis, a potential witness for the State, who "indicated [Forbis] had been receiving threats from [Defendant] not to come to court and [that] she was afraid." On 3 November 2022, the State also received a call from Forbis, who "said that he wasn't coming to court, he wasn't testifying, he was scared, [and] he didn't want to have anything to do with what was going on[.]"

On 7 November 2022, Womble filed an affidavit signed by Lindsey which stated, in pertinent part, as follows:

> 3. That I make this statement of my own free will, absent of any duress;

> 4. That on or about [17 August 2019], I was shot in the neck;
>
> 5. That on the aforementioned date, [Defendant] was not the individual who shot me.
>
> 6. That initially, I did not tell the police who the shooter was;
>
> 7. Then I subsequently did identity [Defendant] as the shooter;
>
> 8. [Defendant] was not in fact the shooter.

That same day, the State filed a motion in limine to declare Defendant's right to confront Lindsey, Stancil, and Forbis as "forfeited . . . by his pre-trial actions."

On 8 November 2022, the State filed additional motions in limine to preclude Defendant from entering evidence "showing . . . the possibility of another person's responsibility for the crimes . . . if that inquiry, evidence, or showing does not: (1) point directly to another person's guilt, and (2) contradict [Defendant's] guilt" and to admit recordings of hearsay statements made by Stancil and Lindsey into evidence pursuant to N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(5).

On 8 November 2022, the trial court presided over a hearing on these motions. The trial court found that Defendant forfeited his right to confrontation of Lindsey and admitted the recording of Lindsey's statement to Chief George Gillenwater under 803(24) and 804(b)(5). The trial court further permitted the State to introduce evidence of Stancil's prior identification of Defendant as a present sense impression.

At the conclusion of trial, Defendant was convicted of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by felon and stipulated to the armed habitual felon offense. Defendant appealed.

B. On Appeal

[1] On appeal, Defendant attempted to file multiple pro se motions while still represented by counsel. We dismissed these motions without prejudice due to Defendant still being represented. Additionally, Defendant's then-appellate counsel filed a motion to withdraw. We allowed this motion and remanded to the trial court for a determination as to whether Defendant was indigent and desired the Appellate Defender to be appointed. The Appellate Defender was appointed on

20 March 2024. However, on 4 June 2024, appellate counsel decided not to file any further motions after reviewing the pro se motions previously filed and moved to withdraw as appellate counsel upon Defendant's request. Despite being informed by appellate counsel that Defendant may not be entitled to appointed counsel for the remaining duration of the appeal if the motion was allowed, Defendant indicated a desire to proceed with the motion to withdraw and to seek substituted appointed counsel, which appellate counsel opposes.

Here, we deny the motion to withdraw. It is worth noting that Defendant has no constitutional right to proceed pro se on appeal. *See Martinez v. Court of Appeal*, 528 U.S. 152, 161, 163 (2000) (stating that "the [Sixth] Amendment itself does not provide any basis for finding a right to self-representation on appeal [or a right to appeal]" and holding "that neither the holding nor the reasoning in *Faretta* requires California to recognize a constitutional right to self-representation on direct appeal from a criminal conviction[]"). Additionally, to the extent that there is an alternative motion for substitution of appointed counsel, we deny that motion as well. It is well established that there is no right to choice of appointed counsel. *See State v. Thacker*, 301 N.C. 348, 351–52 (1980) (citations and footnote omitted) ("[A]n indigent defendant does not have the right to have counsel *of his choice* appointed to represent him. This does not mean, however, that a defendant is never entitled to have new or substitute counsel appointed. A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of [the] defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded [the] defendant his constitutional right to counsel."). We find no constitutional insufficiency in appellate counsel's conduct here, and substitution is not necessary. Although the motion to withdraw is made on the basis of a disagreement regarding what appellate counsel should file on appeal, we note that there is no right to control the arguments of appellate counsel. *See Jones v. Barnes*, 463 U.S. 745, 751–54 (1983) ("Neither *Anders* nor any other decision of this Court suggests . . . that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. . . . For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*.").

Relatedly, our caselaw regarding absolute impasse, established by *State v. Ali*, 329 N.C. 394 (1991), is inapplicable on appeal, and is properly

restricted to representation by trial counsel. The absolute impasse rule is outlined in *Ali* as follows:

> Our Court of Appeals has held that tactical decisions, such as which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer. . . . However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship. In such situations, however, defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.

Id. at 404 (citations and marks omitted). *Ali* was decided in the context of Sixth Amendment rights at the trial court level and should be limited to this setting. *Id.* at 402–04 (discussing the right to counsel at multiple points, citing cases based on the Sixth Amendment, enunciating the absolute impasse rule in the context of an allegation that the right to counsel was violated, and ultimately holding "the defendant was not denied effective assistance of counsel"). We have not found any case which applies *Ali* in the context of appellate counsel. Additionally, limiting this rule to trial counsel is appropriate, as to apply it to appellate counsel would conflict with the Supreme Court's holding in *Jones v. Barnes*, which we are bound by. *See Johnston v. State*, 224 N.C. App. 282, 288 (2012) (citing *State v. Elliott*, 360 N.C. 400, 421 (2006), and *In re Civil Penalty*, 324 N.C. 373 (1989)) ("In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court[,] . . . [and] decisions of the North Carolina Supreme Court construing federal constitutional . . . provisions, and we are bound by those interpretations. We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court.").

In summary, we find no constitutional violation in appellate counsel's refusal to submit arguments to us despite Defendant's express desire and see no reason to allow counsel to withdraw or appoint substitute appointed counsel.

Following the motion to withdraw, but prior to any ruling by our Court regarding it, Defendant filed multiple pro se motions, including *Exhibits to be Attached to Pro Se Motion Designated "Substitution of*

Appointed Appellant Counsel"; Substitution of Appointed Appellate Counsel; Motion Asking to be Heard; Motion to Compel; Motion to Supplement Previously Filed Motion for Substitution of Appointed Appellate Counsel; Supplemental Motion; Motion for Appropriate Relief; Addendum of Law; Motion for Judicial Notice; Motion to Notify the Court; Motion to Take Judicial Notice; and *Motion to Invoke Rule 2.*

These motions were filed improperly, as Defendant was represented by counsel at the time of their filing. *See State v. Williams*, 363 N.C. 689, 700 (2009) (citations and marks omitted) ("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. Having elected for representation by appointed defense counsel, [a] defendant cannot also file motions on his own behalf or attempt to represent himself. [A] [d]efendant has no right to appear both by himself and by counsel."). As a result, we dismiss these motions without prejudice as not properly before us.

ANALYSIS

On appeal, Defendant asserts several evidentiary issues surrounding the admission of purported hearsay statements.

A. Residual Hearsay Exception

[2] Defendant first argues that the trial court erred in admitting the hearsay recording of Lindsey's statement to Chief Gillenwater under a residual hearsay exception.

> The admission of evidence pursuant to the residual exception to hearsay is reviewed for an abuse of discretion, and may be disturbed on appeal only where an abuse of such discretion is clearly shown. The appellant must show that he or she was prejudiced and a different result would have likely ensued had the error not occurred.

In re W.H., 261 N.C. App. 24, 27 (2018) (cleaned up).

Here, the trial court granted the State's motion to admit the recording of Lindsey's statement to Chief Gillenwater pursuant to N.C.G.S. § 8C-1, Rule 803(24), the residual hearsay exception that applies if the declarant is available, and pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5), the residual hearsay exception that applies if the declarant is unavailable. Assuming, *arguendo*, that we agree with Defendant's argument that the trial court erred in determining that Lindsey was unavailable as a witness, the requisite inquiry for its admission of the recorded statement remains the same under Rule 803(24):

> Rule 803(24) of the North Carolina Rules of Evidence is essentially identical to Rule 804(b)(5), but it does not require that the declarant be unavailable. Under either of the two residual exceptions to the hearsay rule, the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 517–18 (2003) (citations omitted). Thus, we review whether the trial court properly admitted Lindsey's statement pursuant to Rule 803(24).

Under the residual hearsay exception contained in Rule 803(24):

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C.G.S. § 8C-1, Rule 803(24) (2023).

The trial court determined the following in ruling on the State's motion to admit the recorded statement pursuant to Rules 803(24) and 804(b)(5):

> The [c]ourt finds that the . . . interview statement of the . . . alleged victim Victor [Lindsey] by now Chief Gillenwater is being offered first as evidence of the material fact; there's . . . two material facts, the identity of the person who shot him, and what happened.
>
> Secondly, the statement is more probative on that point for which it's offered than any other evidence, which the State, being the proponent, can procure through reasonable efforts, and the general purpose of the rules in the interest of justice would be best served by the admission of the statement into evidence. The [c]ourt finds the State gave written notice of its intention to offer the statement as soon as it . . . was aware of the circumstances of the witnesses changing or saying something different from what he had previously said.
>
> Also, the Defendant has an opportunity in advance to prepare to respond to the introduction of that evidence and the [c]ourt incorporates, by reference, its previous findings in relation to the unavailability of that witness.

Defendant does not challenge these findings of fact on appeal and argues only that, "regardless of whether the trial court's finding was based upon [Rule 803(24) or Rule 804(b)(5)], the ruling was in error because there were no findings whatsoever regarding the circumstantial guarantees of trustworthiness of the statements sought to be admitted."

"The trial court is required to make findings of fact and conclusions of law when determining the trustworthiness of a hearsay statement." *Valentine*, 357 N.C. at 518. In *Valentine*, "[t]he State concede[d] that the trial court erroneously failed to make the required findings of fact and conclusions of law[,]" and, "[b]ecause the trial court failed to determine whether the victim's statements . . . contained equivalent circumstantial guarantees of trustworthiness necessary for admission under the exceptions to the hearsay rule," our Supreme Court "review[ed] the record and [made] [its] own determination." *Id.* (marks omitted). Here, too, we review whether Lindsey's statement to Chief Gillenwater contains the equivalent circumstantial guarantees of trustworthiness necessary for admission.

> When determining the trustworthiness, the following considerations are at issue: (1) whether the declarant had personal knowledge of the underlying events, (2) whether the declarant is motivated to speak the truth or otherwise,

> (3) whether the declarant has ever recanted the statement, and (4) whether the declarant is available at trial for meaningful cross-examination.

Id. "We note that any recantation of testimony is a factor. However, our Supreme Court has also instructed that none of these four factors, alone or in combination, may conclusively establish or discount the statement's circumstantial guarantees of trustworthiness." *In re W.H.*, 261 N.C. App. at 28 (cleaned up).

Lindsey initially stated to Chief Gillenwater in April 2021 that Defendant had shot him. As the victim of a crime, Lindsey was reasonably motivated to speak the truth and had personal knowledge of the incident. Although Lindsey recanted the statement later on 7 November 2022, he did so only after he made the State aware that Defendant had begun threatening Lindsey and his family. Furthermore, Lindsey was available at trial to be questioned by Defendant about the statement, as Lindsey served as a witness for Defendant.

Defendant also challenges the admission of Lindsey's hearsay statement on Confrontation Clause grounds. This argument fails, as Lindsey served as a witness for Defendant, and the trial court placed no limitations upon what Defendant could ask of him.

B. Present Sense Impression

[3] Defendant next argues that the trial court erred in admitting Stancil's out-of-court statement as a present sense impression because it was not made sufficiently close in time to the event. Defendant also argues that the admission of Stancil's out-of-court statement violated his constitutional right to confrontation. However, the trial court admitted the State's Exhibit 5, Corporal Williams's bodycam footage, without objection at the time it was offered. Defendant therefore failed to preserve these issues for our review:

> Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial. It is insufficient to object only to the presenting party's forecast of the evidence. As such, in order to preserve for appellate review a trial court's decision to admit testimony, objections to that testimony must be contemporaneous with the time such testimony is offered into evidence and not made only

> during a hearing out of the jury's presence prior to the actual introduction of the testimony.
>
> In the case *sub judice* [the] defendant objected to the admission of evidence regarding his 1990 assaultive behavior only during a hearing out of the jury's presence. In other words, [the] defendant objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was actually introduced at trial. Thus, [the] defendant failed to preserve for appellate review the trial court's decision to admit evidence regarding his 1990 assaultive behavior.

State v. Ray, 364 N.C. 272, 277 (2010) (citations and marks omitted).

However, Defendant argues on appeal that the trial court's admission of Stancil's statement amounted to plain error. *See State v. Miller*, 371 N.C. 266, 268 (2018) (allowing plain error review for challenges to jury instructions and evidentiary issues); *see also* N.C. R. App. P. 10(a)(4) (2023) (allowing review of unpreserved issues "when the judicial action questioned is specifically and distinctly contended to amount to plain error"). To demonstrate plain error, Defendant must show that,

> absent the error, the jury *probably would have* returned a different verdict. This wording is important because this standard—showing that a jury *probably would have* reached a different result—requires a showing that the outcome is significantly more likely than not. In ordinary English usage, an event will "probably" occur if it is "almost certainly" the expected outcome; it is treated as synonymous with words such as "presumably" and "doubtless."

State v. Reber, 386 N.C. 153, 159 (2024) (citation omitted) (emphasis in original). "In other words, the test examines the state of all the evidence except for the challenged evidence and asks whether, in light of that remaining evidence, the jury probably would have done something different." *Id.* at 162.

Even assuming, *arguendo*, that it was error for the trial court to admit Stancil's statement, and, therefore, disregarding the challenged statement, the remaining evidence was sufficient to support the jury verdict. Even if it is "*possible* that the jury would have acquitted [Defendant,]" Defendant "has not shown that the jury *probably* would have done so." *Id.* (emphasis in original).

At trial, Defendant testified that he "had words with the victim in this case[]" inside of the convenience store. Martin testified that he witnessed two individuals "having some words" inside of the convenience store. Martin testified that, after the two individuals arguing inside of the store came outside of the store, one returned to his vehicle, while "[t]he one with the gun . . . looked dead at [him] . . . and he just pulled the gun out his back, cocked it, shell hits the floor. He walks over and sticks it in the car." Martin testified that he was looking at the shooter when he pulled the gun and was able to recognize him as "the same person that was arguing in the store." The State presented a photograph of Stancil showing Corporal Williams a picture of Defendant, and Corporal Williams testified that he "was able to get a Facebook photo of who [Stancil] said was the shooter." Furthermore, Defendant's testimony about approaching Lindsey's car is contradicted by video surveillance footage introduced at trial. Viewing the remaining evidence, Defendant "failed to satisfy the exacting standard to show plain error[.]" *Id.* at 163.

CONCLUSION

The trial court did not abuse its discretion in admitting Lindsey's out-of-court statement to Chief Gillenwater under the residual hearsay exception. Even assuming, *arguendo*, that the trial court erred in admitting Stancil's out-of-court statement to Corporal Williams, Defendant cannot show that, disregarding this evidence, the jury probably would have reached a different result.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges ARROWOOD and HAMPSON concur.

CAMERON VLASSIS, PLAINTIFF
v.
NISSAN NORTH AMERICA, INC., ET AL., DEFENDANTS

No. COA24-288

Filed 31 December 2024

Appeal and Error—specific personal jurisdiction—stream of commerce—insufficient findings of fact for meaningful appellate review—remanded

In a tort proceeding brought by plaintiff—a resident of Texas and the front-seat passenger in a car involved in a collision in Wake County, who suffered a catastrophic spinal injury after the alleged failure of a rear-seat safety belt caused another passenger to be thrown into the back of plaintiff's seat—against a number of defendants, including appellee Adient US LLC (Adient), one of several entities alleged to be involved in the design, manufacture, and other aspects of the seat belt in question, the trial court's order dismissing the complaint on personal jurisdiction grounds lacked findings of fact sufficient to permit meaningful appellate review of plaintiff's argument that the lower court erred in concluding that plaintiff failed to establish specific personal jurisdiction as to Adient. While the findings of fact concerning other defendants were affirmed because plaintiff did not challenge them, the findings did not address plaintiff's "stream of commerce" arguments pertaining to Adient. Accordingly, the order was affirmed as to other defendants and vacated as to Adient, and the matter was remanded to the trial court for the entry of findings of fact resolving evidentiary conflicts pertinent to Adient's stream of commerce arguments.

Appeal by plaintiff from order entered 18 December 2023 by Judge Vinston M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 25 September 2024.

Milberg Coleman Bryson Phillips Grossman PLLC, by Mark R. Sigmon, Abrams & Abrams, P.A., by Noah B. Abrams and Melissa N. Abrams, and Garrett, Walker, Aycoth & Altamura, LLP, by Matthew F. Altamura, for plaintiff-appellant.

Womble Bond Dickinson (US) LLP, by Matthew F. Tilley, and Faegre Drinker Biddle & Reath, LLP, by Tracy Gregar Ferak, Elizabeth C. Christen, and Lisa J. Perunovich, pro hac vice, for defendant-appellee Adient US LLC.

No brief filed for other defendants-appellees.

ZACHARY, Judge.

Plaintiff Cameron Vlassis appeals from the trial court's order granting the motion to dismiss of Defendants Adient Inc., Adient plc, Adient US LLC, Adient US Enterprises Limited Partnership, Adient Systems Engineering LLC, Adient Enterprises US LLC, Adient Clanton Inc., and Adient Eldon Inc.[1] for lack of personal jurisdiction. After careful review, the trial court's findings of fact are insufficient to enable meaningful appellate review of the complex jurisdictional issues presented. Consequently, we affirm in part, vacate in part, and remand for additional findings of fact.

I. Background

On 6 August 2019, Plaintiff was the front passenger in a 2017 Nissan Altima traveling in Wake County, North Carolina, when it collided with another vehicle. According to Plaintiff, the retractor for the Altima's right rear seat belt suddenly failed and broke apart during the collision, sending the occupant of the rear passenger's side seat hurtling into the back of Plaintiff's seat. Plaintiff's seat back collapsed forward, causing Plaintiff to suffer a catastrophic spinal injury resulting in paraplegia.

The procedural facts of the ensuing litigation are not disputed. On 3 June 2022, Plaintiff, a Texas resident, filed a complaint in Wake County Superior Court against several defendants, raising various claims arising out of the collision. On 21 July 2022, Plaintiff filed an amended complaint, adding the Adient Defendants as co-defendants. Plaintiff alleged that the Adient Defendants "derive profit from designing, manufacturing, assembling, inspecting, testing, warning, advertising, promoting, and supplying driver and passenger seats and components thereof for installation and use in motor vehicles for sale within the State of North Carolina," including the Altima involved in Plaintiff's collision.

On 16 August 2022, Plaintiff served Adient[2] through its registered agent in Michigan. On 25 August 2022, Adient registered to transact business in North Carolina. Adient identified a registered agent

1. We refer to this group of defendants collectively as "the Adient Defendants." Where appropriate, we refer to Defendant Adient US LLC individually as "Adient."

2. The record on appeal contains affidavits of service upon Adient and Adient plc filed on 25 August 2022. At no point did any of the other Adient Defendants contend that service was inadequate.

and registered office address in Raleigh. Plaintiff eventually served Adient again, this time through service upon its North Carolina registered agent, on 22 May 2023.

On 29 September 2022, the Adient Defendants filed a motion to dismiss for lack of personal jurisdiction together with a motion for a protective order to stay merits discovery. On 26 October 2022, Plaintiff served the Adient Defendants with discovery requests related to personal jurisdiction, comprising special interrogatories, requests for production, and requests for admission.

With the consent of all the parties, on 14 November 2022, Plaintiff filed and served upon all Defendants a second amended complaint. The Adient Defendants again moved to dismiss on 2 December 2022. On 23 December 2022, the Adient Defendants served Plaintiff with their responses to the jurisdictional discovery requests.

On 20 February 2023, Plaintiff filed a motion to compel further responses to the jurisdictional discovery, which came on for hearing in Wake County Superior Court on 18 May 2023. On 10 July 2023, the trial court entered an order granting Plaintiff's motion in part, and denying it in part. In conformance with this order, the Adient Defendants provided supplemental responses to the jurisdictional discovery on 8 September 2023.

On 3 October 2023, the Adient Defendants filed a memorandum in support of their motion to dismiss, and Plaintiff filed his memorandum in opposition to the motion that same day. The motion to dismiss came on for hearing on 5 October 2023. At the hearing, the trial court heard arguments of counsel and received documentary exhibits.

On 18 December 2023, the trial court entered an order granting the Adient Defendants' motion to dismiss. In its order, the court made the following pertinent findings of fact:

> 4. The Subject Vehicle was manufactured by Nissan at its manufacturing facility in Smyrna, Tennessee. Plaintiff has alleged that the Adient Defendants, along with other Defendants "designed, manufactured, assembled, tested, inspected, advertised, sold, and/or supplied" the "front passenger seat and its components and subcomponents thereof" for the Subject Vehicle.
>
> 5. The Adient Defendants submitted two affidavits with their Motion to Dismiss Plaintiff's Second Amended Complaint, filed on December 2, 2022, detailing the role of the Adient Defendants in connection with model year

2017 Nissan Altima vehicles and the Subject Vehicle. The only Adient Defendant that potentially had any involvement with the front passenger seat in the Subject Vehicle is Adient US LLC. The other Adient Defendants had no involvement whatsoever.

6. Adient US LLC is organized under the laws of the State of Michigan, and its principal place of business is in Michigan. Adient US LLC has never had a business location in North Carolina.

7. Adient US LLC's limited involvement with model year 2017 Nissan Altima vehicles built at Nissan's Smyrna, Tennessee plant was as follows: Adient US LLC's Pulaski, Tennessee plant supplied foam for the front passenger seats. Using this foam and other component parts supplied by non-Adient entities, Adient US LLC's Murfreesboro, Tennessee plant assembled and supplied all front passenger seats to Nissan for its model year 2017 Nissan Altima vehicles that were built at Nissan's Smyrna, Tennessee plant. The assembled seats were delivered directly from Adient US LLC's Murfreesboro, Tennessee plant to Nissan's Smyrna, Tennessee plant, without leaving the State of Tennessee. Once the seats were delivered to Nissan's plant in Smyrna, Tennessee, Adient US LLC had no further involvement with, or control over, the seats or vehicles and their distribution. No other plants or locations supplied model year 2017 Nissan Altima front passenger seats to Nissan's Smyrna[,] Tennessee plant, and Adient US LLC's Murfreesboro, Tennessee plant only supplied model year 2017 Nissan Altima seats to Nissan's Smyrna[,] Tennessee plant and to no other Nissan plant or location.

8. Adient US LLC's business model involves selling automotive seats and related component parts through OEM[3] automobile manufacturers who distribute Adient's automotive seating products to the end users through their customers' automotive dealership networks.

. . . .

3. "OEM" is an abbreviation for "original equipment manufacturer" and in this case Nissan is the OEM.

> 12. Defendant Adient US LLC registered to transact the business of "Automotive Seating Manufacturing" in the State of North Carolina on August 25, 2022, over three years after the subject incident, and . . . on May 22, 2023[,] Plaintiff served Adient US LLC with process in this action through its North Carolina registered agent, after having previously served Adient US LLC through its registered agent in Michigan on August 16, 2022.

The trial court then made several conclusions relating to various bases for personal jurisdiction. The court first reasoned that Adient's registration to transact business in North Carolina and service through its registered agent was "not in and of itself sufficient to create general personal jurisdiction over Adient US LLC in North Carolina, nor d[id] it create specific personal jurisdiction over Adient US LLC in North Carolina in this action." The trial court also explained that "[n]one of the Adient Defendants are 'at home' in the State of North Carolina such that they would be subject to general personal jurisdiction in North Carolina." Furthermore, the court determined that "[n]one of the Adient Defendants have sufficient contact with the State of North Carolina such that they would be subject to specific personal jurisdiction in North Carolina" because "[t]he controversy in this case does not arise out of or relate to any activities of the Adient Defendants in North Carolina." Consequently, the trial court concluded that "Plaintiff has not established general or specific personal jurisdiction over any Adient Defendant[,]" and granted the Adient Defendants' motion to dismiss.

Plaintiff timely filed notice of appeal.

II. Appellate Jurisdiction

"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 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). In that the order from which Plaintiff appeals granted the Adient Defendants' motion to dismiss but did "not dispose of the case" as to the other defendants, Plaintiff's appeal is interlocutory. *Id.*

However, "[a]ny interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]" N.C. Gen. Stat. § 1-277(b) (2023). "Indeed,

motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257–58, 625 S.E.2d 894, 898 (2006). Accordingly, Plaintiff has the right of immediate appeal from the trial court's interlocutory order, and this appeal is properly before us.

III. Discussion

Plaintiff argues that the trial court erred by granting the Adient Defendants' motion to dismiss for lack of personal jurisdiction. As a preliminary matter, we note that Plaintiff clarified at oral argument before this Court that he only challenges the trial court's order with respect to Adient, and not all of the Adient Defendants.[4] Accordingly, the trial court's order remains undisturbed as to the other Adient Defendants.

Plaintiff raises two main arguments on appeal in support of his contention. First, Plaintiff maintains that Adient "consented to suit [in North Carolina] by obtaining a certificate of authority to transact business and appointing a registered agent who was served." Second, Plaintiff contends that Adient had "sufficient minimum contacts [with North Carolina] such that the exercise of specific personal jurisdiction does not offend due process." For the reasons that follow, we are unable to effectively review the trial court's order.

A. Standard of Review

"When the parties have submitted affidavits and other documentary evidence, a trial court reviewing a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) must determine whether the plaintiff has established that jurisdiction exists by a preponderance of the evidence." *Schaeffer v. SingleCare Holdings, LLC*, 384 N.C. 102, 106, 884 S.E.2d 698, 703–04 (2023) (citation omitted). "If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (cleaned up).

On appeal from a trial court's Rule 12(b)(2) order, an appellate court "consider[s] whether the trial court's determination regarding personal jurisdiction is supported by competent evidence in the record." *Schaeffer*, 384 N.C. at 106, 884 S.E.2d at 704 (citation omitted). "Where

4. In his brief on appeal, Plaintiff explains that Adient is "the entity that registered to do business in North Carolina, manufactured the seat at issue, and had the most contacts with North Carolina."

no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (citation omitted), *disc. review denied*, 365 N.C. 574, 724 S.E.2d 529 (2012).

"We review de novo the issue of whether the trial court's findings of fact support its conclusion[s] of law . . . ." *Id.* (italics omitted). We also conduct de novo review "when the pertinent inquiry on appeal is based on a question of law[.]" *State ex rel. Stein v. E.I. DuPont de Nemours & Co.*, 382 N.C. 549, 556, 879 S.E.2d 537, 543 (2022) (citation omitted).

B. Applicable Legal Principles

"It is well established that whether a nonresident defendant is subject to personal jurisdiction in this State's courts involves a two-step analysis." *Schaeffer*, 384 N.C. at 106, 884 S.E.2d at 704 (cleaned up). "First, North Carolina's long-arm statute, [N.C. Gen. Stat.] § 1-75.4, must authorize a court to exercise jurisdiction. This statute makes available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Id.* (cleaned up). "[T]he second step in the inquiry addresses the determinative issue: whether the Fourteenth Amendment's Due Process Clause permits a state court to exercise jurisdiction over a defendant." *Id.*

At oral argument before this Court, Adient confirmed that it does not raise any first-step argument under the long-arm statute independent from the due-process analysis of the second step.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358, 209 L. Ed. 2d 225, 233 (2021); U.S. Const. amend. XIV, § 1. "Due process permits a state's courts to exercise jurisdiction over an out-of-state defendant when the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Schaeffer*, 384 N.C. at 106–07, 884 S.E.2d at 704 (cleaned up); *accord Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945). "Minimum contacts are established through some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Schaeffer*, 384 N.C. at 107, 884 S.E.2d at 704 (cleaned up).

In its explication of this formulation, the United States Supreme Court "has long focused on the nature and extent of the defendant's

relationship to the forum State. That focus led to [the Court] recognizing two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Ford*, 592 U.S. at 358, 209 L. Ed. 2d at 233 (cleaned up).

A state court may exercise general jurisdiction—which "extends to any and all claims brought against a defendant"—only in cases where "a defendant is essentially at home" in the forum state. *Id.* (cleaned up); *see also Schaeffer*, 384 N.C. at 107, 884 S.E.2d at 704 ("General jurisdiction requires that a defendant's affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." (cleaned up)). Paradigmatically, this means that "an individual is subject to general jurisdiction in her place of domicile" and a corporation is subject to general jurisdiction in "its place of incorporation and principal place of business." *Ford*, 592 U.S. at 358–59, 209 L. Ed. 2d at 233.

As Plaintiff does not contend that this case implicates this traditional form of general jurisdiction,[5] we proceed to discuss specific jurisdiction.

"Specific jurisdiction is different: It covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name 'purposeful availment.' " *Id.* at 359, 209 L. Ed. 2d at 233–34 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985)). "The defendant . . . must take some act by which it purposefully avails itself of the privilege of conducting activities within the forum State. The contacts must be the defendant's own choice and not random, isolated, or fortuitous." *Id.* at 359, 209 L. Ed. 2d at 234 (cleaned up). These minimum contacts "must show that the defendant deliberately reached out beyond its home—by, for example, exploiting a market in the forum State or entering a contractual relationship centered there." *Id.* (cleaned up).

---

5. Adient contends that, by explicitly stating during the 18 May 2023 hearing on Plaintiff's motion to compel that he is "not alleging general jurisdiction[,]" Plaintiff has waived appellate review of his consent-by-registration argument because the consent-by-registration doctrine has been described as a form of general jurisdiction. *See Chavez v. Bridgestone Ams. Tire Operations, LLC*, 503 P.3d 332, 341 (N.M. 2021) ("Consent by registration provides a basis for general personal jurisdiction."). Because of our disposition of this appeal, we need not address the merits of this waiver argument. Nevertheless, we note that Plaintiff has consistently argued for Adient's consent by registration at all stages of the present case following Adient's registration in North Carolina, contended that Adient "erroneously conflate[d]" consent-by-registration with general jurisdiction, and only conceded below that the trial court could not exercise general jurisdiction over the Adient Defendants on an "at home" or "principal place of business" basis.

"Yet even then—because the defendant is not 'at home'—the forum State may exercise jurisdiction in only certain cases. The plaintiff's claims . . . must arise out of or relate to the defendant's contacts with the forum." *Id.* (cleaned up). "Or put just a bit differently, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* at 359–60, 209 L. Ed. 2d at 234 (cleaned up).

"These rules derive from and reflect two sets of values—treating defendants fairly and protecting interstate federalism." *Id.* at 360, 209 L. Ed. 2d at 234 (cleaned up). The United States Supreme Court has explained that specific jurisdiction was founded "on an idea of reciprocity between a defendant and a State: When (but only when) a company exercises the privilege of conducting activities within a state—thus enjoying the benefits and protection of its laws—the State may hold the company to account for related misconduct." *Id.* (cleaned up). In this way, specific jurisdiction also "provides defendants with fair warning—knowledge that a particular activity may subject it to the jurisdiction of a foreign sovereign. A defendant can thus structure its primary conduct to lessen or avoid exposure to a given State's courts." *Id.* (cleaned up).

Finally, the United States Supreme Court has also "considered alongside defendants' interests those of the States in relation to each other. One State's sovereign power to try a suit . . . may prevent sister States from exercising their like authority." *Id.* at 360, 209 L. Ed. 2d at 234–35 (cleaned up). "The law of specific jurisdiction thus seeks to ensure that States with little legitimate interest in a suit do not encroach on States more affected by the controversy." *Id.* at 360, 209 L. Ed. 2d at 235 (cleaned up).

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Schaeffer*, 384 N.C. at 107, 884 S.E.2d at 704 (quoting *Burger King*, 471 U.S. at 476, 85 L. Ed. 2d at 543). These factors include:

> the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

Id. at 107, 884 S.E.2d at 704–05 (cleaned up).

C. Discussion

Plaintiff argues on appeal that (1) Adient consented to suit by obtaining a certificate of authority to transact business in North Carolina and appointing a registered agent in this state, whom Plaintiff subsequently served; and (2) Adient had sufficient minimum contacts with North Carolina such that the trial court's exercise of specific jurisdiction would not offend due process.

However, in that the court did not make sufficient findings of fact to support its conclusion of law that Plaintiff has not established specific jurisdiction, we cannot effectively review the merits of Plaintiff's appeal. Accordingly, we must vacate and remand the trial court's order for further proceedings on the specific jurisdiction issue. As such, we need not address Plaintiff's argument regarding consent jurisdiction.

1. Stream of Commerce

In his complaint, in his voluminous opposition to the Adient Defendants' motion to dismiss, and during the hearing on the motion, Plaintiff consistently argued, *inter alia*, that the trial court could exercise specific jurisdiction in this case because Adient "purposefully availed itself of the privilege of North Carolina's laws" by "knowingly serv[ing] the North Carolina market for automotive seating products." This is known as the "stream of commerce" theory of specific jurisdiction. We begin our analysis with an overview of this doctrine.

The stream-of-commerce theory is a common method of analyzing whether a state's courts would offend traditional notions of fair play and substantial justice through the exercise of personal jurisdiction over a non-resident defendant in products-liability cases such as the one before us. *See*, *e.g.*, *Cambridge Homes of N.C., Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 417, 670 S.E.2d 290, 298 (2008) ("The stream of commerce theory applies to products liability cases such as this one."). "Minimum contacts can be found when the out-of-state defendant injects products into the 'stream of commerce' with the expectation that the products will reach the forum state." *Carswell Distrib. Co. v. U.S.A.'s Wild Thing, Inc.*, 122 N.C. App. 105, 107, 468 S.E.2d 566, 568 (1996).

In *World-Wide Volkswagen Corp. v. Woodson*, a leading stream-of-commerce case, the United States Supreme Court explained that

> if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other

> States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

444 U.S. 286, 297, 62 L. Ed. 2d 490, 501–02 (1980) (emphasis added).

Although the plaintiff had contended that it was arguably foreseeable that the defendant's product, sold elsewhere, could reach the forum state, the *World-Wide Volkswagen* Court observed that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295, 62 L. Ed. 2d at 500 (cleaned up). However, the Court cabined this statement with an important reminder:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297, 62 L. Ed. 2d at 501.

In *Bush v. BASF Wyandotte Corp.*, this Court surveyed post-*World-Wide Volkswagen* jurisprudence and cited approvingly the following explanation for why an indirect relationship between a defendant and a forum state may provide the requisite minimum contacts to satisfy due process:

> It is seldom that a manufacturer deals directly with consumers in other states. The fact that the benefit he derives from their laws is an indirect one, however, does not make those laws any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his products, to say that the use of such products in the ordinary course of commerce is sufficient contact with such states to justify a requirement that he defend there.

64 N.C. App. 41, 48, 306 S.E.2d 562, 567 (1983) (cleaned up).

Thus, this Court in *Bush* observed that a forum state may appropriately exercise specific jurisdiction in "[c]ases involving parts manufacturers whose product entered the forum state with which it had no direct contacts by way of the parts' incorporation into a finished product[.]" *Id.* at 50, 306 S.E.2d at 568; *see also Cox v. Hozelock, Ltd.*, 105 N.C. App. 52,

58, 411 S.E.2d 640, 644 ("[T]he sole act of a manufacturer's intentional injection of his product into the stream of commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant."), *disc. review denied*, 331 N.C. 116, 414 S.E.2d 752, *cert. denied*, 506 U.S. 824, 121 L. Ed. 2d 42 (1992).

Later, a fractured United States Supreme Court articulated two different visions of the stream-of-commerce test. *See Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 94 L. Ed. 2d 92 (1987) (plurality). In the lead opinion in *Asahi*, but writing for a plurality of only four Justices, Justice O'Connor stated:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.

Id. at 112, 94 L. Ed. 2d at 104 (O'Connor, J., plurality opinion). This formulation of the doctrine has come to be known as "stream of commerce plus." *Brown v. Meter*, 199 N.C. App. 50, 60, 681 S.E.2d 382, 390 (2009) (cleaned up), *appeal dismissed and disc. review denied*, 364 N.C. 128, 695 S.E.2d 756 (2010), *rev'd sub nom. Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 180 L. Ed. 2d 796 (2011).

Writing for another group of four Justices in *Asahi*, Justice Brennan argued that Justice O'Connor's version of the test was "a marked retreat from the analysis in *World-Wide Volkswagen*[.]" 480 U.S. at 118, 94 L. Ed. 2d at 108 (Brennan, J., concurring). Instead, Justice Brennan framed the stream-of-commerce theory thusly:

> A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether

> that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.

Id. at 117, 94 L. Ed. 2d at 107.

Notwithstanding these disparate visions of the stream-of-commerce theory from the plurality opinions of the United States Supreme Court, this Court subsequently held that "*Asahi* does not overrule previous cases that follow the stream of commerce theory, including *Bush v. BASF*." *Cox*, 105 N.C. App. at 57, 411 S.E.2d at 644 (citation omitted). With these principles and precedents in mind, we now turn to the trial court's order from which the instant appeal arises.

2. The Trial Court's Findings of Fact

In its order granting the Adient Defendants' motion to dismiss, the trial court made several findings of fact regarding Adient's manufacture of the vehicle seat at issue. In particular, the court homed in on the solely Tennessee-based nature of Adient's involvement:

> The assembled seats were delivered directly from Adient US LLC's Murfreesboro, Tennessee plant to Nissan's Smyrna, Tennessee plant, without leaving the State of Tennessee. Once the seats were delivered to Nissan's plant in Smyrna, Tennessee, Adient US LLC had no further involvement with, or control over, the seats or vehicles and their distribution.

These findings address Adient's lack of a direct effort to service North Carolina and are certainly relevant to the issue of specific jurisdiction. However, as our precedents make clear, Adient's *direct* efforts are not dispositive. Adient's *indirect* efforts to service North Carolina through the stream of commerce could also form a sufficient basis for the trial court's exercise of specific jurisdiction.

Yet the trial court did not make any findings of fact concerning this basis for specific jurisdiction, despite Plaintiff's considerable focus on that argument throughout the case. This omission presents an obstacle to our appellate review. Indeed, we "cannot resolve the question on appeal" because "[i]t is a long-standing principle of appellate law that appellate courts cannot find facts." *LouEve, LLC v. Ramey*, 286 N.C. App. 263, 272, 880 S.E.2d 431, 437–38 (2022) (cleaned up).

It is within our limited purview to establish that competent evidence supports what findings of fact that the trial court did make. Moreover, Plaintiff does not challenge the court's findings, so we are thus

bound by those findings on appeal. *See Bell*, 216 N.C. App. at 543, 716 S.E.2d at 871.

However, we cannot say that the trial court's findings of fact sufficiently support its conclusion of law that Plaintiff has not established specific jurisdiction in the absence of any findings of fact relating to Plaintiff's stream-of-commerce argument. As it happens, the court's finding of fact 8—explaining that Adient's "business model involves selling automotive seats and related component parts through OEM automobile manufacturers who distribute Adient's automotive seating products to the end users through their customers' automotive dealership networks"—arguably better supports the *opposite* conclusion: that Adient injected its products into the stream of commerce, thereby supporting North Carolina courts' exercise of specific jurisdiction.

For instance, in *Cohen v. Continental Motors, Inc.*, this Court determined that the trial court erred by concluding that it did not have personal jurisdiction over an aircraft component manufacturer that "did not sell components to individual aircraft owners themselves, [but] actively maintained a business model that operated through independent distributors" including one in North Carolina. 279 N.C. App. 123, 139, 864 S.E.2d 816, 827 (2021), *disc. review denied*, 380 N.C. 682, 868 S.E.2d 859 (2022). Notably, the Delaware-based corporate defendant made nearly 3,000 sales to—and earned almost $4 million from—North Carolina-based consumers through its distributor in North Carolina. *Id.* at 125, 864 S.E.2d at 818. The defendant also worked with 14 North Carolina-based maintenance providers that paid subscription fees for access to the defendant's "online technical library" for various manuals. *Id.* at 126, 864 S.E.2d at 819.

Plaintiff contends that the similar figures in the present case are even more favorable for showing purposeful availment than those in *Cohen*. Plaintiff alleges that 41,556 Nissan Altimas "equipped with front passenger seats manufactured by Adient, including the seat that injured [Plaintiff], were distributed for original sale in North Carolina through North Carolina dealerships." Further, based upon Adient's quoted price of $125.15 per seat, Plaintiff suggests that "Adient made more than $5,000,000 from distributions of the exact seat at issue into North Carolina."

On the other hand, this Court recently rejected a trial court's finding of personal jurisdiction over two foreign corporations that manufactured helicopters and their engines where neither defendant marketed, advertised, sold, delivered, or distributed their products in or to North Carolina. *See Bartlett v. Est. of Burke*, 285 N.C. App. 249, 265–66, 877

S.E.2d 432, 443–44 (2022), *appeal dismissed and disc. review denied*, 386 N.C. 662, 905 S.E.2d 213 (2024). The distinction between *Cohen* and *Bartlett* was based on the particular facts alleged in each case. For example, the *Bartlett* Court found a material difference between the websites provided by the defendants in each case: "Unlike the paid subscription service shown in *Cohen*," one of the *Bartlett* defendant's websites was "not shown to contain a commercial nature from paid subscriptions." *Id.* at 265, 877 S.E.2d at 443.

This level of factual scrutiny, as demonstrated by these representative examples from *Cohen* and *Bartlett*, only serves to underscore the importance of the trial court's role as finder of fact. The extent to which the present case compares to *Cohen*, *Bartlett*, and other similar cases remains unclear without additional findings of fact by the trial court.

Indeed, Plaintiff has alleged several additional facts in support of the trial court's exercise of specific jurisdiction, namely that:

- Adient serves as the "First Tier" or "Just-In-Time" supplier of millions of automotive seats, . . . which were knowingly and intentionally sold by Adient for distribution through dealers.
- Adient is the largest manufacturer of automotive seats in the world, it supplies seats for vehicles sold by every major car manufacturer, and it supplies one out of every three seats worldwide. Millions of Adient's seats are on North Carolina roads right now.
- Adient manufactured 41,55[6] front passenger seats for 2013 to 2018 Nissan Altimas that were sold in North Carolina.
- Adient provides after-sale support and warranty parts for repairs of its seats, including seats sold in North Carolina.
- In manufacturing its seats, Adient contracted with at least 38 separate North Carolina-based businesses for the purchase of tooling equipment used to manufacture the seats, subcomponents installed in the seats, and fabric, foam, and other materials incorporated into its seats.
- Adient actively sent its employees to North Carolina in furtherance of its automotive seating business in North Carolina.

Meanwhile, Adient contends that it rebutted these factual allegations before the trial court below. Yet the court made no findings to resolve these disputed questions of fact, and we are without authority to "resolve issues of credibility or conflicting evidence." *Carolina Mulching Co. LLC v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 246, 846 S.E.2d 540, 545 (2020) (cleaned up), *aff'd*, 378 N.C. 100, 861 S.E.2d 496 (2021). "Where the evidence is conflicting, the [trial] judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth." *Id.* at 246, 846 S.E.2d at 544–45 (cleaned up). We are thus confronted with conflicting and potentially outcome-determinative factual allegations that remain unresolved, but which we lack the authority to resolve.

Moreover, our review of the record suggests that the trial court may have determined this matter based upon a possible misapprehension of stream-of-commerce jurisprudence. In their memorandum in support of the motion to dismiss, the Adient Defendants argued that Plaintiff's factual assertions were irrelevant to specific jurisdiction, contending that "[t]he key element of the specific jurisdiction analysis is whether Plaintiff's claims arose out of or related to the Adient Defendants' activities in the State of North Carolina." (Original emphasis omitted). At oral argument before this Court, counsel for Adient asserted that Adient's contacts with North Carolina "are not what gives rise to . . . Plaintiff's claim, and . . . are not related enough to . . . Plaintiff's claim" to establish jurisdiction. However, in *Ford*, the United States Supreme Court clarified that the "or relate to" portion of that element "contemplates that some relationships will support jurisdiction without a causal showing." 592 U.S. at 362, 209 L. Ed. 2d at 236.

Notably, in that case, Ford had argued that, because "the company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents[,]" the plaintiffs' claims in those cases would have been "precisely the same if Ford had never done anything in Montana and Minnesota." *Id.* at 366, 209 L. Ed. 2d at 238–39 (citation omitted). This argument is similar to Adient's insistence that "Adient's only connection with North Carolina in this case resulted from the decisions of others," and that "at least with respect to model year 2017 Nissan Altima vehicles in general, and the Subject Vehicle in particular, Adient did not have (or create for itself) a relationship with North Carolina." (Original emphasis omitted). And at oral argument, Adient's counsel added that "the alleged contacts aren't, for the most part, Adient's actions, and they are not sufficient to show purposeful availment." Nevertheless, the *Ford* Court summarily dismissed

this reasoning, as "that argument merely restate[d] Ford's demand for an *exclusively* causal test of connection—which [the Court had] already shown is inconsistent with [its] caselaw." *Id.* at 366, 209 L. Ed. 2d at 239 (emphasis added).

If Plaintiff's factual allegations are determined to have merit—which, again, we cannot determine—then Plaintiff plausibly may have properly invoked the trial court's specific jurisdiction over Adient based upon a proper application of the stream-of-commerce test, or even the stream-of-commerce-plus test articulated by Justice O'Connor in *Asahi*.

Plaintiff likens this case to *Cox*, in which the defendant was an English manufacturer of a water-pressure sprayer that sold thousands of its sprayers and replacement parts to Pennsylvania distributors, one of whom the defendant knew was a wholesaler distributing goods to retail stores in the United States. 105 N.C. App. at 52, 411 S.E.2d at 641. The wholesale distributor sold some of the defendant's sprayers for resale to a retail store in North Carolina, which in turn sold the sprayers to the plaintiff's employer. *Id.* When one such sprayer exploded and damaged the plaintiff's eye to the extent that it required removal, the plaintiff sued the English manufacturer in North Carolina. *Id.* at 52–53, 411 S.E.2d at 641.

This Court upheld the trial court's exercise of specific jurisdiction because the "defendant was fully aware that [the Pennsylvania distributor] was a wholesaler which bought goods from manufacturers such as [the English] defendant and resold those goods in the United States." *Id.* at 55, 411 S.E.2d at 643. Even though the defendant neither had any further involvement with, nor control over, the sprayer or its distribution after its sale to the distributor—much as Adient asserts is the case here—we nevertheless held that the defendant had sufficient minimum contacts with North Carolina because the defendant purposefully injected its products into the stream of commerce, with full knowledge that they could reach North Carolina. *Id.* at 55–56, 411 S.E.2d at 643. "At no time did [the] defendant attempt to limit its area of distribution so as to exclude North Carolina. These facts therefore indicate [the] defendant knew or reasonably should have known that, due to its relationship with [the Pennsylvania distributor], its products would be used in [other] states." *Id.* "As such, [the] defendant availed itself of the laws of these various states." *Id.* at 56, 411 S.E.2d at 643.

Finally, due to its determination that "[n]one of the Adient Defendants have sufficient contact with the State of North Carolina such that they would be subject to specific personal jurisdiction in North Carolina[,]" the trial court did not analyze any of the "other factors to determine

whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Schaeffer*, 384 N.C. at 107, 884 S.E.2d at 704 (citation omitted). As stated above, these unaddressed factors include

> the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

Id. at 107, 884 S.E.2d at 704–05 (cleaned up).

In his brief and again at oral argument, Plaintiff advances several arguments concerning these factors, such as his contention that if the trial court's order is affirmed, then a similarly situated plaintiff would be required "to file multiple lawsuits arising out of the same incident in multiple jurisdictions against multiple corporate defendants[,]" which "would be manifestly unfair, inefficient, and certainly not compelled by the due process clause." The trial court did not reach the weighing of these "fair play and substantial justice" factors due to its disposition below and, for the reasons discussed above, we cannot weigh these factors for the first time on appeal. Indeed, analyzing these "fair play and substantial justice" factors may ultimately prove unnecessary on remand, depending upon the additional findings of fact. However, it underscores the prudence of remanding to the trial court for a potential determination of these factors, if warranted, because this Court is ill-equipped to make such a determination in the first instance.

In sum: the trial court did not make sufficient findings of fact concerning Plaintiff's stream-of-commerce argument, which our review suggests Plaintiff has pleaded and argued to such extent that it may have merit, if it is determined to be supported by the facts. But as this Court lacks the authority to make findings of fact and resolve evidentiary conflicts, we cannot appropriately review this appeal. "Accordingly, we decline to address [this] issue because disputed factual questions prevent this Court from engaging in meaningful appellate review." *LouEve*, 286 N.C. App. at 272, 880 S.E.2d at 438. The appropriate course is to remand to the trial court to provide that court with an opportunity to make additional findings of fact that resolves the conflicts in evidence, in accordance with the stream-of-commerce jurisprudence articulated herein.

IV. Conclusion

For the foregoing reasons, we vacate the trial court's order as to Adient and remand for further proceedings. The court's order is affirmed as to the remaining Adient Defendants. On remand, "[t]he trial court is free to revisit [its] findings, although it is not required to do so, with the exception of the portions of the findings related to the" other Adient Defendants, which are affirmed by this Court. *42 E., LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 520, 722 S.E.2d 1, 12 (2012). Because of this disposition, we make no determination as to the merits, if any, of Plaintiff's arguments concerning specific jurisdiction or consent by registration. *See id.* (stressing "that nothing in this opinion is intended to express any view on what conclusion the trial court should reach").

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges GRIFFIN and STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 31 December 2024)

AMATO v. MILLER No. 24-417	New Hanover (21CVS776)	Vacated in part, affirmed in part, and remanded
ARSTARK v. CABARRUS CNTY. No. 24-362	Cabarrus (22CVS2560)	Affirmed
CAMBRE v. MED. IMAGING CTR., LLC No. 24-334	Cumberland (20CVS2804)	Affirmed in part, reversed in part, and remanded for new trial solely on issue of economic damages
GARNER v. JESSUP No. 23-310	Bertie (21CVS112)	Vacated and Remanded
IN RE WILL OF HOBBS No. 24-301	Harnett (17E206)	Affirmed
KERSEY v. PERDUE FARMS, INC. No. 24-455	N.C. Industrial Commission (21-021455) (21-745792)	Affirmed
MEYER v. ALLNUTT No. 24-496	Transylvania (21CVS000408)	Affirmed
PRICE v. NEW HANOVER CNTY. CHILD SUPPORT No. 23-216	New Hanover (21CVD126)	Reversed and Remanded
STATE v. BRACY No. 24-441	Mecklenburg (22CRS365846) (23CRS4290)	No Error
STATE v. BRYANT No. 24-439	Randolph (23CRS212) (23CRS213)	Affirmed
STATE v. CROWDER No. 24-262	New Hanover (23CRS2240)	Vacated
STATE v. McLEAN No. 24-90	Mecklenburg (21CRS228547)	No Error

STATE v. McPHERSON No. 24-259	Wake (19CR206013-910) (19CR206014-910) (20CR145-910) (20CR146-910)	No Error
STATE v. MINYARD No. 24-299	Burke (09CRS3910-12) (09CRS4222-23) (11CRS1471)	Affirmed.
STATE v. PITTMAN No. 23-674	Vance (20CRS726-27) (21CRS276) (21CRS277)	Affirmed
TESTERMAN v. COTHRAN No. 23-962	Ashe (19CVD138)	Reversed and Remanded
WILLIAMSON v. SMITH No. 23-1164	Franklin (22CVD689)	Affirmed

HIGGINS v. MENDOZA

[297 N.C. App. 581 (2025)]

LISA HIGGINS, ADMINSTRATOR OF THE ESTATE OF MICHAEL S. HIGGINS, PLAINTIFF
v.
OMAR ROMERO MENDOZA, IN HIS INDIVIDUAL CAPACITY, AND BRANDON CESAR CRUZ, IN HIS INDIVIDUAL CAPACITY, DEFENDANTS

No. COA24-140

Filed 15 January 2025

Negligence—gross negligence—police officer—death of passenger—high-speed pursuit of suspect—no immunity—genuine issue of material fact

In a wrongful death case, where a state trooper crashed his police car during a high-speed pursuit of a suspected drunk driver, which resulted in the death of a 22-year-old passenger who was accompanying the trooper on a "ride-along" as part of an internship with the State Highway Patrol, the trial court erred in granting summary judgment in the trooper's favor. Although N.C.G.S. § 20-145 would prevent the trooper from being held personally liable for injuries to another resulting from his ordinary negligence, it could not provide the same immunity to the trooper for acts of gross negligence. Here, a genuine issue of material fact existed as to whether the trooper was grossly negligent where the evidence showed that he: was not authorized to take the passenger on a ride-along; and, by his own admission, drove in a manner where he was unable to maintain control of his car (specifically, he drove into a curve in the road at a speed of 113 miles per hour (despite the speed limit being 55 miles per hour), failed to observe the visible "Curve ahead" warning sign, failed to react to the suspect vehicle's turning and use of brake lights, and lost control of his car).

Chief Judge DILLON dissenting.

Appeal by plaintiff from orders entered 20 December 2022 by Judge Eula Reid and 11 July 2023 by Judge William D. Wolfe in Superior Court, Pitt County. Heard in the Court of Appeals 9 October 2024.

J.C. White Law Group, PLLC, by James C. White, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Brian M. Williams, for defendants-appellees.

ARROWOOD, Judge.

Lisa Higgins, in her capacity as the administrator of the Estate of Michael S. Higgins ("plaintiff") appeals from the trial court's orders granting an extension of time to serve requests for admission and a motion for summary judgment in favor of Trooper Omar Romero Mendoza ("defendant Romero")[1] and Trooper Brandon Cesar Cruz ("defendant Cruz") (together, "defendants").[2] Plaintiff contends there was sufficient disputed evidence to find defendant Romero liable for gross negligence, and that the motion for extension of time was filed after the deadline to do so had passed. For the following reasons, we reverse the trial court's order granting summary judgment and remand for further proceedings.

I. Background

Michael S. Higgins ("Michael") was a 22-year-old student at East Carolina University ("ECU") majoring in criminal justice and security studies. ECU maintained an affiliation agreement with North Carolina State Highway Patrol ("NCSHP") for an internship program for qualified college students interested in careers in law enforcement. Michael enrolled in the internship program at the beginning of the fall semester in August 2020. As part of the internship, Michael was assigned to ride-alongs to observe NCSHP patrol work and went on two successful ride-alongs with Senior Troopers A.M. Bowen and N.S. Miles. Per NCSHP Directive O.04 § IV B, ride-alongs may be conducted by Field Training Officers ("FTO") or members holding the rank of Senior Trooper or higher if an FTO is not available.

On or around 17 August 2020, Michael was assigned to a third ride-along with defendant Cruz, who held the rank of Trooper at the time. Defendant Cruz allegedly told Michael that he could not bring him on a ride-along because of "some errands he had to run[,]" and suggested that Michael contact defendant Romero, who also held the rank of Trooper. Apparently unaware that defendant Romero was not authorized to take him for a ride-along, Michael texted defendant Romero his request to be assigned and they agreed to do a ride-along on the evening of 21 August 2020 into the morning of 22 August 2020.

---

1. The defendant is referred to by the name of Romero throughout the transcripts and discovery documents, and we adopt the same.

2. Plaintiff filed a motion for voluntary dismissal of the appeal as to defendant Cruz on 30 April 2024, which this Court allowed by order entered 1 May 2024. This appeal only concerns plaintiff's claims against defendant Romero.

At approximately 12:21 a.m. on 22 August 2020, defendant Romero, carrying Michael as a passenger, responded to the scene of an accident where a car had driven off the road into a ditch in Pitt County so that Michael could witness an accident investigation. Defendant Cruz had also responded to the scene, and allegedly told defendant Romero about an unidentified female driver in the area that was observed with an odor of alcohol on her breath; defendant Cruz encouraged defendant Romero to pursue the driver "in a high-speed chase." Defendant Romero allegedly did not notify the dispatch center of the intended high-speed chase or contact a supervisor to get authority to do so. At his deposition, defendant Romero acknowledged that he "never had any contact" with the driver and "did not personally observe any intoxication," and based his pursuit on defendant Cruz's assessment that he "smelled" alcohol on the driver.

With Michael as a passenger, defendant Romero activated the emergency lights and siren and "immediately accelerated his cruiser to a speed of at least 110 miles per hour in a matter of seconds[,]" in an attempt to catch up to the driver's last known whereabouts. At his deposition, defendant Romero stated his primary consideration in assessing the safety of the road was "the conditions of traffic." When asked about his determination to pursue at that rate of speed, defendant Romero stated he was "trying to catch up to the violator[,]" and determined it would be safe to travel at that speed because "[t]here were no other cars on the roadway." Defendant Romero further stated that he could "see the taillights [of the vehicle] in the distance" when he initiated the pursuit and believed the road he was pursuing on was straight "[b]ecause the vehicle in front of [him] was going straight."

As he continued the pursuit, defendant Romero observed the suspect vehicle braking to the left, indicating a turn or curve in the road, but stated he could not recall any adjustments he made to his driving upon this observation and did not recall seeing a warning sign. Defendant Romero maintained his speed into the curve, at which point the cruiser veered sideways off the roadway, knocking down a utility pole and fence and ultimately colliding with two trees on the passenger side of the vehicle. Michael died a result of the injuries suffered during the crash.

A "Collision Scene Information" report produced by NCSHP indicated that the speed limit on the roadway was 55 miles per hour, and a "Curve ahead" warning sign was present and visible on the side of the roadway. Another report from the Collision Reconstruction Unit indicated that defendant Romero's vehicle was traveling at a speed of 113 miles per hour prior to airbag deployment, and the "high speed coupled

with the application of brakes while negotiating a curve could have created a potentially dangerous combination" leading to defendant Romero losing control of his vehicle. The "critical speed" of the curve was estimated to be between 85 and 100 miles per hour, and the average speed of the suspect was estimated to be between 55 and 65 miles per hour. That report concluded by finding that "Trooper Romero's speed alone would never have allowed him to negotiate this curve successfully, but an improper curve set up that included the application of brakes in the curve increased the probability of loss of control exponentially[,]" leading to Michael's death. The report found defendant Romero violated State Highway Patrol Policy Directive B.02, which provides:

> Any member in an authorized Patrol vehicle may initiate a traffic enforcement response. Prior to initiating such action, the member shall determine if the traffic enforcement response can be accomplished with due regard for the safety of the public, the member and the suspect or violator.

Plaintiff filed a complaint on 25 April 2022 asserting claims against both defendants for gross negligence and willful or wanton conduct. Plaintiff served requests for admission on defendant Romero on 22 July 2022. On 16 August 2022, defendant Romero filed a motion to dismiss pursuant to Rule 12(b)(6). That same day, defendant Romero filed an answer denying wrongdoing and liability and asserting several defenses.

On 29 September 2022, defendant Romero filed a motion for additional time to respond or for relief to set aside responses, which was heard before the trial court on 14 November 2022. The trial court granted defendant Romero's motion pursuant to Rule 6 by order entered 20 December 2022.

Defendant Romero then filed a motion for summary judgment on 23 May 2023. Following a hearing on 15 June 2023, the trial court granted defendant Romero's motion for summary judgment by order entered 6 July 2023. Plaintiff filed notice of appeal on 8 August 2023.

II. Discussion

Plaintiff contends the trial court erred in granting summary judgment in favor of defendant Romero because there was sufficient disputed evidence to find defendant Romero liable for gross negligence. We agree.

"We review a trial court's order for summary judgment de novo . . . ." *Robins v. Town of Hillsborough*, 361 N.C. 193, 196 (2007) (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.G.S. § 1A-1, Rule 56(c) (2023). "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact," and in reviewing evidence at summary judgment, "all inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Gary v. Wigley*, 271 N.C. App. 584, 586 (2020) (cleaned up).

> 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. Carolina, Inc., 385 N.C. 797, 801 (2024) (quoting *DiOrio v. Penny*, 331 N.C. 726, 729 (1992)). Furthermore, "[g]ross negligence is determined based on the facts and circumstances of each case and is a matter generally left to the jury." *Ray v. N. Carolina Dep't of Transp.*, 366 N.C. 1, 13 (2012).

Defendant Romero contends he is exempt from personal civil liability through governmental immunity, and that the proper channel of recovery is to sue him in his official capacity in the Industrial Commission. We disagree.

Although N.C.G.S. § 20-145 provides immunity to law enforcement officers for ordinary negligence, it does not grant the same for gross negligence:

> The speed limitations set forth in this Article shall not apply to vehicles *when operated with due regard for safety* under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . nor to any of the following when either operated by a law enforcement officer in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . *This exemption shall not, however, protect*

> *the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.*

Our Supreme Court has reiterated that an officer may be held *personally* liable for injuries to another caused by his gross negligence when pursuing a criminal suspect. *Estate of Graham v. Lambert*, 385 N.C. 644, 658 (2024). That Court has defined "gross negligence" as "wanton conduct done with conscious or reckless disregard for the safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583 (1988). And that Court has further instructed that "an act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Parish v. Hill*, 350 N.C. 231, 239 (1999).

In *Parish*, our Supreme Court discussed several cases addressing the burden of a plaintiff to show gross negligence on the part of an officer in a vehicle pursuit. In *Young v. Woodall*, the Court held that an officer was entitled to summary judgment on a plaintiff's gross negligence claim where he hit another car while speeding through an intersection. 343 N.C. 459, 463 (1996). The Court found that "[h]is following the [suspect] without activating the blue light or siren, his entering the intersection while the caution light was flashing, and his exceeding the speed limit" were discretionary acts that may have been negligent but did not reach the level of gross negligence. *Id.* Similarly in *Bray v. N. Carolina Dep't of Crime Control & Pub. Safety*, this Court held that a pursuing officer was entitled to summary judgment on a gross negligence claim where that officer crossed the middle line, was traveling at a speed of at least eighty miles per hour on a curving rural road, and lost control of his car resulting in a collision with plaintiff. 151 N.C. App. 281, 284 (2002).

Defendant asserts that *Allmond v. Goodnight*, 230 N.C. App. 413 (2013) is dispositive in this case and requires affirming the grant of summary judgment. In *Allmond*, a state trooper was sued in his individual capacity in a claim that he violated N.C.G.S. § 20-145. The defendant trooper was driving 120 miles per hour when he collided with the plaintiffs' car, killing an elderly woman and severely injuring her grandson. *Id.* at 415. The trial court denied the defendant's motion for summary judgment which this Court upheld, while also stating: "[i]n the event that the jury determines that Defendant was pursuing a speeding motorist at the time that he entered the intersection in which the collision occurred, he will be immune from liability." *Id.* at 426–27.

We note that although several facts of *Allmond* are similar to the facts of this case, particularly the speed and loss of life in the collision,

Allmond is an unpublished opinion[3] and is not binding on this Court nor dispositive in this case with respect to determining whether a suit may proceed against defendant Romero in his individual capacity for gross negligence. Furthermore, "[g]ross negligence is determined based on the facts and circumstances of each case and is a matter generally left to the jury." *Ray*, 366 N.C. at 13. Although our Courts have declined to allow suit for gross negligence to continue in other officer pursuit cases, these determinations are based on the peculiar facts and circumstances of each case.

Turning now to this case and viewing the evidence and pleadings in the light most favorable to plaintiff, here defendant Romero travelled at an extreme rate of speed in pursuit of a suspected drunk driver and with little to no regard for the conditions of the road or Michael as his passenger. Defendant Romero reached a speed of at least 113 miles per hour, failed to appropriately observe or react to the warning sign or the suspect vehicle's turning and use of brake lights, and ultimately lost control of his vehicle, with the passenger side taking the full impact of the crash. Defendant Romero later acknowledged that he drove in a manner where he was unable to maintain control of his vehicle, and that he was not authorized to take Michael on a ride-along.

The evidence and testimony before the trial court indicates at minimum a genuine issue of material fact as to whether defendant Romero's actions rise to the level of gross negligence. Defendant Romero engaged in a chase at an unnecessarily high speed with reckless disregard for the safety of Michael, his student intern passenger. It should be for the jury to determine whether defendant Romero's actions were needless or manifested a reckless indifference to the rights of Michael. Accordingly, it was improper for the trial court to grant summary judgment in defendant Romero's favor, and we reverse the order and remand for further proceedings.

Plaintiff additionally contends the trial court erred in granting defendant Romero's motion for additional time. However, the reversal of the summary judgment order effectively moots the order granting additional time, and we decline to address it.

---

3. Although *Allmond v. Goodnight* does appear in the N.C. App. Vol. 230 book, it was designated as a 30(e) unpublished case with no motion or order altering its publication status.

III. Conclusion

For the foregoing reasons, we reverse the trial court's orders and remand for further proceedings.

REVERSED AND REMANDED.

Judge COLLINS concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

Based on the jurisprudence of our Supreme Court and our Court, I conclude that the evidence in the light most favorable to Plaintiff does not show that Defendant Romero Mendoza acted with gross negligence when he crashed his patrol car while in pursuit of a suspected drunk driver resulting in the death of Michael S. Higgins (a passenger in Trooper Mendoza's patrol car). Therefore, I conclude the trial court did not err in granting Trooper Mendoza summary judgment on the claims by the administrator of Mr. Higgins' estate against him. Accordingly, I respectfully dissent.

Trooper Mendoza argues that he is entitled to public official immunity. Indeed, "North Carolina courts have deemed police officers engaged in performance of their duties as public officials for the purposes of public official immunity: a police officer is a public official who enjoys absolute immunity from personal liability *for discretionary acts done without corruption or malice.*" *Bartley v. City of High Point*, 381 N.C. 287, 295 (2022) (internal marks omitted) (emphasis added).

Our Supreme Court has recently explained the wisdom of clothing police officers and other public officials a certain level of immunity for injuries caused by their actions in the performance of their duties:

> A judicially created doctrine steeped in prudential concerns, that immunity shields public officials from tort liability when those officials truly perform discretionary acts within the scope of their official duties. The doctrine has two primary goals: promoting fearless, vigorous, and effective administration of government policies, and dampening trepidation about personal liability that may deter competent people from taking office. And as the name suggests,

> public officer immunity is for public officers—i.e., people charged with duties involving the exercise of some portion of the sovereign power. But the doctrine does not immunize conduct at odds with the protections afforded by it and that underlie its utility. For that reason, an officer is immune only when he lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption.

Estate of Graham v. Lambert, 385 N.C. 644, 654 (2024) (internal citations and marks omitted).

Our Supreme Court has instructed that, based on G.S. 20-145, an officer, though shielded with public official immunity, may be held personally liable for injuries to another caused by his *gross negligence* when pursuing a criminal suspect. *Parish v. Hill*, 350 N.C. 231, 238 (1999) (stating that "as the law stands currently, in any civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability"); *Lambert*, 385 N.C. at 658.[1] That Court has defined "gross negligence" as "wanton conduct done with conscious or reckless disregard for the safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583 (1988). And that Court has further instructed that "an act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Parish v. Hill*, 350 N.C. 231, 239 (1999).

Our Supreme Court in *Parish* cited several cases to demonstrate that the burden of an injured plaintiff to show "gross negligence" on the part of that officer in pursuit of a suspect is particularly high. For example, that Court cited its decision in *Young v. Woodall*, 343 N.C. 459 (1996), in which it held that an officer, though negligent, was *not* grossly negligent *as a matter of law*, where the evidence showed that the officer's vehicle while speeding through an intersection in hot pursuit of a suspect struck another car. In *Young*, the Court reasoned:

> Applying the gross negligence standard, we hold the superior court should have granted [the officer's] motion for summary judgment. His following the [suspect] without activating the blue light or siren, his entering

1. G.S. 20-145 exempts an officer from speed limit laws but expressly states that the exemption "shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others."

> the intersection while the caution light was flashing, and his exceeding the speed limit were acts of discretion on his part which may have been negligent but were not grossly negligent.

Young v. Woodall, 343 N.C. 459, 463 (1996).

In 2002, our Court, applying *Young*, affirmed a conclusion by the Industrial Commission that an officer who struck a vehicle after crossing the center line in pursuit of a suspect, though negligent, was not *grossly* negligent:

> Plaintiff's attempt to distinguish *Young* is unavailing. Plaintiff argues that in this case, unlike *Young*, [the trooper] crossed the center line in addition to exceeding a safe speed. Also, [the trooper] was traveling at a speed of at least eight miles per hour, at dusk, on a curving, rural road. Finally, [the trooper] lost control of his car resulting in the collision with plaintiff . . . . None of these distinctions, however, would justify this Court in reversing the Commission's conclusion that [the trooper] did not engage in "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins*, 322 N.C. at 583.

Bray v. N.C. Dep't of Crime, 151 N.C. App. 281, 284 (2002).

Indeed, neither Plaintiff nor the majority in this case has cited a North Carolina case where a police officer was held personally liable for injuries sustained by a third party due to the officer crashing his car while in hot pursuit of a suspect. *See Truhan v. Walston*, 235 N.C. App. 406 (2014) (differentiating between an officer responding to the scene of an accident and an officer in hot pursuit of a suspect).

The evidence in the present case, when viewed in the light most favorable to Plaintiff, showed that Defendant's acts in pursuing a suspected drunk driver was risky: (1) Defendant's blue lights and siren were turned on; (2) Defendant's actions directly and independently caused a collision; (3) Defendant admitted that he "drove [his] cruiser at a speed and in a manner such that [he was] unable to maintain proper control" of his vehicle and he only had one hand on the steering wheel; (4) Defendant violated the policies of NCSHP, as the Internal Affairs report shows, both by taking Michael Higgins as a passenger to this pursuit, and by engaging in the pursuit in the manner which he did; and finally, (5) Defendant's speed was 113 mph in a 55 mph zone. However, based on our jurisprudence, though the manner Trooper Mendoza exercised

his discretion in his pursuit of the suspected drunk driver may have been negligent, it did not rise to the level of "wanton conduct", done with "corruption or malice". Accordingly, I disagree with the majority's conclusion that the trial court erred in granting summary judgment for Trooper Mendoza in his individual capacity.

I note Plaintiff's argument in her brief concerning the discovery order (also subject to this appeal) allowing Trooper Mendoza additional time under Rule 6 of our Rules of Civil Procedure to respond to her requests for admissions, where Trooper Mendoza did not seek the extension until after the time he was to respond to Plaintiff's requests had expired. Plaintiff contends the requests were deemed admitted under Rule 36 once the deadline to respond had passed; a Rule 6 extension of time is ineffective to cure *deemed* admissions; and Defendant should have moved to withdraw or amend his deemed admissions.

Generally, where a party fails to timely respond to another party's request for admissions, the facts in question are deemed to be judicially admitted. N.C.G.S. § 1A-1, Rule 36. *See also Goins v. Puleo*, 350 N.C. 277, 281 (1999).

Rule 6(b) grants a trial court with broad authority (with some exceptions, as outlined in the Rule) to extend time periods specified in any of the Rules of Civil Procedure for the doing of any act required by those rules. *See Lemons v. Old Hickory Council*, 322 N.C. 271, 276 (1998) (allowing for the retroactive extension of time for the issuance of a summons after the statute of limitations had expired). Further, under Rule 36(b), a trial court has discretion to "permit withdrawal or amendment" of an admission made under the Rule. N.C.G.S. § 1A-1, Rule 36(b).

Here, to the extent that a trial court may have lacked authority to extend time *after* a party has failed to timely respond to requests for admissions, I conclude that the trial court did not err. By allowing Trooper Mendoza to respond to Plaintiff's requests after the 30-day deadline, the trial court was, in substance, allowing him to withdraw his deemed admissions or, otherwise, amend his deemed admissions. To me, Plaintiff's argument that another motion is required to withdraw the admissions is overly technical and does not comport with the canon of liberal interpretation of the Rules. *See Sutton v. Duke*, 277 N.C. 94, 99 (1970) ("The North Carolina Rules of Civil Procedure are modeled after the federal rules."); *see also Johnson v. Johnson*, 14 N.C. App. 40, 42 (1972) ("The canon of interpretation of the [ ] Rules is one of liberality, and it has been held in numerous decisions that the general policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits.").

STATE v. MIDDLETON

[297 N.C. App. 592 (2025)]

STATE OF NORTH CAROLINA
v.
ROBERT AHMAAD MIDDLETON, JR.

No. COA24-252

Filed 15 January 2025

1. Homicide—first-degree murder of one infant—intentional child abuse inflicting serious bodily injury to the deceased infant's twin—evidence sufficient

In a prosecution for intentional child abuse inflicting serious bodily injury and first-degree felony murder, arising from a father's abuse of his infant twin sons—less than two weeks after the premature babies had been released from a hospital's neonatal intensive care unit—the trial court did not err in denying defendant's motion to dismiss both charges. First, the State presented evidence sufficient to send to the jury charges of intentional child abuse, including that: both children suffered multiple severe head injuries while in the sole care of defendant, defendant changed his story of how the twins were injured several times, and, eventually, defendant admitted to causing the injuries. Second, as to the twin who died as a result of injuries inflicted by defendant, the jury was permitted to infer that, when used against a helpless infant, defendant's hands were deadly weapons (an essential element when intentional child abuse is the underlying offense for felony murder).

2. Evidence—testimony from a jailhouse witness—not inherently incredible—no plain error—constitutional arguments not preserved

In a prosecution for intentional child abuse inflicting serious bodily injury and first-degree felony murder, arising from a father's abuse of his infant twin sons—less than two weeks after the premature babies had been released from a hospital's neonatal intensive care unit—the trial court did not commit plain error in admitting evidence from a witness who had shared a jail cell with defendant and testified that defendant gave various stories about the twins' injuries before confessing to striking one of the infants with a bottle and then throwing the child to the floor. That testimony did not concern inherently incredible observations, but rather only the type of witness-credibility determinations that jurors must make in any trial. Further, since defendant did not raise any objection to this testimony at trial—on constitutional grounds or otherwise—his constitutional arguments were not preserved for appellate review.

Appeal by defendant from judgments entered 28 February 2023 by Judge William R. Bell in Gaston County Superior Court. Heard in the Court of Appeals 24 September 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Heidi M. Williams, for the State.

William D. Spence for defendant-appellant.

ZACHARY, Judge.

Defendant Robert Ahmaad Middleton, Jr., appeals from judgments entered upon a jury's verdicts finding him guilty of (1) first-degree murder of his infant son, "Dylan," and (2) intentional child abuse inflicting serious bodily injury of Dylan's twin brother, "Daniel."[1] After careful review, we conclude that Defendant received a fair trial, free from error.

BACKGROUND

Defendant and Takaylia Young ("Ms. Young") began a relationship in the spring of 2018. Soon after the couple began living together, Ms. Young became pregnant. She terminated the pregnancy at Defendant's urging; however, she told Defendant that if she became pregnant again, she would not obtain another abortion. In October 2019, Ms. Young discovered that she was pregnant again—this time, with twins. But when she told Defendant, he "wasn't too excited about it" and hung up the phone. Defendant made it clear to Ms. Young that he wanted her to abort the twins. Ms. Young refused.

Twins Dylan and Daniel were born prematurely in May 2020, and they remained in the neonatal intensive care unit ("NICU") until early June. When they were discharged from the NICU, Ms. Young brought the twins home to the apartment she shared with Defendant. On 12 and 18 June 2020, the twins had wellness checks with their pediatrician, during which nothing unusual was noted.

On Saturday, 20 June 2020, Ms. Young and her stepfather drove to Walmart in Belmont to get groceries, diapers, and other necessities, leaving Defendant home alone with the twins for a couple of hours.

---

1. Throughout their appellate briefs, Defendant and the State respectively identify the twins as "T1" or "Twin 1" and "T2" or "Twin 2." However, for clarity and ease of reading—as well as sensitivity to the minor victims in this case—we employ pseudonyms in this opinion. *See generally* N.C. R. App. P. 42. Hereinafter, we shall refer to "T1"/"Twin 1" as "Dylan" and "T2"/"Twin 2" as "Daniel."

Defendant was playing video games when Ms. Young and her stepfather returned from their errands. Ms. Young inquired about the twins, and Defendant "said they were fine."

However, the next day, 21 June 2020, Ms. Young began to notice concerning changes in Dylan. She observed that Dylan "was off," in that "he was really, really tired, like, exhausted tired." The twins had an eye doctor's appointment scheduled for early Monday morning, 22 June 2020, which was only the twelfth day since their release from the NICU. But Dylan had not fed since Sunday night, after multiple attempted feedings throughout the night and into Monday morning. Before the twins' appointment, Ms. Young called their pediatrician and left a message expressing concern that Dylan was not eating.

At the eye doctor's office, Dylan failed to blink his eyes during dilation, and "he just didn't look right and [his] breathing patterns . . . [weren't] right." Meanwhile, the twins' pediatrician returned Ms. Young's phone call and instructed her to take Dylan directly to the local emergency room. Although Ms. Young heeded the pediatrician's advice, Dylan's condition worsened at the emergency room, and he was airlifted to Levine Children's Hospital ("Levine") in Charlotte. There, Dylan was diagnosed with, *inter alia*, "a fractured skull and . . . severe bleeding in the brain." Dylan was also severely dehydrated and unable to breathe on his own; he was given fluids and medication and placed on life support.

Dr. Kendra Ham ("Dr. Ham"), a child-abuse pediatrician at Levine, testified at trial that Dylan had a parietal skull fracture on the left side of his head, along with "associated scalp swelling," which "happen[ed] quickly after [an impact], . . . up to 72 hours after an injury occurred." Dr. Ham also noted the existence of a bilateral subdural hematoma—a brain injury that typically results from "extreme force" or "rapid acceleration, deceleration"—which had occurred "within the last 72 hours." According to Dr. Ham, this injury could not have been caused by "a simple fall from an adult height," and Dylan's records showed no "pre-existing condition or injury" that would account for it.

In addition, Dylan suffered (1) bilateral subarachnoid hemorrhages; (2) an intraventricular hemorrhage, which Dr. Ham noted was not typically seen "in accidental injuries"; (3) cerebral edema, or "swelling of the brain"; and (4) a fracture to his left wrist, which Dr. Ham said was "very specific for physical abuse." Dr. Ham explained that "[d]ue to the constellation and extent of [Dylan's] injuries," her "medical assessment was consistent with abusive head trauma." According to Dr. Ham, Dylan's injuries could not have resulted from "a simple fall" or "accidentally bump[ing the] child's head into the wall or door frame"; rather, Dr. Ham

explained, Dylan's injuries were consistent with those that she would expect to see from "someone shaking [the] child and throwing [him] on the floor."

On the evening of 23 June 2020, Daniel was also admitted to Levine, where doctors noticed "bruising and swelling on [his] eyes." According to Dr. Ham's report, which was admitted at trial as State's Exhibit 34, Daniel "presented [at Levine] for a medical screening exam per recommendations due to his twin brother being admitted to the [pediatric intensive care unit] with injuries concerning for abusive head trauma and physical abuse." Following a full examination, doctors determined that Daniel "had similar injuries [to Dylan]. He also had a brain fracture and several bleeds on his brain." Dr. Ham diagnosed Daniel with (1) a left parietal skull fracture; (2) a subdural hematoma; (3) a subarachnoid hemorrhage; and (4) bruising to his upper left eyelid. Dr. Ham testified that, as with Dylan, Daniel's injuries were "consistent with inflicted trauma or abusive head trauma" but not with "a bump into the wall" or "a simple fall."

During his hospitalization, Daniel exhibited "intermittent hypothermia . . . and feeding difficulties believed to be due to his traumatic brain injury"; however, his condition eventually improved, and he was discharged from Levine on 8 July 2020. That same day, Dylan "was withdrawn from life support due to his very poor prognosis." He died that day.

Dr. Thomas Owens ("Dr. Owens"), a forensic pathologist and medical examiner, performed an autopsy on Dylan's body on 9 July 2020. Dr. Owens testified that Dylan suffered (1) a skull fracture on the left side of his head, which "require[d] an impact"; (2) a hemorrhage in the left parietal tissue; (3) bilateral subarachnoid hemorrhages caused by "violent, rapid, forceful shaking"; and (4) a fracture on the left wrist, caused by the arm "being moved back and forth in a rapid manner." Dr. Owens ultimately opined that Dylan's death was caused by "blunt force head trauma due to a nonaccidental method."

Investigation and Trial

Investigators representing various law enforcement and child protective services agencies questioned Defendant and Ms. Young on multiple occasions during the twins' stay at Levine. Defendant initially reported no knowledge of any traumatic events, although he admitted that he had once "plopped down" on the bed beside Dylan during a nighttime feeding, causing Dylan's head to rise "approximately two inches off the bed." Defendant shared this story with at least three

investigators, including Detective Albert Fleming ("Detective Fleming") of the Gastonia Police Department.

On 23 June 2020, Ms. Young told a DSS caseworker that Defendant "would sometimes be fast and rough" in his interactions with the twins, leading her to ask him "to be gentler with the children." Ms. Young also reported that when she first asked Defendant about the twins' injuries, he denied any knowledge of what had occurred. However, Defendant eventually "offered one explanation." Defendant told Ms. Young that he had awoken one night because he heard one of the twins crying: "It was dark in the hall so he picked one of the boys up, . . . [they] had spit up on themselves, and they were crying so he was trying to pick the baby up and accidentally ran into the corner of the wall in the bedroom."

At Ms. Young's urging, Defendant repeated this story to DSS. Ms. Young also asked the physicians at Levine whether the events described by Defendant could have caused the twins' injuries, but "they told [her] it couldn't have."

On 20 July 2020, a grand jury returned indictments charging Defendant with murder (as to Dylan) and intentional child abuse inflicting serious bodily injury (as to Daniel).[2]

Defendant continued to adopt different stories throughout the investigation of the case and while he awaited trial in this matter. While he was in jail, Defendant spoke to fellow inmate Brandon Woods ("Mr. Woods") about the twins and the reasons for his incarceration. Mr. Woods testified at trial that the "first story" that Defendant told him about Dylan's injuries was that an "old lady" had "bumped into him while he was carrying his baby and he dropped his baby"; however, this story "[didn't] sound right" to Mr. Woods. Defendant later told Mr. Woods a different version of the "same little story," in which "two Mexican kids . . . playing soccer . . . bumped into [Defendant]," who "dropped [the] baby, and [Defendant] just kept it moving." Mr. Woods testified that he ultimately told Defendant that he "didn't believe it . . . . [the] story kept changing and [Defendant] needed to keep it real."

According to Mr. Woods, upon this confrontation, Defendant broke down and

> said that he was playing his [video] game and the baby kept crying and [he] couldn't get the baby to stop crying and didn't know what [the baby] wanted. He said he got

2. Superseding indictments were issued for both charges on 16 May 2022.

> frustrated, and when the baby wouldn't take a bottle, then bam bam and [he] hit the baby with the bottle and the baby started crying louder. . . . He said the baby kept . . . making these little noises, and he picked [the baby] up . . . and he threw [the baby] down.

Mr. Woods, who was incarcerated on drug-related charges, shared Defendant's statements with Detective Fleming in October 2020. He testified, however, that he did not receive "any consideration from the State" as a result of the information that he provided to law enforcement officers in Defendant's case.[3]

On 14 February 2023, Defendant's case came on for jury trial in Gaston County Superior Court. At the close of the State's evidence, Defendant moved to dismiss both charges due to insufficient evidence, and he renewed his motion at the close of all evidence; the trial court denied Defendant's motion on both occasions.

On 28 February 2023, the jury returned verdicts finding Defendant guilty of first-degree murder and intentional child abuse inflicting serious bodily injury. The trial court entered separate judgments, sentencing Defendant to life imprisonment without parole for his conviction of first-degree murder and imposing a concurrent, active term of 180 to 228 months' imprisonment for his conviction of intentional child abuse inflicting serious bodily injury.

Defendant gave oral notice of appeal.

DISCUSSION

On appeal, Defendant first contends that the trial court erred by denying his motion to dismiss the charges of (1) first-degree murder (as to Dylan), and (2) intentional child abuse inflicting serious bodily injury (as to Daniel), because the State's evidence was insufficient to submit either charge to the jury.

Defendant further argues "that the trial court committed plain error" by allowing the State to present the testimony of Mr. Woods, because (1) the evidence "was 'inherently incredible' pursuant to *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967)"; and (2) Mr. Woods was acting "as an agent of the State" when he unlawfully "interrogated" Defendant in jail, in violation of his constitutional rights.

---

3. Mr. Woods's charges were dismissed, and he was released from jail in December 2020 after his codefendant "took responsibility for everything."

A. Defendant's Motion to Dismiss

[1] The State sought to convict Defendant of first-degree felony murder in the death of his infant son, Dylan, based on the underlying felony of intentional child abuse inflicting serious bodily injury. The State also charged Defendant with the same offense—intentional child abuse inflicting serious bodily injury, in violation of N.C. Gen. Stat. § 14-318.4(a3)—in relation to Dylan's twin brother, Daniel.

Excluding medical testimony and similar evidence regarding the twins' individual injuries (and death, in Dylan's case), much of the State's evidence at trial was, by necessity, the same for each victim. As a result, many of Defendant's appellate arguments concerning the trial court's denial of his motion to dismiss are also quite similar. Accordingly, we shall consider the sufficiency of the State's evidence of both charges contemporaneously.

1. Standard of Review

Whether the State presented sufficient evidence to withstand a motion to dismiss is a question of law reviewed de novo. *State v. Cox*, 367 N.C. 147, 150–51, 749 S.E.2d 271, 274–75 (2013). "Upon a defendant's motion to dismiss for insufficient evidence, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of [the] defendant's being the perpetrator of such offense." *Id.* at 150, 749 S.E.2d at 274 (cleaned up).

> Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (citation omitted).

The same test applies "whether the evidence is direct, circumstantial, or both." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Hunt*, 365 N.C. at 436, 722 S.E.2d at 488 (citation omitted).

2. Analysis

In North Carolina, the felony-murder rule is statutory. *See* N.C. Gen. Stat. § 14-17(a) (2023). Pursuant to the felony-murder rule, a homicide "committed in the perpetration or attempted perpetration of any . . . felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." *Id.*

When the offense underlying a felony-murder charge is felonious intentional child abuse, the State must "prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon." *State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997); *see also* N.C. Gen. Stat. § 14-17(a).

Pursuant to N.C. Gen. Stat. § 14-318.4(a3), the felony child-abuse statute at issue here,

> [a] parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class B2 felony.

N.C. Gen. Stat. § 14-318.4(a3). In this context, "serious bodily injury" means "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." *Id.* § 14-318.4(d)(1).

Certain inferences may arise from the evidence in cases of felony child abuse or felony murder based on felony child abuse. Foremost, as our Supreme Court articulated in *Pierce*, "[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." 346 N.C. at 493, 488 S.E.2d at 589; *see*, *e.g.*, *State v. Frazier*, 248 N.C. App. 252, 262, 790 S.E.2d 312, 320 (reiterating that "the offense of felonious child abuse, where [the] defendant's hands were a deadly weapon, serve[s] to elevate the killing to first-degree murder under the felony murder rule"), *disc. review denied*, 369 N.C. 188, 794 S.E.2d 330 (2016).

Furthermore, "when an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120–21 (2003). This is significant because both offenses—that is, felony child abuse and felony murder predicated on felony child abuse—are general-intent, rather than specific-intent, crimes. *See Pierce*, 346 N.C. at 494, 488 S.E.2d at 589 ("General-intent crimes are crimes which only require the doing of some act." (cleaned up)). As a result, N.C. Gen. Stat. § 14-318.4(a3) merely "requires the State to prove that the accused intentionally inflicted a serious [bodily] injury upon the child or intentionally committed an assault resulting in a serious [bodily] injury to the child." *Id.* (cleaned up). Similarly, "[f]elony murder on the basis of felonious child abuse requires the State to prove that the victim was killed during the perpetration or attempted perpetration of felonious child abuse with the use of a deadly weapon." *Id.* (citing N.C. Gen. Stat. § 14-17). Neither offense "require[s] the State to prove any specific intent on the part of the accused." *Id.*

In the present case, the State presented substantial evidence that Defendant committed intentional child abuse inflicting serious bodily injury with regard to both twins, and that Dylan died as a result. It is undisputed that Defendant fathered the twins, and that Dylan and Daniel were infants at the time they incurred their injuries. Moreover, the overwhelming medical evidence establishes that both twins suffered multiple severe head injuries, including bilateral subdural hematomas and subarachnoid hemorrhages. It is manifest that such serious trauma to the developing heads of five-week-old infants constitutes "serious bodily injury" within the meaning of our child-abuse statutes. *See* N.C. Gen. Stat. § 14-318.4(d)(1) (defining "[s]erious bodily injury" as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization"). Indeed, both twins required approximately two weeks' hospitalization in Levine's pediatric intensive care unit due to their injuries. Although Daniel's condition improved and he was discharged on 8 July 2020, Dylan died that day, after he was withdrawn from life support.

Significantly, Dr. Ham noted that during their previous stay in the NICU—which preceded their admission to Levine by barely a fortnight—both twins had two normal ultrasounds of their heads; the significant

trauma that was evident at Levine had not yet occurred when the twins were in the NICU.

Dylan also suffered a "corner or bucket handle fracture" of his left wrist. According to Dr. Ham, such fractures "have a high predictive value for physical abuse in infants less than one year of age" and are the most common type of fracture "found in fatal abuse cases." This type of fracture "involves torsional and shearing strains of the bone by forcefully pulling or twisting of the extremity and can also be seen when infants are shaken, and extremities are flailing." *Cf. Pierce*, 346 N.C. at 493, 488 S.E.2d at 589 ("The evidence that [the defendant] caused a small child's death by shaking her with his hands was sufficient to permit the jury to conclude that [the] defendant committed felonious child abuse and that he used his hands as deadly weapons.").

Daniel, on the other hand, presented at Levine with bruising and swelling to the upper left eyelid "without explanation for the injury." Dr. Ham noted in her report that "[a]ny bruise in an infant under 4 months is highly concerning and suspicious for physical abuse." *See Liberato*, 156 N.C. App. at 186, 576 S.E.2d at 120–21 (explaining that "when an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries").

On appeal, Defendant concedes that Dr. Ham testified that the injuries to Dylan and Daniel, "taken all together, were consistent with child abuse"; however, he contends that "Dr. Ham did not express an opinion that the injuries she found were caused by intentional child abuse, nor that [D]efendant had assaulted either child." This argument is demonstrably false. Dr. Ham testified that in her medical opinion, both twins' injuries were indicative of "nonaccidental" or "inflicted trauma"—specifically, "abusive head trauma." And although Defendant also asserts that the State failed to present substantial "credible" evidence that his actions (or the twins' injuries) were, in fact, *intentional*, our precedent does not require the State to make such a showing. *See Pierce*, 346 N.C. at 494, 488 S.E.2d at 589.

Notwithstanding Defendant's assertions otherwise, we conclude that the State's evidence was more than sufficient to withstand Defendant's motion to dismiss the charges. In addition to the evidence discussed above, the State established that Defendant's story changed numerous times, which the jury could infer as a sign of his dishonesty, or even guilt. Mr. Woods testified that Defendant admitted to getting

frustrated with one of his babies for crying; to striking one of the babies in the face with a bottle; and to picking up and throwing down one of the babies during the time that Ms. Young was out grocery shopping on 20 June 2020, within the 72-hour window of injury described by Dr. Ham. Defendant also admitted that he bumped one of the twins' heads against a wall and slapped and threw the other twin. Moreover, although he initially denied having any knowledge of the twins' injuries, Defendant eventually admitted to Detective Fleming that he was aware that his "actions . . . caused those injuries."

Viewed in the light most favorable to the State, the State's evidence was more than sufficient to allow a jury to reasonably infer that Defendant committed intentional child abuse inflicting serious bodily injury with regard to both Dylan and Daniel. The trial court therefore did not err by denying Defendant's motion to dismiss this charge as applied to Daniel. And because the State also presented substantial evidence that Dylan's death resulted from felonious child abuse with the use of a deadly weapon (i.e., Defendant's hands), the court properly denied Defendant's motion to dismiss the charge of first-degree murder of Dylan.

Accordingly, we conclude that the State presented sufficient evidence to withstand Defendant's motion to dismiss both charges.

B. Admission of Mr. Woods's Testimony

[2] Defendant's final argument on appeal is that the trial court erred by allowing the State to present the testimony of Mr. Woods because (1) the evidence was "inherently incredible"; and (2) its admission violated Defendant's constitutional rights under the Fifth and Sixth Amendments.

1. Plain Error

Although Defendant acknowledges that he failed to object at trial to the testimony that he now challenges on appeal, 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 meet his burden of establishing plain error, 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).

Here, Defendant asserts that the trial court committed plain error in admitting Mr. Woods's testimony because "it was 'inherently incredible' pursuant to *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967)." The State responds that "[a]ccepting Defendant's argument would drastically expand the scope of *Miller* and would encroach upon the jury's exclusive role to determine the credibility of witnesses and to determine the truth." We agree with the State.

It is well established that "the credibility of witnesses and the proper weight to be given their testimony is to be determined by the jury," rather than the trial court. *Miller*, 270 N.C. at 730, 154 S.E.2d at 904. In *Miller*, however, our Supreme Court recognized a narrow exception to this general rule, which applies "where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred." *Id.* at 731, 154 S.E.2d at 905; *see also id.* at 732, 154 S.E.2d at 905 ("Without the testimony of [the witness], there would be a complete failure of the State's evidence to connect the defendant . . . with the offense with which he is charged.").

We agree with the State that the *Miller* rule propounded by Defendant is wholly inapplicable here. First, our Supreme Court has long since clarified that its holding in *Miller* "was based on the general rule that *evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature* is not sufficient to take the case to the jury." *State v. Cox*, 289 N.C. 414, 422–23, 222 S.E.2d 246, 253 (1976) (emphasis added). Defendant does not—and indeed, cannot—suggest that Mr. Woods's testimony in this case conflicts with "indisputable physical facts or laws of nature"; rather, Defendant merely identifies certain discrepancies in Mr. Woods's testimony as compared to other evidence offered by the State. But whether these discrepancies evinced flaws in Mr. Woods's overall credibility as a witness, or instead with the content of his testimony—namely, Defendant's constantly changing stories regarding the twins' injuries and his knowledge thereof—was properly a matter for the jury's determination. *Cf. id.* at 423, 222 S.E.2d at 253 (reaffirming the "sound" holding in *Miller*, but noting that "it has no application where, as here, there is a reasonable possibility of observation sufficient to permit subsequent identification" because "[i]n such event, the credibility of the witness and the weight of his identification testimony is for the jury" (cleaned up)).

Moreover, contrary to Defendant's assertions, any potential questions about Mr. Woods's credibility—including, for example, the

circumstances through which he became acquainted with Defendant or his decision to share information with law enforcement—are characteristic of those properly left for the jury's determination. Recognizing this, the trial court properly instructed the jurors, *inter alia*, that they "[we]re the sole judges of the believability of a witness"; that they could "believe all or any part or none of what a witness . . . testified to from the witness stand"; and that, in deciding whether to believe a witness, they should consider such common-sense factors as "any interest, bias, or prejudice" displayed by the witness, "or whether the testimony is consistent with other believable evidence in the case."

In summary, Defendant's challenge to Mr. Woods's testimony does not concern "inherently incredible" observations but rather the type of witness-credibility determinations that jurors are called upon to make in nearly every trial. Defendant has thus failed to show that the trial court's admission of this testimony constituted error, much less plain error.

2. Constitutional Arguments

Defendant last argues that the trial court erred by admitting Mr. Woods's testimony because Mr. Woods was acting "as an agent of the State who interrogated [Defendant] on behalf of the State in violation of [D]efendant's rights under the Fifth and Sixth Amendments of the United States Constitution."

However, Defendant did not object to the admission of Mr. Woods's testimony—on constitutional grounds or otherwise—and therefore, he has waived appellate review of this issue. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Patterson*, 249 N.C. App. 659, 664, 791 S.E.2d 517, 521 (citation omitted), *disc. review denied*, 369 N.C. 199, 794 S.E.2d 328 (2016); *see also* N.C. R. App. P. 10(a)(1).

Moreover, although Defendant requests plain error review, "constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Wilkins*, 287 N.C. App. 343, 349, 882 S.E.2d 454, 458 (2022) (cleaned up), *disc. review denied*, 385 N.C. 313, 890 S.E.2d 903 (2023). The argument Defendant presents on appeal "is solely a constitutional one." *Id.* Thus, it is "an issue that is fully waived if not timely asserted in the trial court." *Id.* Accordingly, this argument is waived.

CONCLUSION

For the reasons stated herein, the trial court did not err by denying Defendant's motion to dismiss the charges of first-degree murder and intentional child abuse inflicting serious bodily injury, nor did the trial court commit plain error by allowing the State to present the testimony of Mr. Woods. Accordingly, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges STROUD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JIMMY DAVENPORT

No. COA24-330

Filed 15 January 2025

1. **Evidence—authentication—through circumstantial evidence —murder trial—Facebook messages purportedly sent by defendant to victim**

   In a prosecution for first-degree murder, the trial court did not err in admitting photographs of Facebook messages purportedly sent by defendant to the victim (his brother) on the day of the murder. The State properly authenticated the messages through circumstantial evidence, including: testimony from defendant's niece, who identified the victim's phone (used to retrieve the messages) in the photographs and testified that defendant communicated exclusively via Facebook Messenger; testimony from a police deputy regarding chain of custody and his process of retrieving the messages (by opening the Facebook Messenger application on the victim's phone and clicking on defendant's name); and the content of the messages, which repeatedly referenced the sibling relationship between the sender and the victim, as well as certain details about the victim's personal life.

2. **Evidence—murder trial—report showing 911 call—factual relevance—distinguished from prejudicial nature of the call's contents**

In a prosecution for first-degree murder, the trial court did not err in admitting a Computer-Aided-Dispatch report showing that a second 911 call was made shortly after law enforcement responded to the initial call reporting the murder. Defendant argued on appeal that the report was irrelevant and should not have been admitted where the trial court subsequently excluded the content of the call from evidence. However, the report was relevant under Evidence Rule 401 because it confirmed the time when the call was made and explained why the police officer who received the call chose to leave the crime scene. Further, the actual content of the call—which the court, in its discretion, determined was substantially more prejudicial than probative under Rule 403—was a separate evidentiary matter altogether, and the court's rulings on the factual relevance of the report and the prejudicial nature of the phone call's contents were consistent with each other.

Appeal by Defendant from Judgment entered 14 November 2023 by Judge Taylor Browne in Scotland County Superior Court. Heard in the Court of Appeals 24 September 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Marissa K. Jensen, for the State.

Marilyn G. Ozer for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jimmy Davenport (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of First-Degree Murder. The Record before us, including evidence presented at trial, tends to reflect the following:

On 10 December 2020, the victim in this case, Defendant's brother Frankie Tyrone Davenport, was at a gathering with his daughter—Shonquila Wall—as well as Defendant and Amber Bullard. That evening, Wall, Defendant, Frankie Davenport, and Bullard left the gathering together in Wall's car, and Wall dropped Defendant off on the way back to her house. Wall, Frankie Davenport, and Bullard all returned to Wall's house on Lee's Mill Road in Scotland County, North Carolina. Akeem Breese, who was Wall's boyfriend, and her niece, Gloria Malloy, were also present at Wall's house. Defendant arrived later, knocked on the

door, and told Wall he wanted Bullard to come outside. Wall left the entry area and observed Defendant and Frankie Davenport having a "back-and-forth exchange" and Defendant pacing on the porch through the front door window. Bullard, Frankie Davenport, Breese, and Wall were in the living room when they heard the sound of glass shattering from the middle of the front port. According to Wall, all of them got up and ran because they saw a gun coming through the window. Wall testified that Defendant was holding the gun when it came through the window. Wall stated that she believed she heard three gunshots. Wall also testified she heard Frankie Davenport say, "You done f'ed up now. You shot me." Wall then called 911, and she testified that she believed Breese also called 911.

Emergency Call Center records presented at trial showed a 911 call came in from Wall's address on 10 December 2020. Deputy David Blackmon with the Scotland County Sheriff's Office responded. When Deputy Blackmon arrived at the scene, Breese answered the door and reported that someone had been shot and was lying on the living room floor. Deputy Blackmon observed Frankie Davenport lying on the ground with a large pool of blood around his head.

At trial, Wall testified she had communicated with Defendant only through Facebook Messenger because Defendant did not have a phone with service. She stated she believed Frankie Davenport also communicated with Defendant exclusively through Facebook Messenger. Further, Wall stated Frankie Davenport had told her Defendant was threatening him.

During its case in chief, the State sought to introduce as evidence photographs of Defendant's Facebook messages to Frankie Davenport. Deputy Shawn Gagnon with the Scotland County Sheriff's Office testified that a cell phone was collected from the crime scene. Later, he retrieved the phone from the evidence vault, opened the Facebook Messenger application, accessed the message thread with "Jimmy Davenport", and took photographs of the messages. Deputy Gagnon identified State's Exhibit 37 as a photo of a cellphone placed on top of an evidence bag showing the case number corresponding to the underlying matter here and Frankie Davenport's name. Counsel for the State then began to question Deputy Gagnon about State's Exhibit 38—the same cellphone opened to a Facebook message from "Jimmy D."—when counsel for Defendant objected. The trial court then excused the jury.

Counsel for Defendant argued the State had not laid a proper foundation to show where the messages shown in the photographs came

from. Counsel for Defendant asserted: "The State's evidence has been that [Defendant] did not have a cell phone. And now the State is purporting to put into evidence what they are saying, I believe, is [sic] text messages from [Defendant] when their own evidence has been that he didn't have a cell phone." The State responded that the content it sought to introduce were Facebook messages from Defendant, Wall had identified the cellphone as belonging to Frankie Davenport, and Deputy Gagnon testified to the chain of custody and process of retrieving the messages in question. Further, Wall testified that Defendant communicated through Facebook Messenger. The trial court sustained the objection but allowed the State to conduct a voir dire for the exhibits.

During the voir dire, Deputy Gagnon read the contents of the messages in the exhibits at issue and identified how incoming and outgoing messages were color coded. Deputy Gagnon testified again that he had unlocked the phone shown in State's Exhibit 37, went into the Facebook Messenger application, and clicked on the name "Jimmy Davenport". Following the questioning of Deputy Gagnon, the State argued

> for authentication purposes that the content and context of – that are contained within the messages would also aid in the sense of establishing authenticity of the sender. And I'd argue to you that it would be the – I'd argue it's admissible and that any question would go to weight for the jury to determine whether or not they believe, in fact, it's – it would be Mr. Davenport, Jimmy Davenport, the defendant in this case, sending the message.

The trial court found that the State had, through voir dire, properly authenticated the messages, reversed its previous ruling, and overruled defense counsel's objection.

Additionally, during its case in chief, the State called Samantha Dutch, the Director of the Scotland County Emergency Communications Center. Dutch testified that when the Center receives a 911 call, each call is "documented in what is called a CAD system, which is basically our database system for keeping track of notes and all other information for responders and the calls themselves." During the State's direct examination, Dutch identified a State evidentiary exhibit as a CAD report from the date of the incident—10 December 2020. Defendant objected to the admission of the CAD report, and the trial court heard arguments about the admissibility of the report outside of the presence of the jury.

During the voir dire that followed, the State clarified precisely what it sought to introduce: "The State would not be introducing the audio

call because it's [sic] been purged from the system. It would just be the CAD report showing that a call was made and which may be used, I guess, later for other purposes[.]" Further, the State limited its exhibit to one page, which contained only the report of the call's occurrence:

> [State's Counsel]: And specifically, this one is a single page, I think. And can you determine whether or not there are any notes or any other comments that would be inputted by other individuals on that?
>
> [Dutch]: Yes.
>
> [State's Counsel]: Okay. And are there any other notes or any other comments?
>
> [Dutch]: Not on this page.
>
> [State's Counsel]: Okay. But there would be a separate page?
>
> [Dutch]: That's correct.
>
> [State's Counsel]: Okay. And is that — how are you able to determine that?
>
> [Dutch]: The bottom of this printout shows that this is page 1 of 2. And also being familiar with the printouts, they always show a comment section that is not here.

Counsel for Defendant objected on the basis that the CAD report was not relevant. The trial court overruled the objection and explained its reasoning: "Well, according to Rule 401, if it has any tendency. I believe the report states that a phone call was made around the relevant time. It's a 9-1-1 phone call. I suppose it does have some tendency to make the existence of a fact in consequence more probable than not." Upon resuming the direct examination of Dutch, she testified after the CAD report was admitted, consistent with the trial court's ruling and the limitations of the exhibit the State had expressed, that the CAD report reflected a call came in to the Emergency Call Center on 10 December 2020 at 3:43 a.m.

Later, the State questioned Deputy David Blackmon about his response to the incident. Deputy Blackmon testified he stayed at the crime scene after officers secured the perimeter. The State then asked: "Did you ever respond to any calls during that time?" Deputy Blackmon began to respond, "A few hours later, we had a call in reference to–". At that point, counsel for Defendant interjected to object. The trial court

sustained the objection and conducted another voir dire outside of the presence of the jury. During that voir dire, Deputy Blackmon spoke to the contents of the 911 call. Based on questioning from both parties, the trial court observed the testimony was "getting farther and farther removed," and stated: "Let me just put it on the record that the Court will sustain defense counsel's objection based on Rule 401 and 402 to the extent that the testimony is relevant. The Court finds that the danger of unfair prejudice to the defendant substantially outweighs any probative value of the proffered evidence." The trial court expressly distinguished between the CAD report, which showed only that a call had been made, and the content of the call as reported by Deputy Blackmon: "I believe [Deputy Blackmon] confirmed that another phone call came in and that he had to leave. I think that's . . . any objection to that is overruled. But to the contents of the phone call stating that his life is in danger by the defendant or the perpetrator or the suspect of the first shooting, that's sustained. . . . Contents of the conversation are off limits." When the jury returned, Deputy Blackmon testified:

> [State's Counsel]: And I think we were at the portion – I had asked did you receive any other calls for service?
>
> [Deputy Blackmon]: I did, yes.
>
> [State's Counsel]: Okay. And at that point, did you leave the location where you were?
>
> [Deputy Blackmon]: Yes.

On 14 November 2023, the jury returned a verdict finding Defendant guilty of First-Degree Murder. The trial court sentenced Defendant to life imprisonment without parole. Defendant orally gave Notice of Appeal on 14 November 2023.

Issues

The issues on appeal are whether the trial court erred by admitting: (I) photographs of Facebook messages purportedly sent by Defendant; and (II) a CAD report of a 911 call.

Analysis

I. Facebook Messages

[1] "We review *de novo* rulings on authentication issues under Rule of Evidence 901." *State v. Jones*, 288 N.C. App. 175, 187, 884 S.E.2d 782, 793 (2023) (citing *State v. Crawley*, 217 N.C. App. 509, 515-16, 719 S.E.2d 632, 637 (2011)). "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. Hicks*, 243 N.C. App. 628, 639, 777 S.E.2d 341, 348 (2015) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

Rule 901 of our Rules of Evidence provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2023). "Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated." *State v. Clemons*, 274 N.C. App. 401, 414, 852 S.E.2d 671, 679 (2020) (quoting *State v. Allen*, 258 N.C. App. 285, 288, 812 S.E.2d 192, 195 (2018)). One way our Rules of Evidence provide a writing or other piece of evidence may be authenticated is by "Distinctive Characteristics and the Like–Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." N.C. Gen. Stat. § 8C-1, Rule 901(b)(4) (2023).

Further, our Courts have acknowledged "the authorship and genuineness of letters, typewritten or other, may be proved by circumstantial evidence[.]" *State v. Davis*, 203 N.C. 13, 28, 164 S.E. 737, 745 (citation omitted), *cert. denied*, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932). Additionally, "[i]t [is] not error for the trial court to admit the [evidence] if it could reasonably determine that there was sufficient evidence to support a finding that 'the matter in question is what its proponent claims.' " *State v. Wiggins*, 334 N.C. 18, 34, 431 S.E.2d 755, 764 (1993) (quoting N.C. Gen. Stat. § 8C-1, Rule 901(a)). "Importantly, the burden to authenticate under Rule 901 is not high—only a prima facie showing is required[.]" *State v. Ford*, 245 N.C. App. 510, 519, 782 S.E.2d 98, 105 (2016) (quoting *U.S. v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (citation and quotation marks omitted)).

This Court has concluded a trial court did not err in admitting two screenshots of a defendant's social media webpage where the account at issue was attached to a screenname that reflected the defendant's nickname and the account displayed pictures of the defendant. *Ford*, 245 N.C. App. at 521, 782 S.E.2d at 106. In *Ford*, the defendant appealed from a conviction for involuntary manslaughter where his dog attacked the victim. *Id.* at 514-15, 782 S.E.2d at 102. There, a detective testified he found photographs of the defendant and the dog in question on a MySpace page accompanying the defendant's nickname. *Id.* at 513, 782 S.E.2d at 101. The Court concluded, "[w]hile tracking the webpage directly to defendant through an appropriate electronic footprint or

link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique contents belong to defendant." *Id.* at 521, 782 S.E.2d at 106. That "strong circumstantial evidence" included photographs of the defendant, corroboration that the username was defendant's nickname, and a video with a song where the detective identified the voice in the song as the defendant's. *Id.*

In *State v. Clemons*, this Court considered whether Facebook comments posted from the victim's daughter's Facebook account were properly authenticated as belonging to the defendant. 274 N.C. App. at 415, 852 S.E.2d at 680. There, the Court concluded "the distinctive characteristics of the post in conjunction with the circumstances are sufficient to conclude [d]efendant wrote the comments." *Id.* The Court pointed to circumstantial evidence showing the defendant had access to the Facebook account, the comments began "a week or two" after the defendant was released from prison, the close relationship between the defendant and the victim's daughter, and the posts themselves which the victim testified were unlike her daughter. *Id.*

Here, two witnesses—Shonquila Wall and Deputy Gagnon—provided pertinent testimony. Wall identified the victim's cellphone in photographs during her testimony. Further, she testified she communicated with Defendant "[o]nly through Facebook [M]essenger" because he did not have a working phone. Wall further stated she knew the victim had communicated with Defendant, likewise only through Facebook Messenger because Defendant did not have a working phone. This is consistent with the type of circumstantial evidence this Court concluded was sufficient to authenticate the Facebook messages in *Clemons*. In a similar vein, while in *Clemons* the Court looked at the Facebook comments as a clear deviation from the victim's daughter's typical behavior—and thus supporting the inference that someone else wrote the comments—here, Wall's testimony was that the use of Facebook Messenger was consistent with Defendant's behavior.

Additionally, during voir dire Deputy Gagnon testified to how he retrieved the messages from the phone, which Wall had identified at the scene as belonging to Frankie Davenport. This is consistent with *Ford* in which the detective testified to how he discovered the MySpace page at issue. Further, Deputy Gagnon also read the content of the messages, which contained references and information corroborating their authenticity. In one exchange, the message from "Jimmy D." read, "I hope you enjoy your day with Jayden 'cause it just may [be] your last one with him." This is consistent with Wall's earlier testimony

that Frankie Davenport's son's name was Jayden and that Davenport was spending time with Jayden around the time of the incident. Another message read: "I'll see you tomorrow at dialysis, big bro." The State established at trial that Defendant and Frankie Davenport were brothers and Frankie Davenport was Defendant's older brother, supporting the inference Defendant had sent the message because he referred to Davenport as "big bro."

These references to the nature of the sender's relationship to Frankie Davenport, as well as to the sender's knowledge about details of Frankie Davenport's personal life, are sufficient "distinctive characteristics" to authenticate the messages. *See* N.C. Gen. Stat. § 8C-901(b)(4) (2023). Therefore, the messages were properly authenticated. Thus, the trial court did not err in admitting photos of the Facebook messages.

II. CAD Report of 911 Call

[2] Defendant contends the CAD report of a 911 call was erroneously admitted into evidence where the trial court subsequently held the content of that call was inadmissible. Specifically, Defendant argues the trial court's decisions to admit the CAD report showing a 911 call had been received approximately two hours after the incident and to exclude the content of the call were inconsistent. We disagree.

Under our Rules of Evidence, "[a]ll relevant evidence is admissible," unless otherwise provided. N.C. Gen. Stat. § 8C-1, Rule 402 (2023). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2023). "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Allen*, 265 N.C. App. 480, 489, 828 S.E.2d 562, 570 (citation omitted), *appeal dismissed, disc. rev. denied*, 373 N.C. 175, 833 S.E.2d 806 (2019). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2023).

Here, the trial court admitted the CAD report over Defendant's objection that it was not relevant. We note at the outset that our Supreme Court has described this relevancy threshold as "relatively lax." *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988). "Moreover, '[i]n order to be relevant, evidence need not bear directly on the question in issue if it is helpful to understand the *conduct of the parties*, their

motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.' " *State v. Norris*, 287 N.C. App. 302, 314, 882 S.E.2d 608, 617 (2022) (emphasis added) (quoting *State v. Miller*, 197 N.C. App. 78, 86, 676 S.E.2d 546, 551, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 216 (2009)). First, the CAD report had a tendency to make the fact that an incident occurred in the early morning of 10 December 2020 more likely because the report showed a 911 call had been made at 3:43 a.m. Second, as the trial court articulated, the CAD report was relevant to explain why Detective Blackmon left his location. This is consistent with prior cases in which our Courts have upheld the admission of evidence to show its effect on a person involved. *See State v. McCutcheon*, 281 N.C. App. 149, 153, 867 S.E.2d 572, 577 (2021) ("Evidence 'offered to explain the conduct of a witness [is] relevant and admissible[.]' " (quoting *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991))); *State v. Potter*, 295 N.C. 126, 132, 244 S.E.2d 397, 401-02 (1978) (witness' testimony regarding a threat to her husband admissible to explain her subsequent conduct in calling the police); *State v. Dial*, 122 N.C. App. 298, 311, 470 S.E.2d 84, 92 (1996) (witness' testimony regarding threatening statements by defendant about victim relevant and admissible to explain subsequent conduct in calling crime tip line).

Defendant points to the trial court's decision to exclude the content of the call as support for his argument the CAD report should have been excluded. The actual content of the call, however, is a separate evidentiary matter which the trial court, in its discretion, determined—even if relevant—was substantially more prejudicial than probative under Rule 403. *See State v. Grant*, 178 N.C. App. 565, 573-74, 632 S.E.2d 258, 265 (2006) ("A trial court has discretion whether or not to exclude evidence under Rule 403, and a trial court's determination will only be disturbed upon a showing of an abuse of discretion." (citing *State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005), *cert. denied*, *Campbell v. North Carolina*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006))). Indeed, these rulings are consistent and show an effort by the trial court to provide jurors with explanatory information as to why Detective Blackmon left Wall's house, while protecting Defendant from undue prejudice as the jury was prevented from hearing statements which might have resulted in unfair prejudice against him.

Thus, the trial court properly determined the CAD report was relevant. Therefore, the trial court did not err in admitting it into evidence. Consequently, there was no error in Defendant's trial and the trial court properly entered judgment on the jury verdict.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgment.

NO ERROR.

Judges STROUD and ZACHARY concur.

JOSEPH AARON WARREN, JR. AND WIFE
LINDA BLACKBURN WARREN, PLAINTIFFS
v.
MARCELLA STRICKLAND BONNER
AND HUSBAND, JACK L. BONNER, DEFENDANTS

No. COA24-453

Filed 15 January 2025

1. Jury—voir dire—reopened after jury impaneled—peremptory challenge

In an action arising from a property dispute, the trial court erred in allowing defendants to reopen voir dire toward the end of plaintiffs' case-in-chief—to address a claim by defendants that one juror had been dishonest during the initial voir dire about his knowledge of and connection to plaintiffs—and to exercise a peremptory challenge to excuse that juror and have him replaced with an alternate juror; Supreme Court precedent prohibited a peremptory challenge—in contrast to a challenge for cause—after a juror had been passed and accepted by the parties. Accordingly, the judgment entered in favor of defendants was vacated and the matter was remanded for a new trial.

2. Appeal and Error—motion for judgment notwithstanding the verdicts—no notice of appeal from denial—no appellate jurisdiction

Plaintiffs' purported appeal from the denial of their motion for judgment notwithstanding the verdicts (JNOV) entered against them was dismissed for lack of jurisdiction where plaintiffs' notice of appeal only designated the judgment entered upon the jury's verdicts and did not specifically designate the order denying their JNOV motion.

Appeal by Plaintiffs from judgment entered 13 December 2023 by Judge Robert C. Roupe in Sampson County Superior Court. Heard in the Court of Appeals 6 November 2024.

Daughtry, Woodard, Lawrence, & Starling, by Luther D. Starling, Jr., for Plaintiffs-Appellants.

Hutchens Law Firm LLP, by J. Haydon Ellis and J. Scott Flowers, for Defendants-Appellees.

COLLINS, Judge.

This appeal arises from a property dispute between Plaintiffs and Defendants and addresses an issue of first impression on this Court: whether the trial court in a civil case may re-open jury voir dire after the jury had been impaneled and allow a party to exercise a peremptory challenge.

Plaintiffs Joseph and Linda Warren appeal from the judgment entered upon the jury's verdicts finding Defendants Marcella and Jack Bonner not liable for the negligence per se, trespass to real property, and nuisance claims asserted against them by Plaintiffs and finding Plaintiffs liable to Defendants for the counterclaims asserted against them for nuisance, trespass to real property, and trespass to personal property. Plaintiffs argue that the trial court erred by re-opening jury voir dire after the jury had been impaneled and allowing Defendants to exercise a peremptory challenge. Plaintiffs also argue that the trial court erred by denying their motion for judgment notwithstanding the verdicts.

Because the trial court erred by allowing Defendants to exercise a peremptory challenge after the jury had been impaneled, we vacate the judgment and remand the matter for a new trial. Because Plaintiffs failed to give notice of appeal from the order denying their motion for judgment notwithstanding the verdicts, we lack jurisdiction to address that order and dismiss that argument.

I. Background

The underlying property dispute is not relevant for purposes of this appeal; relevant to the issues on appeal are the following procedural facts: The matter came on for trial and the jury was impaneled. Toward the end of Plaintiffs' case-in-chief, Defendants informed the trial court that they believed juror number twelve had been dishonest during voir dire about his knowledge of and connection to Plaintiffs. Defendants

asked the trial court to inquire into the juror's relationship with Plaintiffs and whether the juror had spoken to anyone about the trial.

Plaintiffs objected on the ground that "[t]his is trying to reopen the jury[.]" The following conversation then took place about the trial court's ability to reopen jury voir dire in a civil, as opposed to criminal, case:

> THE COURT: [Defense Counsel], I'm quite familiar with the rules regarding voir dire and the Court's discretion to reopen it in the context of a criminal case; admittedly, not as such in a civil case. Do you happen to know the statute or statutes upon which you would be relying that would give me the authority to do that, sir?
>
> [DEFENSE COUNSEL]: Judge, I'm not aware of any distinction between the rules between a criminal case and a civil case when it comes to this matter. I mean, just this week in Cumberland County we had two jurors struck from a murder trial because they spoke about the trial outside of the courtroom. . . .
>
> . . . .
>
> And there's no distinction, to my knowledge, between a civil jury and a criminal jury when it comes to those legal principles.
>
> . . . .
>
> THE COURT: My entire concern about this case and the jury is I want to make sure we have people that can be fair and impartial to both sides. And so I am going to ask that we bring [juror number twelve] in. I'm going to ask him a couple of these questions, and then we will go from there.
>
> . . . .
>
> [DEFENSE COUNSEL]: Your Honor, we're not asking for a new jury. We would ask, as we stated earlier, that if you find that there is bias or impropriety, that the alternate be [impaneled] and move forward with that, with the alternate.

After questioning the juror, the trial court did not find cause to remove him. Defendants then asked the trial court if the juror's friend was an employee on Plaintiffs' farm. The trial court, in turn, asked Plaintiffs if the juror's friend was Plaintiffs' employee. Plaintiffs told the

trial court that the juror's friend is retired but does help on Plaintiffs' farm. Defendants stated, "And, based on that information, Your Honor, we move to strike this juror and [impanel] the alternate."

The trial court then announced the following:

> I am going to find that there was good cause to reopen the voir dire of [juror number twelve], that I do not believe that there's a basis for challenge for cause; however, in reading the voir dire statutes, as I am aware of them, as I know of them, I believe by so reopening, I would give either party the opportunity to exercise a peremptory on this person.

Defendants exercised a peremptory challenge on the juror; the trial court allowed the challenge and replaced the juror with an alternate. Plaintiffs again objected. The trial court excused juror number twelve and noted the decision was made in the trial court's discretion pursuant to N.C. Gen. Stat. § 15A-1214.

At the close of the evidence, Plaintiffs moved for a directed verdict; the motion was denied. The jury returned verdicts finding Defendants not liable on all three of Plaintiffs' claims and finding Plaintiffs liable on all three of Defendants' claims. The trial court entered judgment on the jury's verdicts. Plaintiffs moved for judgment notwithstanding the verdicts; the trial court denied the motion. Plaintiffs noticed appeal to this Court.

II. Discussion

A. Jury Voir Dire

[1] Plaintiffs first argue that the trial court erred by allowing Defendants to exercise a peremptory challenge after the jury had been impaneled and the trial had commenced. Plaintiffs' argument is meritorious.

Whether North Carolina's statutes governing civil litigation authorize peremptory challenges after a jury has been impaneled is an issue of law. Issues of law are reviewed de novo on appeal. *Schroeder v. City of Wilmington*, 282 N.C. App. 558, 565 (2022).

There are two ways in which a party in a civil or criminal case may challenge a juror: a challenge for cause and a peremptory challenge. "A challenge for cause is a challenge to a juror for which some cause or reason is assigned." *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 302 (1951) (citing *State v. Levy*, 187 N.C. 581 (1924)). "A peremptory challenge is a challenge 'which may be made or omitted according to the

judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor.' " *Id.* (citations omitted).

Some provisions of Chapter 9 of our General Statutes govern processes related to selecting and impaneling a jury in both civil and criminal cases. *See, e.g.*, N.C. Gen. Stat. §§ 9-1–9-7.1 (2023) (governing "Jury Commissions, Preparation of Jury Lists, and Drawing of Panels"). Provisions in Chapter 9 also govern challenges to jurors in civil cases, whereas provisions in Chapter 15A govern challenges to jurors in criminal cases. The applicable statutory provisions and the caselaw interpreting those provisions differ from each other.

Pursuant to N.C. Gen. Stat. § 9-19, "before a jury is impaneled to try the issues in any civil suit . . . the parties, or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court." N.C. Gen. Stat. § 9-19 (2023). Our Supreme Court has held that while a trial court has the discretion to allow a challenge for cause after the jurors have been passed by the parties, the trial court may not allow a peremptory challenge after a juror has been passed *and accepted* by the parties:

> After the jurors are passed by the parties any further examination of them is not a matter of right but of discretion in the court. If on such examination good challenge for cause is presented the court may allow the juror to be challenged therefor. But the reason of the thing and the precedents do not extend to the allowance of a peremptory challenge after a juror has been passed and accepted.

Dunn v. Wilmington & W. R. Co., 131 N.C. 446, 447 (1902) (citations omitted). The Court explained that "the rules governing the formation of juries are well settled and material" and that "the allowance of a peremptory challenge after the acceptance of a juror, is not only an impairment of the legal rights of the opposite party but would lead to great uncertainty in trials in a matter which has long been settled and well understood." *Id.* at 448.

The parties have cited no statute or caselaw, and we have found none, specifically addressing the trial court's authority in a civil action to reopen jury voir dire and allow challenges for cause or peremptory challenges after the jury has been impaneled. However, we find *Dunn*'s holding and reasoning persuasive and hold that after the jury has been impaneled, "any further examination of them is not a matter of right but of discretion in the court. If on such examination good challenge

for cause is presented the court may allow the juror to be challenged therefor." *Id.* at 447. However, upon the trial court's reopening the jury voir dire after the jury has been impaneled, the trial court may not allow a peremptory challenge of a juror. *See id.*

Here, the jury was duly impaneled. The trial court, in its discretion, found that there was good cause to reopen the jury voir dire. Upon examination of juror number twelve, the trial court did not find that good challenge for cause had been presented; accordingly, juror number twelve should not have been stricken. The trial court, however, erroneously allowed Defendants to exercise a peremptory challenge on juror number twelve and replaced that juror with an alternate juror. This was reversible error.

The trial court found, and Defendants argue, that N.C. Gen. Stat. § 15A-1214(g) authorized the trial court to allow Defendants' peremptory challenge after the jury had been impaneled. This is not correct.

N.C. Gen. Stat. § 15A-1214(g) provides, in pertinent part, as follows:

> If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:
>
> > (1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.
> >
> > (2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
> >
> > (3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

N.C. Gen. Stat. § 15A-1214(g) (2023).

This statute did not provide the trial court the requisite authority for the following reasons: First, this is a criminal statute and does not apply here. Second, N.C. Gen. Stat. § 15A-1214(g) speaks only to the procedure applicable *before* the jury is impaneled. Third, the general rule in a criminal case is that "after a jury is impaneled, the parties have waived their rights to challenge peremptorily a juror." *State v. McLamb*, 313 N.C. 572, 577 (1985) (citation omitted). However, given the "significant role that the free exercise of peremptory challenges plays in a trial of a

criminal case," *id.* at 576, where liberty and life are often at stake, a body of criminal caselaw has developed allowing the trial court the discretion to re-open examination of a juror after the jury has been impaneled and, upon doing so, requiring the trial court to allow each party to exercise any remaining peremptory challenges to excuse such a juror. *See State v. Thomas*, 230 N.C. App. 127, 130 (2013); *State v. Holden*, 346 N.C. 404, 429 (1997); *State v. Womble*, 343 N.C. 667, 678 (1996). No parallel body of caselaw has developed in North Carolina as to civil actions, and the life and liberty considerations underpinning the criminal caselaw are not at issue here.

For these reasons, the trial court erred by relying on N.C. Gen. Stat. § 15A-1214 for the authority to allow Defendants' peremptory challenge after the jury had been impaneled.

B. Appeal from the JNOV

[2] Plaintiffs also argue that the trial court erred by denying their motion for judgment notwithstanding the verdicts. Because we lack jurisdiction to review this order, we dismiss Plaintiffs' appeal of this issue.

An appellant's notice of appeal "shall designate the judgment or order from which appeal is taken . . . ." N.C. R. App. P. 3(d) (2023). "An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347 (2008) (citation omitted).

Here, Plaintiffs' notice of appeal filed on 11 March 2024 states as follows:

> Plaintiffs . . . hereby give notice of appeal to the North Carolina Court of Appeals from the Judgment signed on the 6th day of December, 2023 and filed in this matter on the 13th day of December, 2023 by the Honorable Robert C. Roupe in the Superior Court of Sampson County. . . .

This language plainly designates the judgment entered on the jury's verdicts filed on 13 December 2023.

Although Plaintiffs' notice of appeal also states, "This appeal is made following the denial of Plaintiffs' post-trial motions pursuant to Rules 50(b) and 59, signed by the Honorable Robert C. Roupe on the 29th day of February, 2024 and filed March 6, 2024," this language does not "designate" the denial of these motions for appeal; rather, it is apparent that this language is included to show that the notice was timely filed

within 30 days after entry of the trial court's denial of their Rule 50(b) and Rule 59 motions. *See* N.C. R. App. P. 3(c)(3) ("[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party . . . .").

"Notwithstanding the jurisdictional requirements in Rule 3(d), our Court has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to N.C. Gen. Stat. § 1-278." *Yorke*, 192 N.C. App. at 348 (citing N.C. Gen. Stat. § 1-278 (2007) (stating that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment")). Review of an "intermediate order" under N.C. Gen. Stat. § 1-278 is permissible when the following three conditions are met: "(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Id.* (citations omitted).

Here, the order denying Plaintiffs' motion for judgment notwithstanding the verdicts does not meet all three conditions. Accordingly, we do not have jurisdiction to review this order.

III. Conclusion

The trial court erred by allowing Defendants to exercise a peremptory challenge after the jury had been impaneled. We thus vacate the trial court's judgment and remand the matter to the trial court for a new trial. Because we lack the authority to review the trial court's order denying Plaintiffs' motion for judgment notwithstanding the verdicts, we dismiss the appeal of that issue.

VACATED AND REMANDED IN PART; DISMISSED IN PART.

Judges ARROWOOD and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JANUARY 2025)

CLARK v. CLARK No. 24-425	Bladen (22CVD335)	Vacated and Remanded
IN RE B.F. No. 24-175	Cumberland (19JA363) (19JA364)	Affirmed
IN RE P.G. No. 23-1039	Guilford (16JT499) (16JT500)	Affirmed
MYERS v. SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. No. 23-854	Swain (23CVS24)	Affirmed
MYERS v. SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. No. 23-943	Swain (23SP9)	Affirmed
SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. v. DUNGAN No. 24-548	Swain (20CVS000089)	Affirmed
STATE v. KING No. 22-469-2	Buncombe (19CRS90651)	Affirmed
UNITED SEWING MACH. SALES, LLC v. DIGIT. CUTTING SERVS., INC. No. 24-86	Catawba (18CVS1052)	NO PREJUDICIAL ERROR

STATE v. BOYD

[297 N.C. App. 624 (2025)]

STATE OF NORTH CAROLINA
v.
BRANDON KASON BOYD

No. COA24-36

Filed 5 February 2025

1. Constitutional Law—right to speedy trial—no order entered on defendant's motion—remand required

In a prosecution on charges including first-degree murder—arising from an October 2020 incident in which the victim died as the result of gunshot wounds received just after he was seen arguing with defendant, but which did not come on for trial until March 2023—where the trial court failed to enter an order on defendant's speedy trial motion following a hearing in November 2022, remand to the trial court was required for the entry of findings of fact and conclusions of law on the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, assertion of the right, and prejudice) because the trial delay of more than two years was sufficient to establish presumptive prejudice to defendant and the court's indeterminant oral statements following the hearing were not minimally sufficient to resolve defendant's motion.

2. Jury—substitution of juror—appearing to sleep—no abuse of discretion

In a prosecution on charges including first-degree murder, where, about halfway through defendant's trial, defense counsel informed the trial court that a juror seemed to be sleeping, suggested the juror might have missed some evidence, and requested a substitution, but did not renew his objection after the trial court denied the initial request—and no further issues with the juror were raised—defendant showed no abuse of discretion by the trial court.

3. Homicide—first-degree murder—second-degree murder—distinction—jury instruction—intent to kill—no plain error

In a prosecution on charges including first-degree murder, where the trial court gave an accurate clarifying instruction distinguishing between first- and second-degree murder in response to a jury question, but omitted the "intent to kill" requirement for first-degree murder when giving the final mandate (a summary of the charge), defendant did not preserve the issue for appellate review because he failed to timely object. Nor could defendant establish plain error

where precedent held, in a similar context, that there was no fundamental error where accurate instructions were, at most, "incomplete at one important part."

Judge GRIFFIN concurring by separate opinion.

Judge STADING concurring in the majority and concurring opinions.

Appeal by Defendant from judgments entered 15 March 2023 by Judge Jerry R. Tillett in Pasquotank County Superior Court. Heard in the Court of Appeals 5 November 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Keith Clayton, for the State.

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

WOOD, Judge.

Brandon K. Boyd ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of first-degree murder, possession of a firearm by a felon, and interfering with an electronic monitoring device. On appeal, Defendant argues the trial court erred by violating his right to a speedy trial, by failing to inquire about or replace Juror 7, and by giving an erroneous clarification of jury instructions. For the reasons set forth below, we hold Defendant received a fair trial free from prejudicial error.

I. Factual and Procedural Background

On 5 February 2020 Defendant pleaded guilty pursuant to an Alford plea to common law robbery, a felony. Under the terms of his probation, Defendant was subject to electronic monitoring for six months.

On 18 October 2020 Kaleb Bilger ("Bilger") was found slumped in the front passenger seat of a gray sedan, unconscious and gunshot. He was pronounced dead at the scene. After an investigation by the Pasquotank Police Department, a warrant was issued for Defendant's arrest. On 11 November 2020, law enforcement located Defendant in Westchester County, New York. He waived extradition to North Carolina where he was indicted in Pasquotank County on charges of first-degree murder, possession of a firearm by a felon, and interfering with an electronic monitoring device.

On 5 October 2021, Defendant filed a motion for a speedy trial and reasserted his right to a speedy trial on 1 August 2022. On 25 October 2022, Defendant filed a motion to dismiss due to violation of his right to a speedy trial. The trial court denied the motion. Defendant remained in custody continuously from his arrest on 11 November 2020 until trial two years and four months later.

Defendant was tried in Pasquotank County Superior Court on 15 March 2023, and the jury found Defendant guilty on all charges.

At trial, the evidence tended to show the following:

On 18 October 2020 at approximately 2:00 p.m., Elizabeth City police officers responded to a call from River Landings Apartments reporting multiple shots fired. Officer Stokley responded to the scene and identified two separate blood trails and multiple spent shell casings in the vicinity of building 106. He set up a crime scene perimeter and began speaking with witnesses.

Stacy Waters ("Waters") reported that she saw two black males arguing near building 106, one light-skinned, the other dark-skinned and 5' 6" to 5' 7" tall. She stated the light-skinned male walked away from the dark-skinned male and then she heard multiple gun shots. She stated the dark-skinned male ran towards building 105 and could possibly be in apartment C. In her original statement Waters noted she could not see the suspect's face.

At trial Waters testified that she saw Justyn Wilson ("Wilson") and Defendant talking and that Defendant appeared agitated. A short time later she heard raised voices and observed Defendant arguing with Wilson. Wilson began walking to the breezeway near building 106 and Defendant followed. She then heard six-to-eight-gun shots. Wilson was still standing out front when Bilger came stumbling out saying he was shot and needed to get to the hospital. Another man in a silver four-door car helped Bilger into the car and drove away. Defendant tucked a small black handgun into his waistband and ran towards building 105.

When questioned during cross-examination about how she could identify Defendant two and a half years later when she had reported to investigating officers that she could not see his face, she stated she could tell today "from the back of his walk, his stance."

Vanessa Brooks ("Brooks") also testified about what she witnessed on 18 October 2020. Brooks stated she heard men arguing, looked out the window of her apartment, and called 911 because the argument was so loud. She recognized Bilger and Defendant from her time as a substitute

teacher. She also saw a third person dressed in a hoodie, whom she could not identify. The men continued to argue and move between the buildings. She turned her head to grab her phone and heard gunshots. When she looked back, she could not see Bilger anymore. Defendant was standing with his back to her and then ran towards building 106. In her statement to the police on the day of the shooting, Brooks did not name Defendant; however, in the summer of 2022, Brooks told prosecutors that Defendant was the shooter.

Officer Mateo testified that she was dispatched to the Fountain View Apartments on 18 October 2020 for suspicious conditions. When she arrived, Officer Mateo found a gray sedan parked at the entrance with blood coming from the passenger area and blood droplets on the passenger door of the vehicle. An unconscious male with blood on his face sat slumped in the front passenger seat. Emergency medical services pronounced him dead at the scene.

Officer Knowles testified that he conducted crime scene analyses at both crime scenes, River Landings Apartments and Fountain View Apartments. He collected blood samples from both scenes as well as ten shell casings from the River Landings scene. He identified the shell casings as .22-caliber. In addition, he found 8.2 pounds of a green leafy substance in a suitcase in Bilger's vehicle that he identified as marijuana. Knowles did not send the green leafy substance to the lab for identification or the shell casings for DNA or fingerprinting analysis. However, he did send the shell casings from the crime scene and the .22-caliber Federal brand bullets and Glock firearm box recovered from Defendant's bedroom to the State Crime Lab in Raleigh.

During trial defense counsel reported to the court that many people had noticed Juror number 7 appeared to be sleeping. The trial court stated, "she could have been resting her eyes or sleeping or taking a break. It was kind of a boring section." Defense counsel requested that the court replace Juror 7 with the alternate juror due to concern that Juror 7 had missed some of the evidence. The trial court denied the request stating, "I'm not inclined to do so at this juncture. I mean, as far as I know, she was resting her eyes as do I sometimes."

Defendant's probation officer Kevin Combs ("Combs") testified he received a strap tamper alert for Defendant's ankle monitor on 18 October 2020 and attempted to contact Defendant. The monitoring company reported Defendant's home as the last known location of the ankle bracelet. While on his way to Defendant's home, the Elizabeth City Police Department contacted Combs to inform him that Defendant

was a suspect in a shooting. No one was at the residence when Combs arrived. Combs' partner contacted Defendant's mother, the homeowner, and waited for her to arrive home. Defendant's mother unlocked the home and gave consent for the probation officers to enter to search for the ankle monitoring bracelet. The ankle bracelet was eventually located on the roof of the home.

When called as a State's witness, Wilson testified that Bilger had traveled to California to get a better price on marijuana. Defendant had invested $800.00 in the marijuana purchase and had been led to believe that Bilger and his partner were apprehended by police at the D.C. airport on 17 October 2020. However, Bilger pulled up to the River Landings Apartments on 18 October 2020 around noon. Wilson, a friend named DJ, and Defendant were standing outside when he arrived. Defendant approached Bilger to ask about his money, but Bilger told him he would have to wait because he had just lost fifty grand. Defendant became visibly upset and walked away while implying he was going to cut off his ankle monitoring bracelet. Approximately five minutes later, Defendant returned in a car with a man named Tyke. Defendant approached Bilger, pulled out a pistol, and loaded a bullet into the chamber. Defendant's voice cracked as he asked Bilger why he would do this after all he had done for him and repeated that he needed his money. Bilger walked away with Defendant following. As Bilger walked up the steps Defendant started shooting. Wilson pushed DJ into the closest apartment. By the time Wilson and DJ came back outside everyone was gone and only a puddle of blood remained on the ground.

After closing arguments, the trial court provided instructions to the jury for both first-degree and second-degree murder. During its instruction to the jury, the trial court stated, "[s]econd-degree murder differs from first-degree murder in that the State need not to prove a specific intent to kill, premeditation, or deliberation." After the jury began its deliberations, the jury sent a message to the trial court requesting to hear the difference between first- and second-degree murder. The trial court conferred with the prosecutor and defense attorney about the instruction that should be given, stating:

> The [c]ourt will give the instruction again generally as contained in 206.14 regarding first degree murder and the other alternative lesser included second-degree murder, and the [c]ourt will give these instructions: First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation.

> Okay? And then I will instruct all of the entire instruction including the mandate on all charges. Anybody have anything to say about that?

There were no objections. The jury returned to the court room and the trial court then delivered the clarifying instructions to the jury. The jury resumed deliberation. Thereafter, defense counsel stated to the trial court, "you said first degree murder is malice and premeditation and deliberation. You didn't say intent to kill, which is part of that." The trial court then clarified that the distinction between first- and second-degree murder was premeditation and deliberation. Defense counsel continued to argue that the instruction was too simplistic, but the trial court noted that it was the exact instruction the defense had requested and was consistent with the pattern jury instruction. After reading the instruction again defense counsel conceded that it was correct. The jury found Defendant guilty of all charges: first-degree murder, possession of a firearm by a felon, and interfering with an electronic monitoring device. Defendant gave notice of appeal in open court.

II. Analysis

Defendant raises three issues on appeal: the trial court's purported violation of his right to a speedy trial, the trial court's failure to inquire about or replace Juror 7, and the trial court's erroneous clarification of the jury instructions.

A. Right to a Speedy Trial

[1] Our Constitution guarantees criminal defendants the right to a speedy trial. "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

> The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citing *Barker v. Wingo*, 407 U.S. 514, 521, 92 S. Ct. 2182, 2187 (1972)).

In *Barker v. Wingo* the U.S. Supreme Court laid out "a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. These factors are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *State v. Spinks*, 277 N.C. App. 554, 562, 860 S.E.2d 306, 314-15 (2021) (cleaned up). None of the factors are essential or required, rather they are related factors that must be considered in light of the circumstances on a case-by-case basis. The court must engage in a "difficult and sensitive balancing process." *Barker v. Wingo*, 407 U.S. 514, 533, 92 S. Ct. 2182, 2193 (1972). The U.S. Supreme Court in *Barker* determined that this process starts with the length of the delay, which "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530, 92 S. Ct. at 2192.

The U.S. Supreme Court clarified what would constitute a delay that is "presumptively prejudicial" in their decision in *Doggett* stating,

> [d]epending on the nature of the charges, the lower courts have generally found post-accusation delay "presumptively prejudicial" at least as it approaches one year. We note that, as the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry.

Doggett v. U.S., 505 U.S. 647, 652 n. 1, 112 S. Ct. 2686, 2691 n. 1 (1992).

Our North Carolina Supreme Court has repeatedly quoted the language from *Doggett* and held consistent with the U.S. Supreme Court that when a delay approaches a year it may not be "enough in itself to conclude that a constitutional speedy trial violation has occurred, [yet] this delay is clearly enough to cause concern and to trigger examination of the other factors." *State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994); *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997); *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000).

This Court has consistently relied upon the precedent set forth by the U.S. Supreme Court in *Barker* and *Doggett* as well as decisions from our North Carolina Supreme Court. In *State v. Chaplin*, we quoted our Supreme Court's decision in *State v. Webster* holding that a delay of nearly three years "[w]hile not enough in itself to conclude that a constitutional speedy trial violation has occurred, . . . [the] delay is clearly

enough to cause concern and to trigger examination of the other factors." *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996) (quoting *State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994)). Similarly, in *State v. Washington*, we cited the U.S. Supreme Court's opinion in *Doggett v. U.S.* and held that a delay of four years and nine months was enough to trigger examination of the other *Barker* factors. *State v. Washington*, 192 N.C. App. 277, 283, 665 S.E.2d 799, 803-04 (2008).

Most recently, this Court addressed this issue in both *Wilkerson I* and *Wilkerson II*. *State v. Wilkerson*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 WL 4081964 (2015) (unpublished) (*Wilkerson I*); *State v. Wilkerson*, 257 N.C. App. 927, 810 S.E.2d 389 (2018) (*Wilkerson II*). In *Wilkerson I* this Court noted that a delay approaching a year is presumptively prejudicial and enough to trigger all of the *Barker* factors and held that the trial court erred by failing to consider all of the *Barker* factors. *State v. Wilkerson*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 WL 4081964 (2015) (unpublished).

On remand the trial court acknowledged the *Barker* factors finding that while the amount of time in the delay was "noteworthy" it was "not *per se* prejudicial." The delay was forty-four months. The case returned to this Court which then held the trial court erred in its finding and made it clear that no specific length of time is "*per se* prejudicial," but the analysis of this first factor was in favor of the Defendant and therefore "triggers the need for analysis of the remaining three *Barker* factors." *State v. Wilkerson*, 257 N.C. App. 927, 930, 810 S.E.2d 389, 392 (2018) (*Wilkerson II*).

It is clear, based on significant federal and North Carolina precedent, that when a delay approaches a year, it is enough to cause concern that the delay may be unreasonable and to trigger examination of all four *Barker* factors. However, the trial court's determinations are not required to be reduced to a written order.

> If a written order is not required and an oral order may be sufficient in certain circumstances, the failure to go above and beyond that which is required by law does not render an otherwise lawful order erroneous. In other words, a minimally sufficient order is still exactly that—sufficient—even if more was ordered or requested by the trial court. Given this standard, the trial court committed reversible error only if: (1) there are conflicts in the evidence that the trial court failed to resolve either orally or in writing, through an explicit factual finding, or (2) the

> trial court failed to make the necessary conclusions of law on the record.

State v. Dixon, 261 N.C. App. 676, 682, 821 S.E.2d 232, 238 (2018) (cleaned up).

On 8 November 2022 the trial court held a hearing on Defendant's Motion to Dismiss for Speedy Trial Violations. At the end of counsel's arguments the trial court stated,

> All right. I will tell you that I will make a -- I will announce and give you a forecast of my ruling today so that there won't be any delay in everybody attempting to get prepared as soon as possible. I intend to deny that motion. I will make -- I reserve the right to make full, that is, plenary findings of fact and conclusions of law. I may ask the State or one member to make a first draft of that, but I will make the final revisions and order myself, but I will consider the factors of Barker v. Wingo and its progeny in North Carolina. I do find that -- I do not determine at this juncture that there is a presumptive prejudice, but I will rule in the alternative as well considering the other factors. However, I will set this case for trial.

No written order was ever entered. The trial court noted that it "intended" to deny the motion but also clearly stated that it "will" consider the factors of *Barker* in the future, not that it already had. The only finding the trial court made was that it "[did] not determine at this juncture that there [was] a presumptive prejudice." However, the trial court qualified that finding by also stating that it "[would] rule in the alternative as well considering the other factors." Notwithstanding the trial court's reservation of its right to enter an order in accordance with its preliminary determination or its right to change its mind if it found the *Barker* factors persuasive, the trial court never entered an order.

Based on the trial court's indeterminant statements, it cannot be determined from the record evidence whether the trial court resolved the issue of presumptive prejudice. Precedent dictates that a full consideration of all four *Barker* factors is triggered when post-accusation delays approach one year; the delay in this case was two years, four months. *Doggett v. U.S.*, 505 U.S. at 652 n. 1, 112 S. Ct. at 2691 n. 1 (1992).

Additionally, the record does not reflect whether the trial court ever considered any of the *Barker* factors. Because the trial court's oral statements do not meet the "minimally sufficient" baseline this Court has set for oral orders, the issue of alleged violations of a constitutional right to

a speedy trial must be remanded to the trial court for a determination inclusive of findings of fact and conclusions of law.

B. Replacement of Juror 7

[2] Defendant contends that the failure to replace Juror 7 was both an abuse of discretion and impacted his constitutional right to a unanimous verdict. Defendant did not raise the constitutional issue at trial. He raises it for the first time on appeal. "[A] purported error, even one of constitutional magnitude, that is not raised and ruled upon in the trial court is waived and will not be considered on appeal." *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002). Our Supreme Court repeatedly has held "constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 415, 597 S.E.2d 724, 748 (2004); *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003). Because Defendant failed to raise his constitutional argument at trial, and the trial court had no opportunity to hear or rule on the issue, Defendant cannot raise a constitutional argument for the first time on appeal.

"The question of whether a juror shall be excused and replaced by an alternate is left to the discretion of the trial court, whose actions are reviewed under an abuse of discretion standard." *State v. Cox*, 190 N.C. App. 714, 717, 661 S.E.2d 294, 297 (2008). "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.A.M.*, 378 N.C. 64, 71, 859 S.E.2d 163, 168 (2021).

When juror misconduct is alleged, which includes a juror falling asleep or failing to attend to the proceedings, "it is the trial court's responsibility to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant." *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014) (cleaned up). "The trial court is vested with the discretion to determine the procedure and scope of the inquiry. On appeal, we give great weight to its determinations [of] whether juror misconduct has occurred . . . ." *Id.* (cleaned up). The trial court's decision "should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible." *State v. Gurkin*, 234 N.C. App. 207, 211, 758 S.E.2d 450, 454 (2014) (cleaned up).

In the case sub judice, Defense counsel reported to the trial court approximately halfway through the trial that Juror Number 7 "seemed

to be sleeping" and he was concerned she had "missed some evidence." Defense counsel requested that the juror be replaced. The trial court responded that "she could have been resting her eyes, or sleeping, or taking a break" and that it was not inclined to replace the juror at that time because "as far as I know, she was resting her eyes." Trial testimony continued for another day and a half. Defendant did not renew his objection concerning Juror Number 7 and no further concerns were noted in the record.

Defendant alleges the trial court erred by failing to investigate the issue after it had been raised. However, "there is no absolute rule that a court must hold a hearing to investigate juror misconduct upon an allegation . . . . Further, an examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous." *State v. Gurkin*, 234 N.C. App. 207, 212, 758 S.E.2d 450, 454 (2014) (cleaned up). The trial court sits in the best position to evaluate the significance of the allegation against the juror and acted within its discretion in declining to conduct further inquiry. Furthermore, there is no evidence that Defendant was prejudiced in any way by Juror Number 7 having closed her eyes for a short time. The trial court did not err in its refusal to replace Juror Number 7.

C. Clarification of Jury Instructions

[3] At the close of evidence, the trial court instructed the jury with all necessary information for their consideration including the pattern jury instructions for first- and second-degree murder. After beginning deliberations, the jury sent a note to the trial court asking for clarification on the difference between first- and second-degree murder. After a conference with the parties, the trial court stated it would give pattern instruction 206.14 regarding first- and second-degree murder. During the formal clarifying instruction, the trial court gave the full and complete instruction, including all references on intent to kill. The trial court omitted, however, the intent to kill requirement when giving the final mandate, a summary of the charge, to the jury before sending them back to deliberations. Defendant concedes he did not raise further objections to the instructions or to the jury's return to deliberations.

Defendant contends alleged jury instruction errors are automatically preserved, despite a failure to object at trial. Defendant cites to this Court's decision in *Richardson* to support his contention that "[w]hen a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection." *State v. Richardson*, 270 N.C. App. 149, 153, 838 S.E.2d 470, 474 (2020). We disagree. In *Richardson*

we addressed the specific scenario of the trial court omitting verbiage from instructions during its final mandate after giving the complete instruction. We held because "the trial court did not completely fail to give the agreed-upon instruction, Defendant's argument that the trial court erroneously delivered the mandate was not preserved for appellate review without further request or objection." *Id.* at 155, 838 S.E.2d at 475 (cleaned up).

Such is the scenario here. The trial court gave the full instruction, including all references on intent to kill. The trial court omitted the intent to kill requirement only when giving the final charge to the jury. Since the trial court did not "completely fail" to give the instruction, we cannot conclude Defendant's argument was preserved for review absent objection at trial.

Failure to preserve an alleged error for review shifts our analysis to a plain error standard of review.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 129 S. Ct. 59 (2008). "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Defendant contends the trial court provided inconsistent instructions in its explanation of first- and second-degree murder. We disagree. Our Supreme Court has held that when a trial court properly instructs the jury concerning all elements of first-degree murder but fails to restate the intent to kill element during the final mandate, it is not contradictory but at most "incomplete at one important point." *State v. Stevenson*, 327 N.C. 259, 266, 393 S.E.2d 527, 530 (1990). Further, the Court in *Stevenson* determined that even with an "incomplete" instruction when there is significant evidence of guilt the trial court's inadvertent omission of the intent to kill element from the final mandate does not rise to the level of plain error. *Id.* at 266, 393 S.E.2d at 531.

Here, after the jury requested clarification, the trial court properly instructed the jury on all elements of the crime including the "intent to

kill" element which it referenced at least seven times. Additionally, as in *Stevenson*, significant evidence of Defendant's guilt was presented to the jury. Therefore, the trial court's "incomplete instruction" did not create a fundamental error sufficient to breech the plain error standard.

III. Conclusion

Notwithstanding that the trial court erred when it failed to make the necessary findings and conclusions of law to constitute a lawful order on Defendant's Motion to Dismiss for alleged violation of his constitutional right to a speedy trial, we conclude the error did not negatively impact the trial process. For the foregoing reasons, we conclude Defendant received a fair trial free from prejudicial error. We remand this case to the trial court with directions as follows:

The presiding judge shall make the necessary findings and conclusions of law to support an order on Defendant's Motion to Dismiss. As in *Clark*, "if the trial court determines that defendant's right to a speedy trial was violated, then the court shall find the facts and enter an order vacating judgment, setting aside the verdict, and dismissing the indictment[s] as to [all] charges." *State v. Clark*, 201 N.C. App. 319, 330, 689 S.E.2d 553, 561 (2009). If the trial court determines that Defendant's right to a speedy trial was not violated, the court shall find the facts and conclusions of law and enter an order denying Defendant's motion to dismiss and order commitment to issue in accordance with the judgment entered at the 15 March 2023 session of Pasquotank County Superior Court. It is so ordered.

NO PREJUDICIAL ERROR IN PART; REMANDED FOR ORDER ON SPEEDY TRIAL ISSUE.

Judge GRIFFIN concurs by separate opinion.

Judge STADING concurs in the majority and the concurring opinion.

GRIFFIN, Judge, concurring.

Defendant contends the trial court erred by denying his motion to dismiss because he was denied a speedy trial. Defendant argues in the alternative, and the majority agrees, the trial court should have made findings of fact and conclusions of law in support of denying Defendant's motion. I concur with the result the majority reaches because precedent

demands it. However, I write separately to highlight inconsistent precedents which changed the applicable law.

The majority relies on *State v. Wilkerson*, to hold:

> a trial court errs when making determinations "without considering all of the *Barker* factors and making appropriate findings." *State v. Wilkerson*, 257 N.C. App. 927, 929, 810 S.E.2d 389, 391 (2018).

After reviewing the relevant precedent, it becomes apparent *Wilkerson* misapprehends and misapplies the law established in *State v. Barker*; specifically, by failing to acknowledge and give proper deference to the threshold inquiry of whether the delay is presumptively prejudicial–only after which full examination of the *Barker* factors is required.

Both the law of North Carolina and the Sixth Amendment to the United States Constitution "guarantee those persons formally accused of crime the right to a speedy trial." *State v. Avery*, 302 N.C. 517, 521, 276 S.E.2d 699, 702 (1981) (citations omitted). *See also* U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"). The United States Supreme Court first recognized the right as fundamental and incorporated its protections against state actors in *Klopfer v. State of North Carolina* through the Fourteenth Amendment's Due Process Clause. 386 U.S. 213, 222–23 (1967). The Court revisited the issue in *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Recognizing "the right to speedy trial is a more vague concept than other procedural rights" with an "amorphous quality" that does not lend itself to a brightline test, the Court set forth a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. 407 U.S. 514, 521–23, 526, 529–30; *id.* at 527 ("The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived[.]"). The test, requiring analysis of: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant, provides courts with a mechanism through which they may determine and weigh the respective roles which both the state and the defendant played in preventing the swift administration of justice. *Id.* at 530.

However, in addition to being one of the factors, the length of the delay "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id. See also Doggett v. U.S.*, 505 U.S. 647, 651–52 (1992) ("Simply to trigger a speedy trial analysis, an

accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay[.]" (citation omitted)). Whether the length of the delay warrants a full *Barker* analysis is fact-specific and "dependent upon the peculiar circumstances of the case," *Barker*, 407 U.S. at 530–31; the determination of which is "within the sound discretion of the trial court," *State v. Pippin*, 72 N.C. App. 387, 392, 324 S.E.2d 900, 904 (1985) (citations omitted). Nevertheless, the law allows for longer delays where the nature of the crime demands more extensive efforts by law enforcement and the State. *See Barker*, 407 U.S. at 531 ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."). *See also Pippin*, 72 N.C. App. at 392, 324 S.E.2d at 904 (collecting cases on the issue).

Regardless of the length of the delay, "the burden is on an accused who asserts denial of his right to a speedy trial to show the delay was due to the neglect or willfulness of the prosecution." *State v. Dietz*, 289 N.C. 488, 494–95, 223 S.E.2d 357, 361 (1976) (citations omitted). When a defendant makes this assertion based upon conjectural and conclusory allegations, "the trial court is not always required to conduct an evidentiary hearing and make findings of facts and conclusions of law." *State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 656 (1996) (citing *Dietz*, 289 N.C. at 495, 223 S.E.2d at 362). Moreover, as the majority notes, a trial court is not required to enter a written order but may adjudicate the issue orally when there is no conflict in the evidence. *State v. Dixon*, 261 N.C. App. 676, 682, 821 S.E.2d 232, 238 (2018). Bookending this analysis is the fact that "[a] criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice." *State v. Tindall*, 294 N.C. 689, 695–96, 242 S.E.2d 806, 810 (1978).

This Court's line of opinions in *State v. Howell*, 211 N.C. App. 613, 711 S.E.2d 445 (2011), *State v. Wilkerson*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 WL 4081964 (2015) (*Wilkerson I*), and *State v. Wilkerson*, 257 N.C. App. 927, 810 S.E.2d 389 (2018) (*Wilkerson II*), misconstrue this well-established precedent.

In *Howell*, we addressed a situation in which the trial court dismissed a defendant's criminal charges after he moved for dismissal based upon various statutory violations relating to the timeliness of his trial. *Howell*, 211 N.C. App. at 614, 711 S.E.2d at 447. The trial court dismissed the case in part because the defendant's Sixth Amendment right to a speedy trial had been violated, but ultimately the grounds upon which it made its decision were unclear. *Id.* at 616–17, 711 S.E.2d at 448. Accordingly, we held "[i]n order to conclude there has been a Sixth Amendment violation

of a defendant's right to a speedy trial, the trial court must examine and consider *all* the *Barker* factors listed above." *Id.* at 618, 711 S.E.2d at 449 (citation omitted).

In *Wilkerson I*, however, we faced an inapposite situation where a defendant alleged the trial court erred by not dismissing his charges. *Wilkerson I*, 2015 WL 4081964, at *1. There, the trial court heard two separate motions alleging the defendant's constitutional rights to a speedy trial had been violated. *Id.* at *15. Ruling on the second motion following a hearing, the trial court stated "[t]he defendant has made an insufficient showing to justify a dismissal under speedy trial grounds. The motion to dismiss is denied." *Id.* at *16. Turning our precedent in *Howell* on its head, and without discussing the role the first factor plays in triggering a full *Barker* analysis, we held:

> The trial court erred by summarily denying Defendant's motion without considering all of the Barker factors and making appropriate findings. Therefore, we must remand this case to the trial court for a proper application of the *Barker* test. *See Howell*, 211 N.C. App. at 620, 711 S.E.2d at 450 (remanding motion to dismiss based on speedy trial grounds to trial court due to its failure to "conduct a full inquiry into all of the Barker factors before making its determination.").

Id. The misapplication of the law in *Wilkerson I* is obvious when considering the Supreme Court's statement in *Barker* that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. *See also Doggett*, 505 U.S. at 651–52 ("Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay[.]"). Moreover, the *Wilkerson I* Court failed to appreciate the material differences between dismissing criminal charges against a defendant and denying their motion. A conclusion that a defendant's Sixth Amendment right to a speedy trial has been violated reasonably requires an in-depth and nuanced analysis as "[t]he amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived." *Barker*, 407 U.S. at 522. Ruling against a defendant's motion to dismiss for an alleged Sixth Amendment violation where there is not presumptive prejudice, however, allows our justice system to run its course efficiently and is a matter "initially within the sound discretion of the trial court." *Pippin*, 72 N.C. App. at 392, 324 S.E.2d at 904 (citations omitted).

Subsequently, in *Wilkerson II*, this Court construed the *Wilkerson I*'s holding to mean it found presumptive prejudice, despite the *Wilkerson I* Court never stating so. Specifically, the *Wilkerson II* court stated "[t]his Court had previously remanded this matter to the trial court for a full review and application of the *Barker* factors, indicating the length of delay was sufficient to trigger such a review." *Wilkerson II*, 257 N.C. App. at 392, 810 S.E.2d at 930 (citing *Wilkerson I*, 2015 WL 4081964, at *15–*16). At this point, it is worth noting the gap in logic here. If our remand in *Wilkerson I* indicated "the length of delay was sufficient to trigger" a full *Barker* analysis, then the trial court's order in the first instance also indicated the opposite: it did not find the length of delay presumptively prejudicial. In fact, the trial court initially stated "[t]he defendant has made an insufficient showing to justify a dismissal under speedy trial grounds." *Wilkerson I*, 2015 WL 4081964, *16. On remand, the trial court plainly and clearly explained its reasoning for finding the delay was not presumptively prejudicial:

> From the date of the defendant's arrest on July 2, 2010 until the beginning of trial on April 21, 2014 is over three years and nine months. This amount of time is noteworthy, but considering all of the matters necessarily involved in the preparation by the prosecution and the defense of this case involving a first degree murder charge with co-defendants, including pretrial discovery, investigation and analysis of crime scene and crime laboratory analysis, it is not *per se* prejudicial.

Again, this being a matter "initially within the sound discretion of the trial court[,]" *Pippin*, 72 N.C. App. at 392, 324 S.E.2d at 904 (citations omitted), there was "no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. In contradiction to our *Wilkerson I* and *Wilkerson II* holdings, the inquiry ought to have stopped upon the initial finding that there was not presumptive prejudice. This misapprehension and misunderstanding deserves clarification so that our courts do not continue to rely on this apparent error.

Nonetheless, I concur with the result the majority reaches for two reasons. First, despite its erroneous foundations, we are bound by the precedent created by *Wilkerson I* and *II*. Second, as the majority states, because of "the trial court's indeterminant statements, it cannot be determined whether the trial court resolved the issue of presumptive prejudice." In light of the trial court's indefinite language, remanding the order solely for entry of findings on whether Defendant has shown presumptive prejudice is proper. If the trial court determines there was presumptive prejudice, then it should engage in a full *Barker* analysis.

STATE v. SPRY

[297 N.C. App. 641 (2025)]

STATE OF NORTH CAROLINA
v.
NICHOLAS JAMES SPRY

No. COA24-129

Filed 5 February 2025

1. Criminal Law—motion for appropriate relief—summary denial—factual issues unresolved—hearing required on remand

The trial court erred by summarily denying defendant's motions for appropriate relief—in which defendant challenged the voluntariness of his guilty plea on the grounds that he was never informed that he would be subject to sex offender registration or five years of post-release supervision, conditions that were added as a correction to the original judgment without prior notice to defendant or opportunity to be heard—where there was a question of fact whether defendant entered his guilty plea under a misapprehension and where the record on appeal was devoid of any verbatim transcript of the plea proceedings. The trial court's orders were vacated and the matter was remanded for the trial court to hold an evidentiary hearing, receive and consider evidence, and make additional findings of fact.

2. Sexual Offenders—registration—mandatory—effect on validity of guilty plea—collateral consequence

In a criminal matter in which defendant pled guilty to an offense compelling mandatory sex offender registration (pursuant to N.C.G.S. § 14-208.7), in evaluating defendant's claim in a motion for appropriate relief that his plea was not voluntary because he was not made aware of the registration requirement prior to pleading guilty, the trial court did not err by holding that the registration requirement was a collateral rather than a direct consequence of the guilty plea.

3. Criminal Law—guilty plea—voluntariness—extended post-release supervision added later—direct consequence of plea

Where defendant entered a plea of guilty to robbery and kidnapping charges without being made aware that he would be subjected to an extended period of post-release supervision (although defendant's initial judgment placed him on nine months of post-release supervision, that component was later amended to five years without notice to defendant or an opportunity to be heard), the trial court

erred by summarily dismissing defendant's supplemental motion for appropriate relief (MAR) challenging the voluntariness of his guilty plea. First, defendant pled sufficient facts in his initial MAR to preserve this argument in his subsequent filing. Further, since post-release supervision is a direct consequence of a guilty plea—as distinguished from satellite-based monitoring and sex offender registration—because it has a definite, immediate, and essentially automatic effect on the range of punishment, the details of such supervision must be conveyed to a defendant before entry of a guilty plea.

Appeal by defendant by writ of certiorari from orders entered 7 March 2023 and 2 June 2023 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General, Caden W. Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender, Heidi Reiner, for the defendant.

TYSON, Judge.

Nicholas James Spry ("Defendant") appeals the 7 March 2023 order denying his Motion for Appropriate Relief (MAR) and the 2 June 2023 order denying his "supplemental" MARs. We vacate and remand to the trial court to hold an evidentiary hearing regarding Defendant's MARs.

I. Background

Defendant robbed an adult employee at a restaurant in Greensboro on 25 November 2006. He was subsequently indicted for three crimes stemming from that robbery: common law robbery, second-degree kidnapping, and attempted second-degree kidnapping. The two kidnapping indictments alleged Defendant had attempted to kidnap Kate and had kidnapped Leslie, who were both "person[s] under the age of sixteen (16) years."

Defendant entered into a plea bargain and pled guilty to all three charges on 30 January 2007. Consistent with the plea arrangement, the trial court consolidated the offenses for judgment and sentenced Defendant to an active term of 25 to 39 months of imprisonment, and he was placed on nine months of post-release supervision. On the original judgment, the sentencing judge failed to check the box indicating

"the above designated offense(s) is a reportable conviction involving a minor. G.S. 14-208.6."

The Combined Records Section of North Carolina Department of Correction sent a letter to the trial court in February 2007 asking for clarification of the victims' ages for the kidnapping and attempted kidnapping offenses. Without prior notice nor Defendant being present, the trial court entered a "corrected" judgment on 5 March 2007, which included the now-checked box indicating "the above designated offense(s) is a reportable conviction involving a minor. G.S. 14-208.6."

Defendant originally pled guilty to second-degree kidnapping and attempted second-degree kidnapping, both in violation of N.C. Gen. Stat. § 14-39 (2005). After the "correction" of the original judgment, and although the indictment did not allege Defendant had committed a sexual offense against the purportedly minor victims, Defendant was required to register under the Sex Offender and Public Protection Registration Program pursuant to N.C. Gen. Stat. § 14-208.6(4) (2005). *See* N.C. Gen. Stat. §§ 14-208.5 to 14-208.46 (2023) (Sex Offender and Public Protection Registration Programs); *State v. Sakobie*, 165 N.C. App. 447, 453, 598 S.E.2d 615, 619 (2004) ("The language of section 14-208.6(1[m]) is clear and unambiguous: an offense against a minor includes kidnapping pursuant to N.C. Gen. Stat. § 14-39.").

Because the kidnapping offenses required Defendant to register as a sex offender, Defendant was also sentenced to five years of post-release supervision pursuant to N.C. Gen. Stat. § 15A-1368.2(c) (2005) (providing a person convicted of a class F through I felony was required to receive nine months of post-release supervision "unless the offense is an offense for which registration is required," in which case "the period of post-release supervision is five years"). In sum, the "corrected" judgment sentenced Defendant to 25 to 39 months of active imprisonment, placed him on five years of post-release supervision, and required him to register as a sex offender.

Defendant was not present when the "corrected" judgment was entered, and the record is devoid of any proof Defendant was aware of the letter sent from Combined Records. Defendant's first MAR asserts Defendant only learned of the "corrected" judgment shortly before he was released from prison in April of 2009, more than two years after the "corrected" judgment was entered.

Richard Wells ("Wells"), the counsel who represented Defendant when he entered into the plea agreement on 30 January 2007, was appointed to represent Defendant on his Petition for Termination of Sex

Offender Registration in 2022. When reviewing Defendant's court documents, Wells "noticed that [he] almost certainly didn't advise [Defendant] on sex registration." Wells noticed this, in part, because Wells had failed to instruct another defendant on mandatory sex registration in an unrelated case on 7 February 2007, merely one week after Defendant entered into his plea agreement. Wells, on his own initiative, met with Defendant and agreed to draft a MAR.

Defendant, proceeding *pro se*, filed the MAR drafted by Wells on 26 January 2023, nearly sixteen years after the "corrected" judgment was entered. The MAR sought to vacate Defendant's guilty plea, asserting Defendant was never informed he would be required to register as a sex offender or be subject to the extended post-release supervision consequences of that registration status. Defendant supported his MAR with the following: (1) his own affidavit; (2) an affidavit from his trial counsel, both of whom asserted neither sex offender registration nor extended post-release supervision were ever discussed prior to Defendant's guilty plea; and, (3) the letter from Combined Records to the court, which led to an amended judgment identifying the kidnapping as a reportable conviction involving a minor.

The trial court summarily denied Defendant's MAR on 7 March 2023 based upon its finding the "matter presents only legal issues, which may be resolved without an evidentiary hearing." The court in the order found: (1) sex offender registration constituted a collateral consequence of Defendant's guilty plea; (2) sex offender registration did not affect the voluntariness of Defendant's plea; and, (3) potential registration did not need to be disclosed by Defendant's counsel.

Although Defendant was never provided with the requested transcript of his plea, the trial court found the original sentencing judge had "asked all of the required questions and made all of the findings set forth in NCGS 15A-1022," and "the trial court's plea colloquy with Defendant was in all respects legally valid."

The trial court took judicial notice of the following facts: Defendant had filed his MAR "more than fifteen" years after he had entered his plea; Defendant had been convicted of failing to register as a sex offender on multiple occasions in 2012; Defendant pled guilty to failing to register as a sex offender in 2016; Defendant did not challenge his duty to register as a sex offender in those subsequent proceedings, either prior to his failure to register as a sex offender convictions or in postconviction MARs; and, Defendant waited to file his MAR after his request to be removed from the sex offender registration was denied. The trial court found "the unambiguous record shows Defendant was well aware of his

requirement to register as a sex offender when he entered his guilty plea in this case in 2007."

Defendant filed additional motions on 1 May and 17 May 2023, which sought relief in a "supplemental" MAR and a copy of the stenographic transcript of the plea hearing. In the first motion, Defendant again argued his plea was involuntary, emphasizing he was unaware he would be placed on post-release supervision for five years because of his sex offender registration, when he agreed to, expected to, and was originally sentenced to receive nine months post-release supervision. He also argued his first MAR was improperly denied without an evidentiary hearing. In his second motion on 17 May 2023, he contended, for the first time, that the sentencing judge had "made improper statements regarding plea and participated in plea arrangement."

The trial court denied Defendant's motions on 2 June 2023. The order treated petitioner's two filings as "supplemental" MARs and summarily denied both filings as procedurally barred, based on the denial of petitioner's original MAR. The record is devoid of any proof Defendant ever received a transcript of the original plea hearing. Defendant appeals.

II. Jurisdiction

A prior panel of this Court granted Defendant's petition for writ of *certiorari* on 31 August 2023. N.C. R. App. P. 21(a)(1). *See State v. Saldana*, 291 N.C. App. 674, 677, 896 S.E.2d 193, 196 (2023) ("Because Defendant filed the MAR 'long after the time for taking appeal had expired, he can obtain appellate review of the court's ruling only by a petition for a *writ of certiorari*.' " (quoting *State v. Isom*, 119 N.C. App. 225, 227, 458 S.E.2d 420, 421 (1995))), *review dismissed*, *cert. denied*, 901 S.E.2d 800 (2024).

III. Motions for Appropriate Relief

Defendant seeks review of the 7 March 2023 order summarily denying his original MAR and the 2 June 2023 order denying his supplemental MARs. Defendant argues the trial court erred by summarily denying his MARs and concluding his guilty plea was knowingly and voluntarily entered and the consequences thereof were collateral or indirect.

A. Standard of Review

This Court reviews *de novo* an order summarily denying an MAR. *State v. Allen*, 378 N.C. 286, 296, 861 S.E.2d 273, 281 (2021). The Court must determine "whether the evidence contained in the record and presented in [the] MAR—considered in the light most favorable to [Defendant]—would, if ultimately proven true, entitle him to relief." *Id.*

A defendant is entitled to an evidentiary hearing on his MAR "[i]f answering this question requires resolution of any factual disputes[.]" *Id.* at 297, 861 S.E.2d at 281. "By contrast, when a defendant's MAR 'presents only questions of law, including questions of constitutional law, the trial court must determine the motion without an evidentiary hearing.' " *Id.* at 296, 861 S.E.2d at 281 (quoting *State v. McHone*, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998)).

The trial court summarily denied Defendant's MAR after finding the motion presented solely a legal question versus a factual one: whether the requirement that Defendant register as a sex offender and its consequences affected the validity of his guilty plea.

B. Analysis

"Under *Boykin*, due process, as established by the Fourteenth Amendment to the United States Constitution, requires that a defendant's guilty plea be made voluntarily, intelligently and understandingly." *State v. Bozeman*, 115 N.C. App. 658, 661, 446 S.E.2d 140, 142 (1994) (citing *Boykin v. Alabama*, 395 U.S. 238, 244, 23 L. Ed. 2d 274, 280 (1969)).

"Although a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be 'entered by one fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court. . . .' " *Id.* (first quoting *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1970) (emphasis supplied); then citing *State v. Mercer*, 84 N.C. App. 623, 627, 353 S.E.2d 682, 684 (1987)).

"Direct consequences are those that have a definite, immediate and largely automatic effect on the range of the defendant's punishment." *State v. Smith*, 352 N.C. 531, 551, 532 S.E.2d 773, 786 (2000) (quotation marks and citation omitted). "However, [t]he imposition of a sentence or sentences may have a number of collateral consequences, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of *all of the possible* indirect and collateral consequences." *State v. Bare*, 197 N.C. App. 461, 479, 677 S.E.2d 518, 531 (2009) (emphasis supplied) (quotation marks and citation omitted).

Nevertheless, "[a] defendant cannot plead guilty without being informed of collateral consequences that might affect their taking the plea." *State v. Womble*, 277 N.C. App. 164, 193, 858 S.E.2d 304, 323 (2021) (citing *Padilla v. Kentucky*, 559 U.S. 356, 371, 176 L. Ed. 2d 284, 297 (2010)).

Defendant argues he was not informed and was factually unaware of two consequences when entering his guilty plea to the two kidnapping

charges: (1) sex offender registration; and, (2) the imposition of five years of post-release supervision, compared to the nine months of post-release supervision to which the parties agreed in the plea agreement and imposed in the original judgment.

1. Question of Fact

[1] Before we address whether sex offender registration or the extended post-release supervision period to which Defendant was subjected were direct or collateral consequences of Defendant's guilty plea, we must address whether the trial court erred by failing to hold an evidentiary hearing. Defendant argues the trial court erred by summarily dismissing his MARs. We agree.

A defendant is entitled to an evidentiary hearing if the trial court's ruling on a defendant's MAR requires the trial court to settle "any factual disputes[.]" *Allen*, 378 N.C. at 297, 861 S.E.2d at 281. Additionally, our General Statutes require trial courts to record and retain "[a] verbatim record of the proceedings at which the defendant enters a plea of guilty[.]" N.C. Gen. Stat. § 15A-1026 (2023). "This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses." *Id.*

"[I]n most cases[,] reference to the verbatim record of the guilty plea proceedings will conclusively resolve all questions of fact raised by a defendant's motion to withdraw a plea of guilty and will permit a trial judge to dispose of such motion without holding an evidentiary hearing." *State v. Dickens*, 299 N.C. 76, 84, 261 S.E.2d 183, 188 (1980) (citation omitted). "[R]egardless of whether evidentiary hearings are held, the importance of protecting the innocent and [e]nsuring that guilty pleas are a product of free and intelligent choice requires that such claims be patiently and fairly considered by the courts." *Id.* (quotation omitted).

In *State v. Dickens*, our Supreme Court held the trial court should have conducted an evidentiary hearing regarding whether the defendant had agreed to a plea bargain while under a misapprehension regarding his sentence:

> We note the record on appeal in this case does not contain a verbatim record of the proceedings at which defendant entered his pleas of guilty. *See* G.S. 15A-1026. Absent such a verbatim record, we have no way of determining the import of defendant's failures to give written answers to Questions 7 and 10 in the Transcript of Plea. Nor do we know the nature of the representations, if any, made by

> defendant, defendant's trial attorney, or the prosecutor in response to mandatory inquiries by the trial court as to whether any plea bargains had been made or discussed. *See* G.S. 15A-1022(b). On this record we must conclude that defendant's allegations *raise a question of fact as to whether defendant entered the guilty pleas* under the misapprehension that a plea bargain had been made with respect to sentence. Accordingly, *an evidentiary hearing must be held* in which defendant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion." G.S. 15A-1420(c)(5).

Id. at 84-85, 261 S.E.2d at 188 (emphasis supplied).

Here, as in *Dickens*, "the record on appeal in this case does not contain a verbatim record of the proceedings at which defendant entered his pleas of guilty." *Id.* at 84. The sentencing court was statutorily obligated to create such a record, pursuant to N.C. Gen. Stat. § 15A-1026, and its absence from the record on appeal limits this Court's ability to adjudicate Defendant's claims. *Id.* Although the trial court made findings of fact in its first 7 March 2023 order indicating it had reviewed the transcript of Defendant's guilty plea, the record before us is devoid of any transcript of those proceedings. Defendant's request for the transcript of entry of his pleas in his supplemental MAR was also summarily denied by the trial court on 2 June 2023.

Similar to *Dickens*, "the trial court should have held a hearing, received evidence under oath from defendant personally and from his trial counsel [Richard Wells], together with any other relevant evidence, and then made findings of fact as to whether or not defendant entered the guilty pleas under [a] misapprehension[.]" *Dickens*, 299 N.C. at 83, 261 S.E.2d at 187. For these reasons, we remand this matter to the trial court to hold an evidentiary hearing to receive, hear, and resolve factual issues regarding whether Defendant's guilt was entered into "voluntarily, intelligently and understandingly." *Bozeman*, 115 N.C. App. at 661, 446 S.E.2d at 142.

2. Sex Offender Registration

[2] North Carolina appellate courts have not addressed whether the sex offender registration requirement, as outlined in N.C. Gen. Stat. § 14-208.7, should be considered a direct or collateral consequence of a guilty plea to an offense compelling mandatory sex offender registration. N.C. Gen. Stat. § 14-208.7 (2023). In *State v. Bare*, this Court rejected a defendant's argument that a related requirement, lifetime

satellite-based monitoring ("SBM"), constituted a direct consequence of the defendant's plea:

> We disagree that lifetime satellite-based monitoring was an automatic result of defendant's no contest plea. "When an offender is convicted of a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4), during the sentencing phase," the trial court is required to separately determine whether an offender meets the criteria subjecting him to SBM. N.C. Gen. Stat. § 14-208.40A. If there has been no determination by the court whether an offender is required to enroll in SBM, the DOC makes the initial determination, schedules a hearing, notifies the offender, and the trial court determines in a separate hearing whether the offender falls under one of the categories subjecting him to SBM. N.C. Gen. Stat. § 14-208.40B (2007). Therefore, imposition of SBM was not an automatic result of his no contest plea, unlike a mandatory minimum sentence or an additional term of imprisonment.

State v. Bare, 197 N.C. App. 461, 480, 677 S.E.2d 518, 531-32 (2009).

Although Defendant acknowledges the ruling in *Bare*, Defendant argues sex offender registration differs from SBM because it is a direct and immediate consequence of pleading guilty to certain crimes. Before a defendant is subjected to SBM, a separate hearing is held after a judgment has been entered. *Id*. (explaining SBM is "not an automatic result" of a guilty plea because "the DOC makes the initial determination, schedules a hearing, notifies the offender, and the trial court determines in a separate hearing whether the offender falls under one of the categories subjecting him to SBM").

Defendant argues sex offender registration differs from SBM, because the registration requirement is an immediate consequence following a conviction for certain crimes, as indicated by the check-box option requiring mandatory sex offender registration on the front page of a criminal judgment.

This Court has held our General Assembly's intent when enacting the sex offender registration statute was nonpunitive. *State v. White*, 162 N.C. App. 183, 197, 590 S.E.2d 448, 457 (2004) ("Since North Carolina only requires registration for ten years, N.C. Gen. Stat. § 14-208.7, we hold that the registration requirements are not excessive in light of the General Assembly's nonpunitive objective.").

Other states have agreed sex offender registration is nonpunitive. *See*, *e.g.*, *State v. Legg*, 28 Kan. App. 2d 203, 207, 13 P.3d 355, 358 (2000) ("Sex offender registration is not penal in nature or a direct consequence to a plea."). Most states have concluded sex offender registration constitutes a collateral consequence, which does not impact the validity of a guilty plea. *See Magyar v. State*, 18 So. 3d 807, 812 fn. 5 (Miss. 2009) (collecting cases from twenty-eight states and holding "although we do not recognize the law of other states as controlling precedent, our decision today is nevertheless aided by the viewpoint of virtually every other jurisdiction to address the question" viewed sex offender registration as a collateral consequence of a guilty plea).

We find the research and analysis by the court in *Magyar* persuasive. The court in *Magyar* researched the way other states handled this question and found twenty-eight states have held sex offender registration is a collateral consequence of a guilty plea. *Magyar*, 18 So. 3d at 812 fn. 5. While other states' decisions are not binding upon this Court, they are persuasive. *N.C. Ins. Guar. Ass'n v. Weathersfield Mgmt.*, 268 N.C. App. 198, 203, 836 S.E.2d 754, 758 (2019) (citation omitted) ("When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance.").

We agree with the overwhelming majority of state courts and hold sex offender registration is a collateral consequence of a guilty plea to a crime requiring registration. *Id.*; *Magyar*, 18 So. 3d at 812 fn. 5. The trial court did not err by holding the requirement for Defendant to register as a sex offender is a collateral consequence of his guilty plea.

3. Extended Post-Release Supervision

[3] The trial court's first 7 March 2023 order found sex offender registration was a collateral consequence of Defendant's guilty plea. The order, however, failed to mention the extended post-release supervision period to which Defendant was subjected and which was imposed as a result of his plea.

Defendant's first "supplemental" MAR, filed on 1 May 2023 and titled "Motion to Vacate Trial Court's Order AND Supplemental Motion for Appropriate Relief," emphasized Defendant's post-release supervision argument. Defendant included the following information in this motion:

> Defendant signed a plea for 25-39 months active with the impression that he would do 25-30 months to be released on 9 months (PRS). . . . [D]efendant was not admonished that he would be subject to registration requirements or

> the lengthier 5 years PRS and its much more onerous conditions of supervision. Specifically, [D]efendant was not advised that a condition of his PRS would be that minors would not be allowed to live with him during his time on PRS. Defendant was ultimately forced to kick his own brother(s) out and into foster care. Defendant served ten months on PRS before it was revoked. He therefore spent 40 months of imprisonment, and was prejudiced by a lengthier sentence th[a]n he had agreed to.

The affidavit attached to this motion contained the following:

> 3. I was forced to kick my minor brothers out of my apartment when my PRS officer discovered they were living with me. I was not aware that a direct consequence of my plea forbid minors to live with me during my time on PRS. At the time in 2009-2010[,] my mother had been suffering from serial homelessness for years. I was aware of this, and the fact that my brothers were likely to be in need of help with housing upon my release, when I took the plea.

The trial court's 2 June 2023 order, which summarily dismissed Defendant's supplemental MARs, found this motion "essentially reargues [Defendant's] previous MAR and asks this Court to change its ruling." The trial court summarily dismissed Defendant's supplemental MARs.

On appeal, the State argues Defendant's post-release supervision argument is procedurally barred because Defendant failed to raise it in his first MAR. We disagree.

Defendant's first MAR asserted the following:

> 4. Prior to entry of the plea, and in discussion with defense counsel Richard Wells, no mention was made of the possibility of having to register under the Sex Offender and Public Protection Registration Program (Sex Registry). My guilty plea was not fully informed because it left out this very important and restrictive detail. I would then, and still now, plead guilty to the Common Law Robbery. But I would not have pled guilty to the kidnapping-related charges had I known sex registration was the result.
>
> . . .
>
> 12. In addition, it is my belief that these sex registerable kidnapping-related convictions resulted in my receiving

> 5 years of post-release supervision. This time period is different than persons convicted of crimes that do not carry sex registration. *NCGS 15A-1368.2(c)*. This additional post-release supervision was never explained to me prior to my 2007 plea[,] and I have never attended a court hearing where I had notice and a chance to address this question in a courtroom. This additional sanction of definite and potential increased time on post-release supervision is a violation of constitutional principles as noted in *Blakely v. Washington*, 542 US 296 (2004). See also "Reportable Kidnapping," Jamie Markham, NCSOG Criminal Law Blog (Feb 5th, 2015).

Defendant pled sufficient facts in this motion to preserve Defendant's post-release supervision argument.

Defendant similarly argues his plea was not knowing and voluntary because it resulted in sixty (60) months of post-release supervision, a term that only applies to sex offenders. He asserts this extended supervision was not mentioned nor agreed to during his plea negotiations or hearing. Defendant also asserts the extended post-release supervision should be considered a direct consequence, which would render his guilty plea involuntary. He argues the statute mandating sixty (60) months of post-release supervision creates "a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Smith*, 352 N.C. at 551 (internal quotations and citations omitted).

a. Statutory Guidance

N.C. Gen. Stat. § 15A-1022 (2023) sets out the requirements for advising criminal defendants of the consequences of their guilty pleas. The statute does not include a requirement for a defendant to be informed of post-release supervision before the trial court may accept a defendant's guilty plea. *See id.*

N.C. Gen. Stat. § 15A-1368(a)(1) (2023) defines post-release supervision as "[t]he time for which a sentenced prisoner is released from prison before the termination of his maximum prison term[.]" N.C. Gen. Stat. § 15A-1368(a)(1). One of the purposes of post-release supervision is "to monitor and control the prisoner in the community[.]" *Id.*

b. State v. Bare

This Court in *State v. Bare* clearly distinguished SBM and sex offender registration from post-release supervision and probation:

> The sex offender registration requirements may also be imposed as a condition to probation or post-release supervision. *See* N.C. Gen. Stat. § 15A-1343(b2)(1) (2007) (registration "as required by N.C. Gen. Stat. § 14-208.7" is included as a "special condition of probation"); N.C. Gen. Stat. § 15A-1368.4(b1)(1) (2007). In *Smith*, the United States Supreme Court examined whether registration requirements for sex offenders were parallel to supervised release or probation, which are punishments for crime. 538 U.S. at 101-02, 123 S. Ct. at 1152, 155 L. Ed. 2d at 182. The Supreme Court distinguished the registration requirements from conditions imposed by probation because offenders were still "free to move where they wish and to live and work as other citizens with no supervision." *Id.* While SBM results in electronic monitoring of an offender's whereabouts, the record does not indicate that it restricts an offender's liberty in matters such as where to live and work. SBM is therefore similar to registration requirements in this regard *and is distinguishable from probation, parole, and post-release supervision. See id.*

Bare, 197 N.C. App. at 470-71, 677 S.E.2d at 526 (emphasis supplied). The reasoning in *Bare* states the classification of SBM monitoring and sex offender registration as collateral consequences does not also mean post-release supervision is also a collateral consequence. *Id.* Instead, the Court in *Bare* states post-release supervision is "distinguishable" and is a "punishment[ ] for a crime." *Id.*

The courts in New York, New Jersey, and Kansas agree with the reasoning in *Bare*. Each of those jurisdictions has found the failure to advise a pleading defendant about a mandatory term of post-release supervision renders a plea involuntary. *See People v. Catu*, 825 N.E.2d 1081 (N.Y. 2005) ("Because a defendant pleading guilty to a determinate sentence must be aware of the post[-]release supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of post[-]release supervision requires reversal of the conviction."); *State v. Johnson*, 864 A.2d 400, 405 (N.J. 2005) (holding that being subject to a "mandatory period of parole supervision constituted a direct, penal consequence of defendant's plea" and that "because defendant was not informed about the consequences of being subject to [the] fixed period of parole supervision, . . . he is entitled to seek the vacation of his plea");

Helms v. State, 281 P.3d 180 (Kan. Ct. App. 2012) (unpublished) ("The State concedes that the district court failed to mention the mandatory post[-]release supervision requirements until Helm's sentencing hearing. Accordingly, Helm's pleas must be set aside.").

In accordance with *Bare*, we hold post-release supervision is distinguishable from SBM and sex offender registration. *Bare*, 197 N.C. App. at 470-71, 677 S.E.2d at 526 (explaining SBM is "distinguishable from probation, parole, and post-release supervision" because it does not "restrict[ ] an offender's liberty in matters such as where to live and work").

Our General Statutes also indicate the purpose of post-release supervision is "to monitor and control the prisoner in the community," and post-release supervision is not intended to be nonpunitive in nature. *Compare* N.C. Gen. Stat. § 15A-1368(a)(1) *with State v. White*, 162 N.C. App. 183, 197, 590 S.E.2d 448, 457 (2004) ("Since North Carolina only requires registration for ten years, N.C. Gen. Stat. § 14-208.7, we hold that the registration requirements are not excessive in light of the General Assembly's nonpunitive objective.").

The five years of post-release supervision to which Defendant was subjected, as opposed to the nine months to which he agreed, were a "direct consequence" of his guilty plea, because those additional months had a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Smith*, 352 N.C. at 551, 532 S.E.2d at 786 (internal quotations and citations omitted). Defendant spent an additional four years in prison after serving his agreed-upon active sentence and his post-release supervision was revoked ten months after his release simply for housing his younger brothers.

Without being aware of the direct consequences of his guilty plea, Defendant cannot be said to have made his plea "voluntarily, intelligently and understandingly." *Bozeman*, 115 N.C. App. at 661, 446 S.E.2d at 142 (citing *Boykin*, 395 U.S. at 244, 23 L. Ed. 2d at 280). For Defendant's plea to be knowing and voluntary, and thus valid, Defendant must have been made aware of "the actual value of any commitments made to him by the court." *Id.* (quotations omitted).

We remand to the trial court to address Defendant's post-release supervision arguments consistent with this opinion. It is unnecessary for us to address Defendant's ineffective assistance of counsel claim. On remand, Defendant may raise his ineffective assistance of counsel claim before the trial court to determine whether the relief he seeks in his MARs, if granted, addresses and moots the relief sought in his ineffective assistance of counsel claim.

IV. Conclusion

The trial court erred by summarily denying Defendant's MARs. This matter is remanded to the trial court to hold a hearing, receive and consider evidence, and to make additional findings of fact. *See Dickens*, 299 N.C. at 83, 261 S.E.2d at 187.

The trial court's summary denials of Defendant's MARs are vacated and remanded. Consistent with the guidance and conclusions in this opinion regarding sex offender registration and post-release supervision, the trial court must determine whether Defendant's guilty plea was entered into "voluntarily, intelligently and understandingly." *See Bozeman*, 115 N.C. App. at 661, 446 S.E.2d at 142 (internal quotations and citations omitted). *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and FLOOD concur.

SOUTHEASTERN PUBLIC SAFETY GROUP, INC.
D/B/A SOUTHEASTERN COMPANY POLICE, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF JUSTICE, CRIMINAL STANDARDS DIVISION, AND RANDY MUNN, IN HIS OFFICIAL CAPACITY AS THE NORTH CAROLINA COMPANY POLICE ADMINISTRATOR, DEFENDANTS

No. COA24-191

Filed 5 February 2025

Police Officers—Company Police Act—policing a public highway during construction—scope of jurisdictional authority

In a case involving the question of whether officers with a company police agency (plaintiff)—which had been hired by a construction company to provide law enforcement services, including traffic control/enforcement, for the duration of a public-private highway construction project—had jurisdiction pursuant to N.C.G.S. § 74E-6(c) of the Company Police Act (Act) when they activated their blue lights to block free-flowing traffic lanes adjacent to the construction area, the Court of Appeals determined that the superior court properly identified the applicable standard of review (de novo) but did not apply the standard correctly because it was operating under a misunderstanding of the Act's requirements. The

superior court erred by vacating the final decision of the administrative law judge (ALJ) and entering declaratory judgment for plaintiff where its findings did not support its conclusions. The court did not reach the dispositive issue of whether the construction company had ownership or control over the highway property in question (and, thus, could have authorized plaintiff's actions) but instead focused on the applicability of various federal regulations and the effect of contract provisions on the scope of plaintiff's authority. Therefore, the court's decision and declaratory judgment were vacated and the matter was remanded for reconsideration by the ALJ.

Appeal by defendants from decision and declaratory judgment entered 10 August 2023 by Judge Steven R. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2024.

Everson Law Office, PLLC, by Cynthia E. Everson, for plaintiff-appellee.

Attorney General Jeff Jackson, by Solicitor General Fellows Mary Elizabeth Reed and Trey A. Ellis, Deputy Solicitor General James W. Doggett, and Assistant Attorney General Kristen Mallett, for defendants-appellants.

ZACHARY, Judge.

This case arises from the construction of express toll lanes on the I-77 interstate highway ("the I-77 HOT Lanes Project"). Sugar Creek Construction, LLC ("SCC") hired Plaintiff Southeastern Public Safety Group, Inc.—a company police agency commissioned under the Company Police Act ("the Act")—to provide policing services in conjunction with SCC's construction work on the I-77 HOT Lanes Project. During the course of construction, Defendant Randy Munn—the North Carolina Company Police Administrator—received information that Plaintiff was utilizing blue lights to block free-flowing traffic lanes on I-77. Thus arose the question of law that this case presents: did the Act authorize Plaintiff's activities?

Defendants considered Plaintiff to be in violation of the Act, and the administrative law judge agreed. Plaintiff then filed a petition for judicial review with the Mecklenburg County Superior Court; the superior court agreed with Plaintiff, vacated the administrative law judge's decision, and replaced it with the court's own order. Defendants now appeal from the decision and declaratory judgment of the superior court. After careful review, we vacate and remand.

I. Background

The facts of this case are not in dispute. We therefore recite only those facts necessary to resolve the question of law presented.

A. The Company Police Act

The Act "regulates private police agencies, giving them authority similar to municipal or county police forces." *Pinnacle Special Police, Inc. v. Scottsdale Ins. Co.*, 607 F. Supp. 2d 735, 740 (E.D.N.C. 2009); *see also* N.C. Gen. Stat. § 74E-1 *et seq.* (2023). The Act provides company police officers with limited jurisdiction, as determined by the real property owned by or in the possession and control of their employer or a party who contracted with their employer:

> Company police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions on any of the following:
>
> (1) Real property owned by or in the possession and control of their employer.
>
> (2) Real property owned by or in the possession and control of a person who has contracted with the employer to provide on-site company police security personnel services for the property.
>
> (3) Any other real property while in continuous and immediate pursuit of a person for an offense committed upon property described in subdivisions (1) or (2) of this subsection.

N.C. Gen. Stat. § 74E-6(c).

Pertinent to the case before us, company police officers are prohibited—with limited exception—from utilizing blue lights to obstruct free-flowing traffic on a public highway unless they are within the jurisdiction provided by § 74E-6(c). The Office of the Attorney General has promulgated regulations that prohibit company police officers from conducting the following activities:

> (4) [A]ctivating or operating a blue light in or on any vehicle in this State except when operating a motor vehicle used primarily by company or railroad police in the performance of his official duties:

(a) when in property jurisdiction limitations specifically described under [N.C. Gen. Stat. §] 74E-6;

(b) when in continuous or immediate pursuit of a person for an offense committed upon real property owned by or in the possession or control of his employer or real property or in the possession and control of a person who has contracted with the employer to provide on-site police security personnel services for the property; or

(c) during the transportation of an arrestee, which the company police agency has taken into custody;

(5) activating or operating a siren when operating any motor vehicle used primarily by any company police agency in the performance of his official duties when outside of the property jurisdiction limitations specifically described under [N.C. Gen. Stat. §] 74E-6 unless in immediate and continuous pursuit;

. . . .

(7) impeding traffic, stopping motorists or pedestrians, or in any manner imposing or attempting to impose his will upon another person as police authority unless:

(a) he is on the property specifically described under [N.C. Gen. Stat. §] 74E-6; or

(b) when in immediate and continuous pursuit of any person for an offense which occurred within the property jurisdiction limitations specifically described under [N.C. Gen. Stat. §] 74E-6 . . . .

12 N.C. Admin. Code 2I.0304(4)–(5), (7) (2024).

B. The I-77 HOT Lanes Project

The North Carolina Department of Transportation ("NCDOT") contracted with I-77 Mobility Partners ("Mobility")—a consortium of corporate entities organized for the purpose of the I-77 HOT Lanes Project public-private partnership—to finance, design, build, operate, and maintain express toll lanes along a 26-mile stretch of I-77 between Statesville and Charlotte. The I-77 HOT Lanes Project was governed by a Comprehensive Agreement, in which NCDOT granted Mobility and its subcontractors a limited concession to enter the I-77 HOT Lanes Project

property, but expressly provided Mobility "no fee title, leasehold estate, possessory interest, permit, easement or other real property interest of any kind":

> **2.1.2** From and after issuance of any NTP1,[1] [Mobility] and its authorized Developer-Related Entities shall have the right to enter onto the Project Right of Way owned by, or subject to the control of, NCDOT and, with the reasonable consent of NCDOT, other lands owned by NCDOT necessary for the purposes of carrying out the NTP1 Work. From and after issuance of NTP2, [Mobility] and its authorized Developer-Related Entities shall have the right to enter onto the Project Right of Way owned by NCDOT and, with the reasonable consent of NCDOT, other lands owned by NCDOT for the purposes of carrying out its obligations under the [Comprehensive Agreement] Documents. Absent agreement by the Parties as to a later date, [Mobility]'s rights to enter and use the Project Right of Way shall automatically terminate at the end of the Term.
>
> **2.1.3** Subject to Section 2.1.2, [Mobility] has no fee title, leasehold estate, possessory interest, permit, easement or other real property interest of any kind in or to the Project or the Project Right of Way by virtue of this Agreement, any of the other [Comprehensive Agreement] Documents or otherwise.
>
> **2.1.4** Subject to Section 2.1.2, [Mobility]'s property interests under this Agreement are limited to contract rights constituting intangible personal property (and not real estate interests). [Mobility]'s property interests under this Agreement are solely those of an independent contracting party, and NCDOT and [Mobility] are not in a relationship of co-venturers, partners, lessor-lessee or principal-agent (except to the extent the [Comprehensive Agreement] Documents expressly appoint [Mobility] as NCDOT's agent for specified purposes).

1. The Comprehensive Agreement defines "NTP1" and "NTP2" as written notices issued by NCDOT to the developer authorizing the developer to proceed with its contracted work.

Mobility identified SCC as the Design-Build Contractor in the Comprehensive Agreement. Consistent with applicable federal guidelines, NCDOT policy for the I-77 HOT Lanes Project required each contracted developer, such as SCC, to "[f]urnish Law Enforcement Officers and marked Law Enforcement vehicles to direct traffic in accordance with the contract." Specifically, the policy required the use of "uniformed Law Enforcement Officers and marked Law Enforcement vehicles equipped with blue lights mounted on top of the vehicle, and Law Enforcement vehicle emblems to direct or control traffic as required by the plans or by the Engineer."

C. Plaintiff's Policing Services for SCC

On 19 July 2016, SCC entered into a contract with Plaintiff to provide policing services in accordance with the Act "[t]o any [NCDOT] property related to" the I-77 HOT Lanes Project in which SCC had "contracting or subcontracting authority." Plaintiff agreed to provide SCC "with policing/law enforcement services under" the Act, including "traffic control/enforcement[.]" In the project statement between SCC and Plaintiff, SCC identified the physical address of the I-77 HOT Lanes Project as: "I-77 from I-277 to Exit 36, and I-277 from I-77 to Exit 3A/B[.]"

On 27 March 2017, Defendant Munn received an email from Adam Tranum, the operations manager for a private security agency in Charlotte, "about a violation that [he] witnessed." Tranum had noticed a pair of Plaintiff's marked vehicles with flashing blue-and-red lights on the sides of the travel lanes at various points of the I-77 HOT Lanes Project construction area. Based on his experience in private security, Tranum understood this to be a violation of the Act because "company police [are] not allowed to . . . direct traffic on public roadways."

Defendant Munn began investigating Tranum's complaint and contacted both Plaintiff and SCC. Plaintiff's Chief of Police Keith Williams and SCC's Safety Manager Jim Quinn each informed Defendant Munn that Plaintiff was under contract to provide policing services, including blocking the travel lanes in the I-77 HOT Lanes Project construction area. Defendant Munn informed both Plaintiff and SCC that Plaintiff's officers were limited to working inside of any barricaded work zones of the construction area and that it would violate the Act for a company police agency to utilize blue lights to block the travel lanes on a state-maintained highway. Defendant Munn also warned that the potential punishment for such a violation could include an immediate revocation of Plaintiff's certification as a company police agency under the Act. Chief Williams "agreed . . . to pull his folks off the job until DOJ came down with a ruling."

D. Procedural History

The foregoing facts have led to multiple lawsuits in state and federal courts. On 18 December 2017, Chief Williams filed a claim for damages under the Tort Claims Act, but the Industrial Commission dismissed the matter for failure to state a claim upon which relief could be granted. *Williams v. N.C. Dep't of Justice, Crim. Standards Div.*, 273 N.C. App. 209, 210–11, 848 S.E.2d 231, 234 (2020). This Court affirmed the dismissal. *Id.* at 218, 848 S.E.2d at 239. Also, Plaintiff filed suit against Defendant Munn and others in federal court, which was likewise dismissed. *Se. Pub. Safety Grp. Inc. v. Munn*, No. 3:20-CV-00203-FDW-DCK, 2021 WL 3561184, at *1 (W.D.N.C. Aug. 11, 2021), *affirmed in part, vacated in part, and remanded*, No. 22-1114, 2024 WL 4625079 (4th Cir. Oct. 30, 2024) (unpublished).

Additionally, Chief Williams filed a foreign subpoena in Washington State directing Microsoft to produce certain logs for four DOJ email accounts. *Williams v. Custodian of Pub. Records NC Dep't of Justice*, 28 Wash. App. 2d 1022, 2023 WL 6214542, at *1 (2023) (unpublished). When Microsoft "completed its search for responsive records and found none[,]" Chief Williams filed a motion to compel and a motion for reconsideration, which were both denied. *Id.* Chief Williams's appeal was similarly unsuccessful. *Id.*

Plaintiff initiated the case before us on 20 March 2020 by filing a petition for a contested case hearing in the Office of Administrative Hearings. Plaintiff claimed that Defendant Munn deprived Plaintiff of rights and property; exceeded the scope of his authority; acted arbitrarily, capriciously, and erroneously; and failed to act as required by law.

In August 2020, the matter came on for hearing before an administrative law judge. At the hearing, the administrative law judge made a series of rulings preventing Plaintiff from engaging in certain lines of questioning, such as asking Defendant Munn about the contract between NCDOT and SCC in order to determine the boundaries of the property that Plaintiff claimed it was authorized to police. The administrative law judge reasoned that Defendant Munn could not "testify about the contract" because Plaintiff could not obtain by contract any authority that it could not lawfully obtain under the Act, such as the authority to block the travel lanes of a public highway:

> Because you cannot -- because the issue is blocking the road. And if the law says you can't block the road it doesn't matter if a contract -- if you sign a contract -- let's take this and do something imaginary. Let's say there's a law that

> says you cannot own a purple kangaroo. Okay? You can't show me a contract that says, Well, I'm giving you a purple kangaroo because the law says no. So he can't talk about the contract. He can just talk about what's in the statute that's his area of responsibility.

The administrative law judge also prevented Plaintiff from introducing into evidence certain federal regulations that Plaintiff contended would support its argument concerning the definition of the "work zone" that it had contracted to police for SCC.

On 19 November 2020, the administrative law judge entered a final decision, determining that Plaintiff "admits and the evidence shows that [it] engaged in acts that are listed as prohibited acts in [12 N.C. Admin. Code 2I.0304(4), (5), and (7)] and that [Plaintiff] failed to show that its actions on the public highway of [I-77] complied with N.C. Gen. Stat. § 74E-6(c)." Accordingly, the administrative law judge concluded that Plaintiff had failed to meet its burden of proof for its claims.

On 13 January 2021, Plaintiff filed a petition for judicial review in Mecklenburg County Superior Court. In part, Plaintiff alleged that it had discovered new evidence through a public-records request: an email sent on 17 July 2017 from Defendant Munn to his supervisor at DOJ, in which Defendant Munn detailed his phone conversation with a DOJ attorney. In this email, Defendant Munn explained that the DOJ attorney had suggested that NCDOT's contract with Mobility might allow a company police agency to perform policing services along the entire 26-mile stretch of the I-77 HOT Lanes Project; nevertheless, Defendant Munn cautioned his supervisor that DOJ attorneys had yet to fully complete their assessment. On 8 July 2021, the superior court entered an order vacating the final decision and remanding the matter to the administrative law judge to allow Plaintiff to present additional evidence related to this email.

This matter came on for hearing on remand before the administrative law judge on 2 December 2021. The additional evidence included not only the 17 July 2017 email but also an email that Defendant Munn sent to his supervisor the next day, in which Defendant Munn summarized a follow-up conversation with the DOJ attorney. In the 18 July email, Defendant Munn stated that "after much thought and conversation the conclusion is that [Plaintiff] would violate the Act if it work[ed] the I-77 construction zone and its duty included blocking travel lanes or any other police action on the [traveled] portion of the highway." The administrative law judge also admitted into evidence the portion of the Comprehensive Agreement containing definitions and diagrams, as well

as affidavits from SCC's Safety Manager Quinn and the DOJ attorney who consulted with Defendant Munn addressing the boundaries of the construction zone for the I-77 HOT Lanes Project.

On 3 February 2022, the administrative law judge entered a new final decision on remand. The administrative law judge found that the newly introduced emails were "part of an on-going discussion between [the DOJ attorney] and Defendant Munn about whether [Plaintiff] was in violation of" the Act, and that the additional evidence did "not support the argument that [Plaintiff] was not in violation of" the Act. Further, the administrative law judge determined that none of the additional evidence "refute[d] the conclusions of law" made in the previous final decision, and concluded that Plaintiff "still failed to meet its burden of proving that [Defendants] took any action that has substantially prejudiced [Plaintiff]'s rights by exceeding its authority or jurisdiction, acting erroneously, failing to use proper procedure, acting arbitrarily or capriciously, or failing to act as required by law or rule."

On 24 March 2022, Plaintiff filed a petition for judicial review of this final decision, as well as a complaint for declaratory judgment. On 10 July 2023, the matter came on for hearing in Mecklenburg County Superior Court. The superior court entered a decision and declaratory judgment in Plaintiff's favor on 10 August 2023.

The superior court first concluded that the administrative law judge erred by limiting Plaintiff's evidence and lines of questioning at the hearings, because the contract between NCDOT and SCC was necessarily relevant to determining Plaintiff's jurisdiction:

> 10. All the jurisdictional limits, and regulatory prohibitions, of company police agencies and officers are established by the real property owned or possessed and controlled by their employers or entities with whom they have contracts for law enforcement services. N.C. Gen. [Stat. § 74E-6(c)(1)–(3)].
>
> 11. At no point in [the Act] or in 12 [N.C. Admin. Code 2I.0304] are company police officers prohibited from impeding traffic, operating sirens, or operating blue lights, as long as they are within their real property jurisdictions as defined by their respective contracts.
>
> 12. It was impossible for the Administrative Law Judge to ascertain whether Plaintiff was complying with the provisions of Chapter 74E without admitting the full contract between . . . NCDOT and SCC, to determine

> whether . . . NCDOT had possession and control over I-77 and whether . . . NCDOT relinquished that possession and control to SCC for purposes of completion of the construction project between Exits 36 and 3A/3B on I-77.
>
> 13. The Administrative Law Judge's refusal to admit and consider the contract between . . . NCDOT and SCC, as well as her refusal to allow Plaintiff to question Defendant Munn about his review of the contract, was arbitrary and capricious, and was further based on unlawful procedure, since the contract itself sets forth the real property jurisdictional boundaries of Plaintiff and its law enforcement officers.

Because the administrative law judge considered the DOJ attorney's opinion "about the language of the contracts at issue, without admitting the actual primary contract itself," the superior court concluded that the administrative law judge's decision "violated Plaintiff's rights to Due Process and Equal Protection, was arbitrary and capricious, was an abuse of discretion, violated the best evidence rule of civil procedure, and was further based on unlawful procedure."

The superior court further concluded that the federal regulations proffered by Plaintiff were relevant and material to this case, and thus the administrative law judge's "refusal to consider federal law violated Plaintiff's rights to Due Process and Equal Protection, was arbitrary and capricious, and was further based on unlawful procedure." The superior court then concluded that Defendant Munn improperly interfered with Plaintiff's contract, due to his failure to consider the contract and the federal regulations:

> The uncontroverted evidence in the record is that Defendant Munn told Plaintiff that it could not block travel lanes in the project area on I-77 because, without consideration of the [federal regulations], he believed the parameters of the work zone were limited to the barricaded areas, despite his review of the contract language indicating otherwise. Since blocking travel lanes was required by Plaintiff's contract with SCC, Plaintiff was unable to continue working and, thus, lost property in that it ceased earning revenue on this and other NCDOT projects because of Defendant Munn's interpretation of Chapter 74E.

The superior court consequently determined that Plaintiff was an "aggrieved party" for purposes of the North Carolina Administrative Procedure Act ("APA"), and that the administrative law judge's conclusion otherwise was "unsupported by substantial evidence, [wa]s arbitrary and capricious, and was an abuse of discretion." Additionally, the superior court determined that "[n]othing in Chapter 74E gives Defendant Munn the authority to interpret or invalidate a contract. As such, he acted outside the scope of his authority in interpreting the contracts at issue in this case and telling Plaintiff that its contract with SCC was invalid."

As to whether Plaintiff violated the Act, the superior court concluded that the Act (1) "does not prohibit company police agencies and officers from providing contract law enforcement services on streets, roads, or highways, as long as those streets, roads, or highways are within the ownership or possession and control of the entities with whom they have contracts for law enforcement services"; and (2) "does not prohibit company police agencies and officers from providing contract law enforcement services on federally-funded NCDOT work zones, including the free-flowing travel lanes, as long as those lanes are within the actual work zone as defined by the" Code of Federal Regulations ("CFR"). Finally, the superior court concluded that the pertinent federal regulations apply in this case:

> In interpreting Chapter 74E, Defendant Munn must defer to the definitions included in the [CFR] for federally-funded highway construction projects. As long as the company police agencies and its officers are working within the work zone as defined in the CFR, they are within their jurisdiction, and Defendant Munn cannot take any investigative or other action against them for this work.

Consequently, the superior court vacated the administrative law judge's final opinion in its entirety, and entered a new order "replac[ing]" the administrative law judge's decision. Defendants timely filed notice of appeal.

II. Discussion

On appeal, Defendants argue that the superior court erred by concluding that Plaintiff did not violate the Act. Specifically, Defendants contend that Plaintiff's "officers acted outside of their jurisdictional bounds," and that "[c]ontrary to the superior court's understanding, no federal law gave [Plaintiff] or its contractor [SCC] the possession and control of the highway needed for [Plaintiff] to have jurisdiction."

For the reasons that follow, we agree with Defendants that the superior court's findings of fact do not support its conclusions of law regarding Plaintiff's alleged violations of the Act. Consequently, we vacate the superior court's decision and declaratory judgment.

Further, although Plaintiff raised additional procedural and evidentiary issues before the superior court, on appeal, Defendants only challenge the superior court's ultimate conclusions of law concerning whether Plaintiff violated the Act. Therefore, we remand to the superior court with instructions that the case be remanded to the administrative law judge for consideration of (1) the contract between NCDOT and SCC, and (2) the federal regulations, to the extent that they apply.

A. Standard of Review

A party aggrieved by the final decision of an administrative law judge in a contested case has a right to judicial review by the superior court. N.C. Gen. Stat. § 150B-43. On review of a final decision of an administrative law judge, the superior court has a limited scope of review under the APA. *Id.*

The APA sets the boundaries of the superior court's review of a final decision:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [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).

The APA provides a reviewing court with two different standards of review, depending on the nature of the challenge being addressed:

> 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.

Id. § 150B-51(c).

When applying de novo review to alleged errors of law, a reviewing court "considers the matter anew and freely substitutes its own judgment for that of the" administrative law judge. *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 207, 784 S.E.2d 509, 518 (citation omitted), *disc. review denied*, 368 N.C. 919, 786 S.E.2d 915 (2016). "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative [law judge]'s findings and conclusions." *Id.* at 207, 784 S.E.2d at 517–18 (citation omitted).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in [N.C. Gen. Stat. §] 7A-27." N.C. Gen. Stat. § 150B-52. "The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under [N.C. Gen. Stat. §] 150B-51(c), the [superior] court's findings of fact shall be upheld if supported by substantial evidence." *Id.*

"[O]ur appellate courts have recognized that the proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law." *Harnett Cnty. Bd. of Educ. v. Ret. Sys. Div., Dep't of State Treasurer*, 291 N.C. App. 14, 20, 894 S.E.2d 275, 280 (2023) (cleaned up), *disc. review denied*, 386 N.C. 348, 901 S.E.2d 790 (2024). "[T]his 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." *Id.* (cleaned up).

B. Analysis

As an initial matter, we note that the superior court appears to have applied the correct standard of review—de novo—to the question of whether Plaintiff violated the Act by utilizing blue lights to block free-flowing traffic on a public highway, an alleged error of law. *See* N.C. Gen. Stat. § 150B-51(c). However, because the superior court did not

correctly interpret the Act and its application to the facts of this case, we cannot say that the superior court properly applied the de novo standard of review. *See Harnett Cnty. Bd. of Educ.*, 291 N.C. App. at 20, 894 S.E.2d at 280.

Fundamentally, this case concerns the jurisdictional provisions of the Act. There is no dispute that if Plaintiff exceeded its jurisdictional limits, as specifically set forth in the Act, then it would have been engaged in policing activities prohibited by 12 N.C. Admin. Code 2I.0304. Thus, the crux of the matter is whether Plaintiff acted within the real-property jurisdiction limitations of the Act.

In that Plaintiff has never claimed that it owned or had possession and control of the relevant portion of I-77, this case necessarily hinges upon whether the party with whom Plaintiff contracted—namely, SCC—owned or had possession and control of that property. *See* N.C. Gen. Stat. § 74E-6(c)(1)–(2). Significantly, however, the superior court never expressly found or concluded that SCC had such ownership, possession, or control, although the court made a series of findings and conclusions regarding other important procedural and legal issues in this matter.

Rather than focusing on the dispositive issue of whether Plaintiff or SCC owned, possessed, or controlled the free-flowing traffic lanes of the pertinent portion of I-77, as required by N.C. Gen. Stat. § 74E-6(c)(1)–(2) in order to determine whether Plaintiff's actions violated 12 N.C. Admin. Code 2I.0304, the superior court instead focused primarily on two decisions below: the administrative law judge's failure (1) to allow Plaintiff to question Defendant Munn about the contract between NCDOT and SCC, and (2) to consider the various federal regulations proffered by Plaintiff in support of its jurisdictional argument. However, the superior court's analysis of these procedural issues—which Defendants do not challenge on appeal and therefore is not before us—is insufficient on its own to resolve the dispositive question of law and indicates that the superior court may have misinterpreted the jurisdictional requirements of the Act.

1. Federal Regulations

By the express terms of the Comprehensive Agreement that governs the I-77 HOT Lanes Project, NCDOT granted Mobility a concession. *See Concession*, *Black's Law Dictionary* (12th ed. 2024) (defining a "concession" as a "government grant for specific privileges"). Pursuant to this concession, Mobility and its subcontractors obtained a right of entry to designated areas of the I-77 HOT Lanes Project work zone.

Nevertheless, the Comprehensive Agreement plainly states that the I-77 HOT Lanes Project property—including both the existing I-77 right-of-way and the additional property purchased for the project—is "owned by, or subject to the control of, NCDOT" and that Mobility received "no fee title, leasehold estate, possessory interest, permit, easement or other real property interest of any kind in or to" the highway property. This language strongly suggests that neither Mobility nor SCC, as Mobility's design-build contractor, obtained the rights of ownership, possession, or control over the I-77 HOT Lanes Project that the Act requires in order to sanction Plaintiff's policing activity in this case.

However, the superior court accurately recognized that the Act "does not define real property[.]" Consequently, the superior court turned to the host of federal regulations proffered by Plaintiff to assist in its analysis and determined that they were relevant to this issue. The superior court then summarized these regulations in its conclusions of law:

> 16. For federally-funded highway constructions projects, the real property interest acquired by the contractor from the State department of transportation or other entity "must be adequate to fulfill the purpose of the [project]." 23 C.F.R. § 710.305(b).
>
> 17. For federally-funded highway constructions projects, a Right of Way Agreement must exist between the grantee of the federal funds, usually a State department of transportation, and any contractors or subcontractors. 23 C.F.R. § 710.405. These agreements must provide safety measures. One of those measures is a traffic management plan. 23 C.F.R. § 630.1012(b).
>
> 18. The cost of providing and paying uniformed law enforcement officers is generally to be borne by the contractor on the highway construction project. 23 C.F.R. § 630.1108(d)(2).

These conclusions concerning the applicability of the federal regulations to the case at bar formed the basis of the superior court's conclusion that the "refusal to consider federal law violated Plaintiff's rights to Due Process and Equal Protection, was arbitrary and capricious, and was further based on unlawful procedure." But the superior court neglected to extend its analysis to reach the dispositive issue of whether (or how) federal law vested SCC with the necessary ownership, possession, or control of the highway property in question.

Indeed, it is not readily apparent how germane these conclusions of law regarding the federal regulations are to the legal question of whether Plaintiff exceeded its lawful jurisdiction under the Act. As Defendants observe in their appellate brief, "none of these cited regulations gave away NCDOT's possessory interests in the land or required NCDOT to do so."

For instance, Defendants note that the requirement that the contractor obtain an adequate property interest from NCDOT was satisfied by the concession granted to Mobility and its subcontractors, thereby entitling them to a right of entry to perform their contractual duties. But that concession was merely a right of entry, and by its own terms would not include any possessory interest that Mobility could have granted to SCC in turn. More to the point, the superior court never concluded that the application of this federal regulation to the facts of this case vested SCC with the ownership, possession, or control over the free-flowing traffic lanes of I-77 at issue necessary to authorize Plaintiff's actions under the Act.

Similarly, the fact that the federal regulations required NCDOT to have a Right of Way Agreement setting forth a traffic management plan does not, in and of itself, provide blanket authorization for a *company police agency* to provide that traffic management, if providing such a service would violate the Act. As Defendants explain: "Because these regulations do not demand the use of *private* law enforcement agencies, the court erred in holding that they somehow required that [Plaintiff] be allowed to manage traffic." The superior court did not square the federal requirement for a traffic management plan with the Act's jurisdictional limitations when it evidently—but implicitly—concluded that Plaintiff had not exceeded its jurisdiction under § 74E-6(c).

The superior court's findings of fact do not explain whether or how the federal regulations proffered by Plaintiff could vest either SCC or Plaintiff with the ownership, possession, or control over the pertinent area of I-77 and therefore provide Plaintiff with the jurisdiction necessary to satisfy § 74E-6(c). Nor could the regulations provide an alternative basis for Plaintiff to satisfy the jurisdictional requirements of the Act, as explained above. Accordingly, the superior court's findings of fact regarding the cited federal regulations do not support the implicit conclusion that Plaintiff did not violate the Act.

2. Contracts

Just as the superior court's analysis of the federal regulations failed to resolve the dispositive question of law, so too did the superior court's

contractual analysis. The superior court reasoned that Defendant Munn's admonition to Plaintiff that its officers "could not block the free-flowing travel lanes on I-77 but were restricted to working in the barricaded-off areas" was apparently "inconsistent with Plaintiff's contractual obligations to SCC and essentially gutted the contract" between Plaintiff and SCC, because "under SCC's contract with . . . NCDOT and the governing federal regulations, SCC was required to provide traffic control on the free-flowing travel lanes of I-77 in the project area."

The same gap in the superior court's logic discussed above applies here: SCC's contractual obligation to provide traffic control does not furnish blanket authorization for *any agency with whom SCC contracted* to provide that traffic control. If a company police agency was engaged to provide such services, it would still have to comply with the limited jurisdictional authority granted by the Act. Accordingly, it does not necessarily follow that the contract did (or could) authorize Plaintiff's actions in this case.

It is well settled that a contract cannot authorize a party to violate the law. *See*, *e.g.*, *Duke Power Co. v. Blue Ridge Elec. Membership Corp.*, 253 N.C. 596, 602, 117 S.E.2d 812, 816 (1961) ("When called upon to interpret a contract, courts seek to ascertain and give effect to the intent of the parties if that intent does not require the performance of an act prohibited by law."). Because Plaintiff's actions would have violated 12 N.C. Admin. Code 2I.0304(4)–(5) and (7) if the jurisdictional provisions of N.C. Gen. Stat. § 74E-6(c) were not satisfied, the only relevance of any contract in this matter would be to aid the tribunal in determining whether SCC obtained the requisite ownership, possession, or control over the 26-mile stretch of I-77 at issue. But the superior court made no such determination; rather, it only concluded that the "refusal to admit and consider the contract between . . . NCDOT and SCC, as well as [the] refusal to allow Plaintiff to question Defendant Munn about his review of the contract, was arbitrary and capricious" and "based on unlawful procedure, since the contract itself sets forth the real property jurisdictional boundaries of Plaintiff and its law enforcement officers." This conclusion—and particularly, any blanket assertion that a contract alone might define a company police agency's jurisdictional limitations without determining whether the agency or its employer had sufficient ownership, possession, or control of the property that the agency was hired to police—does not resolve this case's dispositive question of law: namely, Plaintiff's jurisdiction under § 74E-6(c).

Ultimately, neither the federal regulations nor any contract can overcome the jurisdictional requirements set out by the plain text of

the Act. Consequently, the superior court erred as a matter of law when it concluded:

> The uncontroverted evidence in the record is that Defendant Munn told Plaintiff that it could not block travel lanes in the project area on I-77 because, without consideration of the [federal regulations], he believed the parameters of the work zone were limited to the barricaded areas, despite his review of the contract language indicating otherwise. Since blocking travel lanes was required by Plaintiff's contract with SCC, Plaintiff was unable to continue working and, thus, lost property in that it ceased earning revenue on this and other NCDOT projects because of Defendant Munn's interpretation of Chapter 74E.

This conclusion—along with others like it in the superior court's decision and declaratory judgment—demonstrates a flawed reading of the Act and the effects, if any, that regulations and contracts have on the jurisdictional requirements of N.C. Gen. Stat. § 74E-6(c). The polestar of the jurisdictional analysis for the question presented by this case is whether SCC had the requisite ownership, possession, or control of the I-77 HOT Lanes Project work zone sufficient for SCC to permit Plaintiff to provide the policing services in question consistent with the Act. Because the superior court did not answer this question and, as a result, demonstrated a misunderstanding of the law at issue in this case, we cannot say that the court properly applied the de novo standard of review. *See Harnett Cnty. Bd. of Educ.*, 291 N.C. App. at 20, 894 S.E.2d at 280.

III. Conclusion

In sum: although the superior court applied the proper de novo standard of review upon review of the administrative law judge's decision, we cannot say that the superior court applied that standard of review *correctly*. *See id.* The superior court's findings of fact and conclusions of law are insufficient to support its determination that Plaintiff was an "aggrieved party" under the APA. N.C. Gen. Stat. § 150B-43. And because the superior court erred as a matter of law in interpreting the Act, the superior court's decision and declaratory judgment must be vacated and remanded.

In light of the superior court's unchallenged determinations regarding the administrative law judge's evidentiary and procedural rulings, however, the proper disposition is for the superior court to further

remand this matter to the administrative law judge for reconsideration. On remand, the administrative law judge shall consider the contract between NCDOT and SCC, as well as the applicable federal regulations, in determining the scope of Plaintiff's jurisdiction pursuant to N.C. Gen. Stat. § 74E-6(c).

We therefore vacate the superior court's decision and declaratory judgment, which itself vacated the final decision of the administrative law judge, and remand to the superior court with instructions that the matter be remanded to the administrative law judge for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ARROWOOD and GORE concur.

IN THE MATTER OF N.R.R.N. AKA N.R.N.

No. COA24-403

Filed 5 February 2025

1. Child Abuse, Dependency, and Neglect—adjudication—sufficiency of evidence and findings—testimony verifying truth of petition allegations

The trial court's findings of fact in its order adjudicating a child neglected and abused were based on clear, cogent, and convincing evidence—including a prior adjudication and disposition of the child's older sibling—and reflected the trial court's processes of logical reasoning and independent evaluation of the ultimate facts of the case rather than a mere verbatim recitation of the allegations contained in the juvenile petition. Further, the sworn testimony of an investigator for the department of social services verifying that the allegations in the petition were true constituted competent evidence. In addition, neither mother nor father objected to the introduction of the petition, presented evidence in opposition to the petition and its allegations, or availed themselves of the opportunity to conduct a cross-examination of the investigator.

2. Child Abuse, Dependency, and Neglect—neglect—injurious environment—prior abuse of sibling from non-accidental injuries

The trial court properly adjudicated a child as neglected based on evidence that the child's older sibling had been abused and neglected from sustaining non-accidental injuries, for which the parents had not provided an explanation, and that the parents had not acknowledged the injurious environment created for the sibling or taken steps to remedy the environment to prevent future harm to the child subject to the current juvenile petition.

3. Child Abuse, Dependency, and Neglect—abuse—lack of evidentiary support—prior abuse of sibling insufficient

The trial court's order adjudicating a child as abused was reversed where the only evidence of abuse pertained to the child's older sibling—whose prior adjudication of abuse and neglect resulted from having sustained serious injuries through non-accidental means while in her parents' care—and where there was no evidence that the child subject to the current juvenile petition had ever been subjected to physical harm by the parents or that the parents had directly placed the child in a substantial risk of harm.

4. Child Abuse, Dependency, and Neglect—effective assistance of counsel—juvenile petition—failure to advocate during adjudication—pending felony child abuse charges

In an adjudication proceeding on a juvenile petition alleging abuse and neglect, neither parent received ineffective assistance of counsel where their counsels' decisions to "stand mute" or not object to the submission of the juvenile petition constituted permissible strategic decisions in light of the pending felony child abuse charges both parents faced for the alleged child abuse of their older child and the fact that counsel for each parent actively participated in the dispositional phase of the hearing. Further, neither parent could show they were deprived of a fair hearing given the sufficiency of the evidence to conclude that the child was a neglected juvenile.

5. Child Abuse, Dependency, and Neglect—initial disposition—ceasing reunification efforts—statutory requirements

In a juvenile abuse and neglect proceeding, the trial court properly ordered the department of social services to cease reunification efforts with the parents at the initial disposition hearing pursuant to N.C.G.S. § 7B-901(c)(3)(iii) after determining, as a "court of competent jurisdiction," that the parents had committed a felony assault resulting in serious bodily injury to the child's sibling. However, the court's order ceasing reunification efforts pursuant to N.C.G.S. § 7B-901(c)(1)(f) was vacated for lack of sufficient findings of the existence of "other" aggravated circumstances, since the facts that

gave rise to the adjudication could not also serve as the "other act, practice, or conduct" for purposes of disposition.

Appeal by respondent-parents from order entered 21 February 2024 by Judge David E. Sipprell in District Court, Forsyth County. Heard in the Court of Appeals 5 November 2024.

Deputy County Attorney Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Michelle FormyDuval Lynch for the guardian ad litem.

Edward Eldred for respondent-appellant mother.

Marion K. Parsons for respondent-appellant father.

STROUD, Judge.

Respondent-Parents appeal from an order entered 21 February 2024 adjudicating their infant child abused and neglected and relieving Petitioner Forsyth County Department of Social Services of efforts to reunify Respondent-Parents with the child. We affirm the trial court's adjudication of the infant child to be a neglected juvenile and affirm in part and vacate in part the trial court's disposition ceasing reunification efforts.

I. Background

Respondent-Parents Karema Coleman ("Mother") and Patrick Nicholson ("Father") (collectively, "Parents") are the mother and father of minor child Nora,[1] born January 2024. Two days after Nora's birth, Forsyth County Department of Social Services ("DSS") filed a Juvenile Petition alleging Nora to be an abused and neglected juvenile. An order for non-secure custody was granted that same day. The petition's allegations, and the trial court's order finding Nora to be abused and neglected, were based mostly on Parents' treatment of Nora's older sister, Nan.

Born at twenty-seven weeks gestation in January 2023, Nan[2] remained in neonatal intensive care until she was released to the care of

1. Stipulated pseudonyms are used to protect the identity of minor children. *See* N.C. R. App. P. 42.

2. Also a stipulated pseudonym.

Parents on 12 April 2023. Only one week later, Parents returned to the hospital to admit Nan for a "near fatality event." Nan was diagnosed with three skull fractures, a large bilateral subdural hematohygroma, extensive fluid and bleeding around her spinal cord, and more. A doctor determined:

> This constellation of injuries without any accidental explanation is highly concerning for abusive head trauma. These significant concerns are heightened by the information we have regarding very concerning behaviors by [Nan]'s father which were documented while [Nan] was in the NICU. We would consider this a near-fatality for [Nan] and she likely would have died without lifesaving resuscitation in the ED.

In accordance with these findings and others, a trial court adjudicated Nan an abused and neglected juvenile by order filed on 27 October 2023. Further, on 28 September 2023, both Mother and Father were charged with Felony Intentional Child Abuse Inflicting Serious Physical Injury and Felony Intentional Child Abuse Inflicting Serious Bodily Injury. At the time of Nora's adjudication hearing on 12 February 2024, Mother had been released on bond for these charges, while Father remained in the Forsyth County Detention Center awaiting trial.

Parents previously appealed Nan's adjudication to this Court, in which we concluded the trial court did not err in finding Nan an abused and neglected juvenile. *See In re N.N.*, 296 N.C. App. 159, 907 S.E.2d 430 (2024).

As for Nora and the case at hand, the trial court adjudicated her abused and neglected given both Mother and Father's felony child abuse charges, finding Nora to be "at substantial risk of harm based upon the serious physical abuse inflicted on her sibling which injuries occurred while [Nan] was 3 months old, and she had only been in the care of [Mother] and [Father] for one week."

Mother filed notice of appeal on 21 February 2024. Father filed notice of appeal on 15 March 2024.

II. Standard of Review

In juvenile adjudications of abuse and neglect,

> [a]n appellate court reviews a trial court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support

> the conclusions of law. Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal. Conclusions of law made by the trial court are reviewable de novo on appeal. An appeal de novo is one in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings. 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, 868 S.E.2d 1, 4 (2022) (citations, quotation marks, brackets, and footnotes 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) (quoting N.C. Gen. Stat. § 7B-1109(f)).

"It is well established that 'clear and convincing' and 'clear, cogent, and convincing' describe the same evidentiary standard." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). This evidentiary standard is an intermediate standard "greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *Id.* at 109-110, 316 S.E.2d at 252 (citing *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982)).

III. Analysis

Mother and Father present similar arguments on appeal. First, both challenge the findings of fact based on the claims that the evidence presented at adjudication was insufficient because DSS presented the verified petition and testimony from DSS investigator Natasha Price who verified the petition was true. Second, Parents contend the findings of fact do not support the adjudication of abuse as they would "[a]t most" support a conclusion that Nora was only *at risk* of abuse, and therefore neglected. Third, Parents contend they were denied their right to effective assistance of counsel during the 12 February 2024 adjudication hearing. Finally, Parents argue the trial court erred by ceasing reunification efforts during the initial disposition. We address each issue in turn.

A. Sufficiency of the Evidence

[1] Both Mother and Father challenge the sufficiency of the evidence relied on by the trial court in adjudicating Nora to be an abused and

neglected juvenile. Specifically, Parents contend the trial court's findings of fact "[were] not supported by clear, cogent, and convincing evidence where the only evidence was the verified petition and the verifier's testimony that the information in the petition was true."

1. Findings of Fact

On appeal, Father argues ten of the fifteen substantive findings made by the trial court during the adjudicatory phase were insufficient to support abuse and neglect under the standard of clear and convincing evidence because they were "verbatim recitations" of the petition's allegations. In making this argument, Father cites to this Court's opinion in *In re M.K.*, which stated

> [r]egurgitated allegations do not reflect a reconciliation and adjudication of all the evidence by the trial court to allow this Court to determine whether sufficient findings of fact are supported by clear, cogent and convincing evidence. Without adjudicated findings of fact this Court cannot conduct a meaningful review of the conclusions of law and test the correctness of the trial court's judgment.

In re M.K., 241 N.C. App. 467, 470-71, 773 S.E.2d 535, 538 (2015) (citations, brackets, and quotation marks omitted). As noted in *In re M.K.*, this Court has "strongly discouraged" verbatim recitation of "the allegations from the petition." *Id.* at 471, 773 S.E.2d at 539. However, this Court in *In re M.K.* ultimately reviewed the other "substantive findings of fact, which form[ed] the basis for the trial court's adjudication of neglect[,]" *id.*, and concluded that "[t]he trial court's evidentiary and adjudicatory findings of fact [were] supported by clear, cogent and convincing evidence[,]" *id.* at 476, 773 S.E.2d at 541.

This Court has also made it clear

> it is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.
>
> . . . .

> [I]t would impose an impossible burden on trial court judges if we were to hold that any findings "cut-and-pasted" from a party's pleading automatically warranted reversal of the order. If a trial court, after carefully considering the evidence, finds that the facts are exactly as alleged in a party's pleading, there is nothing wrong with repeating those same words in an order. The purpose of trial court orders is to do justice, not foster creative writing.

In re J.W., 241 N.C. App. 44, 48-49, 772 S.E.2d 249, 253 (2015).

In *In re J.W.*, this Court concluded the trial court "through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to support its conclusions of law," even though some findings had been "cut-and-pasted" wording from the juvenile petition. *Id.* at 49, 772 S.E.2d at 254. In support of these findings being ultimate facts, this Court noted the trial court heard four days of testimony corroborating the allegations before making its final adjudication. *See id.* "Accordingly, we will only consider those findings that are, in fact, supported by evidence in the record regardless of whether they mirror the language used in the petition." *In re L.C.*, 253 N.C. App. 67, 71, 800 S.E.2d 82, 86 (2017).

Mother also argues that the findings of fact were not supported by clear, cogent and convincing evidence. Mother contends that in reviewing findings of fact which must be based upon clear, cogent, and convincing evidence, the appellate court should "account for the 'level of confidence' the trial court's standard of proof demands[,]" basing her argument on a case from the California Supreme Court which clarified "how an appellate court is to review the sufficiency of the evidence associated with a finding made by the trier of fact pursuant to the clear and convincing standard." *See Conservatorship of O.B.*, 9 Cal. 5th 989, 995, 470 P.3d 41, 44 (2020). The California Supreme Court in *O.B.* stated:

> We now dispel this uncertainty over the proper manner of appellate review by clarifying that an appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court. In general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a

> reasonable trier of fact could have made the finding of high probability demanded by this standard of proof.

Id. at 1005, 470 P.3d at 50-51 (footnote omitted).

Mother contends "California's analysis is instructive and persuasive" and that "no North Carolina case performs such an exhaustive analysis[.]" Mother may be correct that no North Carolina case addresses how an appellate court should review findings as extensively as *O.B.*, but this Court is still bound to follow North Carolina law. The California Supreme Court's extensive analysis was required by splits of authority in cases decided by different divisions of the intermediate appellate courts in California: "There is a split of opinion over how an appellate court should address a claim of insufficient evidence such as the one advanced here." *Id.* at 995, 470 P.3d at 44. But North Carolina has no such split of authority to address, and this Court is bound by precedent from our Supreme Court. *See State v. Ledbetter*, 243 N.C. App. 746, 751, 779 S.E.2d 164, 168 (2015) ("We are bound by the decisions of our Supreme Court and by prior decisions of another panel of our Court addressing the same question, unless overturned by an intervening decision from a higher court." (citation omitted)).

Mother's main substantive argument based on North Carolina law is that DSS's reliance on the allegations of the petition cannot meet the standard of clear, cogent, and convincing evidence. In *In re Z.G.J.*, our Supreme Court held that the evidence was sufficient to support adjudication of grounds for termination of parental rights where DSS presented the petition and testimony from a DSS representative "adopting the allegations" of the petition:

> In this case, DSS called Johnson as a witness and tendered her to give testimony. While Johnson's testimony was not extensive, she orally reaffirmed, under oath, all of the allegations from the termination petition. Respondent was given the opportunity to cross-examine Johnson with respect to any of these allegations, and she declined to do so. In light of Johnson's testimony, the trial court conducted a proper adjudication hearing in accordance with N.C.G.S. § 7B-1109(e), and it did not err by relying on Johnson's testimony adopting the allegations in the termination petition when it entered its adjudication order.

In re Z.G.J., 378 N.C. 500, 508, 862 S.E.2d 180, 187 (2021). Mother tries to distinguish this case from *In re Z.G.J.* by arguing that here, Ms. Price "did not adopt the petition's allegations as her testimony. She merely

testified the information in the petition was true." Also, Mother claims the respondent in *In re Z.G.J.* did not challenge the sufficiency of the evidence to support the findings of fact.

Mother is correct that the social workers who testified in *In re Z.G.J.* did not use the exact same words as the witness in this case to confirm that they had verified the petitions and that the information in the petitions was true, but there is no substantive difference in the meaning of their testimony. The Court in *In re Z.G.J* did not hold that social workers must use magic words to testify in support of the contents of the petition. In both *In re Z.G.J.* and this case, the testifying social workers confirmed that the information in the petitions were true and accurate, and, in both cases, the petition was then received into evidence with no objection. *See id.* at 507, 862 S.E.2d at 186. There is no substantive difference between this case and *In re Z.G.J.* as to the testimony of the social worker who verified the petitions.[3]

Mother then tries to distinguish *In re Z.G.J.* by arguing respondent in that case "did not challenge the sufficiency of the evidence to support the findings[]" beyond her challenge to the presentation of evidence by the social worker's testimony confirming the petition. But Mother likewise presents no substantive challenge to the findings of fact other than claiming the trial court should not have relied on the petition's allegations. Father also presents no substantive challenges to the findings beyond contending only five of the findings "are not verbatim recitations of the petition's contents" and two others are really conclusions of law, not findings of fact.

---

3. In *In re Z.G.J.*, the Supreme Court remanded because the issues in that case required findings addressing circumstances at the time of the hearing, but the social worker's testimony and allegations of the petition addressed only events as of the date of filing of the petition:

> However, the only evidence offered by DSS at adjudication was Johnson's testimony adopting the termination petition, which was filed on 21 August 2018. The termination hearing did not occur until more than thirteen months later, on 24 September 2019. Thus, the allegations in the petition do not shed any light on respondent's fitness to care for Ann at the time of the termination hearing, and the trial court erred by relying on the stale information in the petition as its only support for this ground.

In re Z.G.J., 378 N.C. at 509-10, 862 S.E.2d at 188 (citation omitted). Here, the adjudication was properly based upon facts as of the date of the filing of the petition, and Ms. Price testified that the petition was "still true and accurate today as it was on the day [she] filed the petition." Ms. Price also testified that neither parent had provided "an explanation as to how [Nan] had received her non-accidental trauma injuries in April of 2023."

Here, after examination of the entire record before us, we are satisfied the trial court independently found the ultimate facts of the case based on sufficient evidence, even though many of its substantive findings were verbatim recitations of the wording in the petition. During the hearing, the court heard testimony from Ms. Price, the Forsyth County DSS worker who signed and filed the juvenile petition relating to Nora. Ms. Price testified to the truth and accuracy of the allegations within the petition at the time of filing and attested to their truth and accuracy at the time of trial. Ms. Price also testified neither Mother nor Father ever provided any explanation to DSS as to how Nan received her injuries in April of 2023. Following this testimony, neither counsel for Mother nor Father objected to the admission of the juvenile petition into evidence, presented any evidence opposing the petition and its allegations, nor elected to cross-examine Ms. Price. The trial court noted the absence of objection and presentation of evidence opposing the petition in its substantive adjudicatory findings of fact.

The trial court exercised logical reasoning and the competent evidence supported its findings of fact. Along with the sworn testimony of Ms. Price, the record on appeal also indicates the trial court relied on the prior adjudication and disposition of Nan. The prior order regarding the abuse and neglect of Nan was part of the evidence supporting the trial court's findings regarding Nora. Where a prior order adjudicates a sibling to be abused and neglected, and DSS relies upon the prior order in allegations regarding another sibling's risk of being subjected to similar harms, the trial court may rely upon this evidence in making its findings of fact. *See In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 50 (2007). Father's argument the trial court's findings are insufficient because some are verbatim recitations of the petition's wording is without merit.

Father also argues two of the trial court's findings are actually conclusions of law. Specifically, Father challenges Findings 18 and 29, which read:

> 18. The Court finds that [Nora] is an abused and neglected juvenile as pursuant to N.C.G.S. 7B-101(1) and 7B-101(15).
>
> . . . .
>
> 29. Based upon the foregoing, the Court finds by clear, cogent and convincing evidence that [Nora] is an abused and neglected juvenile in that her parents have created or allowed to be created a substantial risk of serious physical injury by other than accidental means. Also, the parents of

> [Nora] have created or allowed to be created a living environment that is injurious to the child's welfare.

Our Supreme Court has recently reiterated the distinction between ultimate facts and conclusions of law:

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.
>
> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.
>
> When the statements of the judge are measured by this test, it is manifest that they constitute findings of ultimate facts, i.e., the final facts on which the rights of the parties are to be legally determined.

In re G.C., 384 N.C. 62, 66, n. 3, 884 S.E.2d 658, 661, n. 3 (2023) (citation, quotation marks, and ellipses omitted).

We agree with Father's contention that Finding 18 is a conclusion of law but Finding 29 is a finding of ultimate fact. *See id.* at 67, 884 S.E.2d at 662 ("Here, the trial court specifically found that Glenda 'lived in an environment injurious to [her] welfare; and that [she] does not receive proper care, supervision, or discipline from [her] parent, guardian, [or] custodian.' These findings are properly characterized as ultimate findings and satisfy the statutory definition of neglected juvenile. The ultimate findings of fact that Glenda does not receive proper care, supervision, or discipline from her parents is supported by the trial court's evidentiary findings of fact and reached by natural reasoning from the evidentiary findings of fact." (brackets in original)). The mislabeling of conclusions of law as findings of fact, however, does not defeat the issue for appellate review. *See City of Charlotte v. Health*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946) ("The label of fact put upon a conclusion

of law will not defeat appellate review."); *see also Stan D. Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984) ("If the finding of fact is essentially a conclusion of law, however, it will be treated as a conclusion of law which is reviewable on appeal." (citations omitted)). Father makes no argument beyond those already addressed as to Finding 29, and this finding is supported by evidentiary findings and by the evidence. We will address Finding 18 below as a conclusion of law.

2. Conclusions of Law

We next address Parents' challenges to the trial court's conclusions of law that Nora was a neglected and abused juvenile. Mother essentially concedes that the findings of fact would support the conclusion that "Nora was at risk of being abused; i.e., that she was neglected[]" and both Parents focus most of their argument upon the adjudication of Nora's status as an abused juvenile. We will first address the trial court's conclusion of law that Nora was a neglected juvenile.

a. Neglect Adjudication

[2] Our North Carolina General Assembly has defined a neglected juvenile to include a minor whose parent, guardian, or caretaker "[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)(e) (2023).

> A court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children. Rather, in concluding that a juvenile lives in an environment injurious to the juvenile's welfare, the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile.

In re J.A.M., 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019) (citations and quotation marks omitted). "The neglect statute neither dictates how much weight should be given to a prior neglect adjudication, nor suggests that a prior adjudication is determinative. Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence." *Id.* (citations and quotation marks omitted).

Here, Parents argue the trial court improperly relied on the prior adjudication of Nan in concluding Nora to also be a neglected and abused juvenile, contending there were no other factors to support such conclusions. Our Supreme Court in *In re A.J.L.H.* explained

> [a]lthough a trial court cannot rely solely on abuse of another child in the home as a basis for a neglect adjudication, we have emphasized that a 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. This is particularly true for very young children, where the evaluation 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 A.J.L.H., 384 N.C. 45, 55, 884 S.E.2d 687, 694 (2023) (citations and quotation marks omitted).

We agree with Parents' claim the prior adjudication of Nan, standing alone, cannot serve as grounds to adjudicate Nora as a neglected juvenile. We disagree, however, with their claims that no other factors were present to support the trial court's conclusion of Nora to be a neglected juvenile. As our Supreme Court in *In re A.J.L.H.* further explained:

> When determining the weight to be given to a finding of abuse of another child in the home, a critical factor is whether the respondent *indicates a willingness to remedy the injurious environment that existed with respect to the older child*. Facts that can demonstrate a parent's unwillingness to remedy the injurious environment include failing to acknowledge the older child's abuse or insisting that the parent did nothing wrong when the facts show the parent is responsible for the abuse.

Id. at 56, 884 S.E.2d at 694-95 (emphasis added). In *In re A.J.L.H.*, our Supreme Court affirmed a trial court's adjudication of a neglected juvenile, based on past abuse of a sibling, on grounds that "[t]he key 'other factor' in this case, beyond the abuse of [the fellow sibling], is respondents' inability to recognize that it *was* abuse, and their corresponding inability to commit to never repeating it." *Id.* (emphasis in original).

Here, the trial court's findings indicated neither Mother nor Father had acknowledged the injurious environment created for Nan, nor had they taken any steps to remedy this environment to ensure any potential future harm to Nora. Specifically, in Finding 24, the trial court found "[d]uring the period from April 12-19, 2023, [Nan] was in the exclusive care custody and control of her parents[.] Neither parent has provided an explanation for the child's injuries consistent with the medical findings." The unwillingness to acknowledge the abuse and take steps to

ensure it will never happen again is further supported by the trial court's finding that, during the hearing, Parents stood mute to the allegations of the petition and presented no evidence in opposition.

Under precedent established by our Supreme Court, here, the trial court did not have to wait for Nora to be subjected to similar harms faced by her sister before adjudicating her neglected. *See id.* ("[T]he trial court was not required to wait for Chris and Anna to reach the same age as Margaret before determining that they, too, face a substantial risk of harm from these cruel and inappropriate disciplinary measures."). According to the trial court's findings, Nan was only in the care of her parents a little over a week following her birth before she was immediately re-admitted to the hospital for her life-threatening injuries. Following Nora's birth, a little over a year after Nan's, Parents had still provided no explanation for Nan's injuries. As Nora was around the same age as Nan when Nan sustained her injuries, there was a substantial risk of physical harm to Nora, and the trial court is not required to wait for this harm to occur before adjudicating Nora to be a neglected juvenile. We affirm the trial court's adjudication of Nora as a neglected juvenile.

b. Abuse Adjudication

[3] Along with the trial court's adjudication of Nora to be a neglected juvenile, the trial court also determined her to be an abused juvenile under North Carolina General Statute Section 7B-101(1). Parents argue, as they did with the neglect adjudication, the evidence was insufficient to support the adjudication of Nora to be an abused juvenile. We agree.

Section 7B-101(1) defines an "abused" juvenile as one whose "parent, guardian, custodian, or caretaker:"

> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
>
> c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;
>
> d. Commits, permits, or encourages the commission of a violation of [one or more of the included sexual offenses] by, with, or upon the juvenile . . . ;

> e. Creates or allows to be created serious emotional damage to the juvenile . . . ; or
>
> f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

N.C. Gen. Stat. § 7B-101(1) (2023). As noted by our Supreme Court in *In re M.G.*, "[t]here is a commonality present in these criteria. Each definition states that a juvenile is abused when a caretaker harms the juvenile in some way, allows the juvenile to be harmed, or allows a substantial risk of harm." *In re M.G.*, 363 N.C. 570, 573, 681 S.E.2d 290, 292 (2009). As for the harm faced by a juvenile, or a substantial risk of harm, "[t]he harm may be physical, *see* N.C.G.S. § 7B-101(1)(a), (b); emotional, *see id.* § 7B-101(1)(e), (f); or some combination thereof, *see id.* § 7B-101(1)(c), (d)." *Id.*

The trial court, here, found Nora to be an abused juvenile "in that her parents have created or allowed to be created a substantial risk of serious physical injury by other than accidental means." In making this determination, similar to the neglect adjudication, the trial court relied heavily on the earlier actions of Parents that resulted in the non-accidental injuries sustained by Nora's sister. As already discussed above, a history of juvenile abuse and neglect can serve as sufficient grounds for adjudicating a sibling as presently neglected if there are some "other" factors present. However, we have no caselaw supporting the notion that past abuse of a sibling—either standing alone or joined with some other factors—can serve as sufficient grounds for *also* finding a sibling presently abused.

As for a substantial risk of harm, this Court has upheld abuse adjudications where the actions of caretakers directly creates a substantial risk of harm to the child, *see In re K.B.*, 253 N.C. App. 423, 801 S.E.2d 160 (2017), or when the caretakers are aware of a substantial risk of harm and they take no action to remedy this risk, *see In re W.C.T.*, 280 N.C. App. 17, 867 S.E.2d 14 (2021). For example, this Court in *In re K.B.* upheld an abuse adjudication of a special needs child where evidence tended to show the respondents could not maintain the child's medication regimen and were further unable to supervise the child to prevent him from harming himself. *See In re K.B.*, 253 N.C. App. at 429-36, 801 S.E.2d at 165-68. Though there were also some actual, measurable physical injuries sustained by the child in *In re K.B.*, the grounds for concluding a substantial risk of harm arose from findings tending to show that failure to supervise the child and administer his medication directly increased the child's likelihood of harming himself due to his special

needs. *See id.* at 434, 801 S.E.2d at 167-68 ("These findings show that despite being aware of Kirk's mental health and behavior issues, [the] respondents failed to provide adequate supervision and properly maintain Kirk's medication which caused his unbalanced behavior in early November. Even if inflicted by Kirk on himself, the injuries were nevertheless the result of physical harm 'by other than accidental means' that [the] respondents allowed to occur due to their failure to maintain Kirk's medication and provide adequate supervision to meet Kirk's special needs."). Additionally, in *In re K.B.*, the trial court found the child "did not experience any substantial injuries in any of the placements outside of respondents' home. This finding shows that Kirk's other placements were able to provide proper supervision and prevent Kirk from causing any self-harm." *Id.* at 434-35, 801 S.E.2d at 168.

In *In re W.C.T.*, this Court affirmed a trial court's abuse adjudication where evidence tended to show the respondent-parents allowed the paternal grandmother to supervise the child, knowing she suffered from mental health and behavioral issues. *See In re W.C.T.*, 280 N.C. App. at 37, 867 S.E.2d at 28. This Court noted that the trial court's findings

> [tended to] show [the r]espondent-[m]other knew of the paternal grandmother's unstable behavior, which necessitated medication, and the substantial risk of physical injury her volatile conduct posed to the children. Despite this risk, [the r]espondent-[m]other allowed the paternal grandmother to continue to care for her children, and she failed to take steps to ensure her children were properly supervised and protected.

Id. at 37-38, 867 S.E.2d at 28 (citations omitted).

But in *In re K.L.*, this Court reversed and remanded a trial court's abuse adjudication where there was "nothing to bridge the evidentiary gap between the [juvenile's] unexplained injuries . . . and the conclusion that [his parents] inflicted them[.]" *See In re K.L.*, 272 N.C. App. 30, 46, 845 S.E.2d 182, 194 (2020). In *In re K.L.*, however, the juvenile had sustained actual physical injury, and whether the parents inflicted such injuries was central to the adjudication of abuse. *See id.* at 46-47, 845 S.E.2d at 194-95.

Here, the trial court made no findings of fact indicating Nora had been subjected to any physical harm at the hands of Parents nor that their actions and/or inactions directly placed Nora in a substantial risk of harm. The only findings of harm are those pertaining to the injuries sustained by Nora's older sister, Nan. The physical injuries sustained

by Nan, along with Parents' inability to explain them, is not enough to presently adjudicate Nora to be an abused juvenile. There must be some evidence and findings to suggest Nora had been subjected to harm at the hands of Parents or that she faced a substantial risk of harm due to Parent's care and supervision of *her*; not her sister. Because the trial court made no such findings, the trial court's findings do not support the conclusion as to abuse. We reverse the trial court's adjudication of Nora as an abused juvenile.

B. Ineffective Assistance of Counsel

[4] Both Mother and Father argue on appeal they were denied their right to effective assistance of counsel during the hearing on 12 February 2024. It should be noted Parents presented the same argument on appeal of Nan's adjudication, alleging they were denied effective assistance of counsel. *See In re N.N.*, 296 N.C. App. 169, 907 S.E.2d 430. Here, like our conclusions in the appeal of Nan's adjudication, *see id.*, we disagree with Parents' argument they received ineffective assistance of counsel.

In the appeal of Nan's adjudication, this Court explained:

> Parents have a statutory right to counsel in an abuse, neglect, or dependency case, N.C. Gen. Stat. § 7B-602(a) (2023), which encompasses the right to the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a parent must show counsel's performance was deficient or fell below an objective standard of reasonableness that denies the parent a fair hearing. Thus, to prevail, a parent must demonstrate prejudice—a reasonable probability that counsel's deficient performance led to a different result in the proceedings.
>
> . . .
>
> It is well established that attorneys have a responsibility to advocate on the behalf of their clients. However, counsel's failure to advocate for a respondent-parent is not necessarily an indication of ineffective assistance of counsel. In some cases, such a choice by counsel may be the result of strategy or because resourceful preparation revealed nothing positive to be said for the respondent-parent in a particular hearing. There is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's

> performance fell short of the required standard is a heavy one for a party to bear.

Id. at 169-70, 907 S.E.2d at 438-39 (citations, quotation marks, and brackets omitted).

Here, Mother contends her counsel failed to object to the submission of the juvenile petition into evidence, did not move to dismiss at the close of DSS's evidence, and overall remained "mute" throughout the adjudicatory proceedings. Father contends his counsel "failed to object to the entry of the petition into evidence," "offered no evidence in opposition" to the petition's allegations, "did not cross-examine" DSS's witness, and further "posed no questions and called no witnesses of his own."

In the appeal of Nan's adjudication, we discussed the likelihood of counsels' decisions to "stand mute" as being influenced by Parents having pending felony charges relating to the alleged child abuse of Nan. *See id.* at 170, 907 S.E.2d at 439. Relevant to these proceedings, Parents were still awaiting disposition of these charges at the time of the 12 February 2024 hearing. Like counsels' previous decision to remain mute during some of Nan's proceedings, the decision to remain mute during certain parts of Nora's proceedings was likely, again, a strategic decision to not offer any evidence that may incriminate Parents on their felony child abuse charges.

Although counsel for Parents participated little during the adjudication phase, they actively participated during the dispositional hearing. For example, counsel for Mother actively participated during disposition by cross-examining Fialisa Pickard, social worker for DSS assigned to Nora. Counsel for Mother and Father presented their own, individual arguments during disposition as to why the trial court should not cease reunification efforts. Specifically, counsel for Mother argued the trial court should not cease reunification efforts as Mother was still seeking employment and more suitable living arrangements and has shown active involvement during her visitations with Nora. Counsel for Mother also urged the trial court to increase the scheduled visitations between Mother and Nora from one hour to two hours, as Mother and Nora are "in a critical time period where a mother/child bond can be formed." Further, Father's counsel urged the trial court to not cease reunification based on Father's constitutionally protected rights as a parent and because Father had not yet been found guilty of any specific acts causing Nan's harm in the pending felony child abuse charge.

In arguing ineffective assistance of counsel, Mother contends this Court should find the facts of this case consistent with the facts and

holdings in *In re T.D.*, No. COA15-1393, 248 N.C. App. 366, 790 S.E.2d 752 (2016) (unpublished). In *In re T.D.*, this Court remanded to the trial court, holding counsel "made absolutely no contribution to the proceedings and in no way advocated on her behalf at the hearing" in "either the adjudication or the disposition stage of the hearing[.]" *Id.*, slip op. at 5-6. We do not agree with Mother's claim that the holdings of *In re T.D.* should be applied in this case. Here, counsel for both Mother and Father, unlike counsel in *In re T.D.*, actively participated during the dispositional phase of the hearing to advocate for their clients.

As in the appeal from Nan's adjudication, our review of the hearing transcript suggests counsels' silence during the adjudicatory stage of Nora's hearing was a permissible strategic decision and is not ineffective assistance of counsel requiring remand. Also, even if we assumed the silence of Parents' counsel at adjudication was deficient performance, Parents cannot show they were deprived of a "fair hearing" or that but for counsel's performance, there would have been a "different result in the proceedings." *See In re C.B.*, 245 N.C. App. 197, 213, 783 S.E.2d 206, 217 (2016) (citations and quotation marks omitted). Even if either counsel presented a motion to dismiss, as Mother argues should have been done, the trial court should not have dismissed the petition and the motion would not have resulted in a different outcome in the proceedings. There was sufficient evidence presented for the trial court to conclude Nora to be a neglected juvenile based on Nan's previous adjudication, along with the presence of an unwillingness of either parent to acknowledge Nan's harm and to ensure this harm will not occur again. Parents' ineffective assistance of counsel arguments are overruled.

C. Reunification Efforts

[5] Finally, Parents contend the district court erred and abused its discretion by not requiring DSS to continue reunification efforts at the initial disposition hearing. We agree with Parents' argument as it relates to the trial court's determination under North Carolina General Statute Section 7B-901(c)(1)(f) of the Juvenile Code, but disagree as to the trial court's determinations made under Section 7B-901(c)(3)(iii). We affirm in part and vacate in part the trial court's dispositional order relating to the cessation or reunification efforts.

If a trial court ceases reunification efforts during an initial disposition, "the trial court . . . [must] make written findings pertaining to one of the circumstances listed" in Section 7B-901(c). *See In re L.N.H.*, 382 N.C. 536, 546, 879 S.E.2d 138, 145 (2022) (citation omitted). Section 7B-901(c) reads:

> If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
>
> (1) A court of competent jurisdiction determines or has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> a. Sexual abuse.
>
> b. Chronic physical or emotional abuse.
>
> c. Torture.
>
> d. Abandonment.
>
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.
>
> **f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.**
>
> (2) A court of competent jurisdiction terminates or has terminated involuntarily the parental rights of the parent to another child of the parent.
>
> (3) A court of competent jurisdiction determines or has determined that (i) the parent has committed murder or voluntary manslaughter of another child of the parent; (ii) has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; **(iii) has committed a felony assault resulting in serious bodily injury to the child or another child of the parent**; (iv) has committed sexual abuse against the child or another child of the parent; or (v) has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-901(c) (2023) (emphasis added). Here, in Nora's initial disposition, the trial court ordered DSS to cease reunification efforts under both Sections 7B-901(c)(1)(f) and 7B-901(c)(3)(iii). Specifically, the trial court ordered

> 3. Pursuant to NCGS 7B-901(c)(1)(f) and 7B-901(c)(3)(iii), the Forsyth County Department of Social Services shall be relieved of reunification efforts with [Mother] and [Father] based upon the aggravated circumstances which exist. The aggravated circumstances include the determination by a court of competent jurisdiction that [Father] and [Mother] have abused [Nan] and inflicted or allowed to be inflicted on her serious bodily injury by other than accidental means and have failed to disclose the manner and cause of [her] injuries. Additionally, [Father] and [Mother] have by their actions and their failure to disclose the manner and cause of [Nan's] injuries have increased the enormity and added to the injurious consequences of the Abuse and Neglect to both of their children, [Nan] and [Nora].

On appeal, neither Mother nor Father specifically challenge any particular findings made by the trial court during initial disposition as being unsupported by the evidence; they argue the trial court essentially did not make *enough* findings to support its conclusion as to the existence of aggravating circumstances under Section 7B-901, and thus, abused its discretion in ceasing reunification efforts with Nora.

> This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.
>
> . . . .
>
> The trial court's findings of fact are conclusive on appeal if supported by any competent evidence, notwithstanding contrary evidence in the record. The trial court's conclusions of law are reviewed de novo.

In re N.T., 289 N.C. App. 149, 152, 888 S.E.2d 231, 234 (2023) (citations and quotation marks omitted).

Under Section 7B-901(c)(1)(f), our Supreme Court in *In re L.N.H.* noted the language of "any *other* act, practice, or conduct," *In re L.N.H.*, 382 N.C. at 547-48, 879 S.E.2d at 146 (emphasis in original), implicates a requirement that the actions of the respondent-parents giving rise to

the cessation of reunification must be "in addition to the facts that rise to the initial disposition of abuse and/or neglect[,]" *id.* at 548, 879 S.E.2d at 146 (citations omitted). This means the trial court cannot rely on the same facts to adjudicate a juvenile as abused or neglected as the "other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect[]" for purposes of disposition. N.C. Gen. Stat. § 7B-901(c). Here, Parents specifically argue the trial court erred in ceasing reunification efforts during disposition while relying on the same actions of Parents used in adjudicating Nora to be abused and neglected.

The trial court relied heavily on Parents' failure to reveal the cause of Nan's injuries in determining Nora to be an abused and neglected juvenile under a theory of substantial risk of future harm. During the dispositional phase, however, these are the same grounds on which the trial court considers it appropriate to cease reunification efforts under Section 7B-901(c)(1)(f). In the dispositional findings, the only finding supporting this conclusion is Finding 16, which reads: "[Father] also stated that he wants to do the right thing for his girls to be back home with [Mother], so he explained to his attorney what caused the injuries to [Nan]. [Father] advised that he could not share the information with the DSS social worker at that time." Though this finding is separate and distinct from the adjudicatory findings, it still falls into the same realm of which Nora was adjudicated neglected, being a substantial risk of future harm because of Parents' failure to explain how Nora was injured. Put differently, the finding is not an "other" act increasing the enormity or adding to the injurious consequences of the abuse or neglect of Nora, as it is the same basis relied on by the trial court in its initial adjudication of Nora. We vacate the trial court's determination to cease reunification under Section 7B-901(c)(1)(f).

Further, the trial court determined reunification efforts were not required under Section 7B-901(c)(3)(iii), which allows for the cessation of reunification efforts when a parent "has committed a felony assault resulting in serious bodily injury to the child *or another child of the parent*[.]" N.C. Gen. Stat. § 7B-901(c)(3)(iii) (emphasis added). Mother challenges the cessation of reunification on these grounds, contending the trial court was not a "court of competent jurisdiction" to determine whether a felony assault on a child had occurred. We disagree with this argument and conclude the trial court did not err in ceasing reunification efforts as to both Mother and Father under Section 7B-901(c)(3)(iii).

As correctly noted in Mother's brief on appeal, our North Carolina General Assembly recently amended the language of Section 7B-901(c)(3)

in 2018. Before the amendment, the statute allowed for the cessation of reunification efforts when "[a] court of competent jurisdiction *has* determined" a felony assault on a child *had* occurred. *See* N.C. Gen. Stat. § 7B-901(c)(3) (2016) (emphasis added). As this Court noted in *In re G.T.*, "this tense indicates that the determination must have already been made by a trial court—either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court." *In re G.T.*, 250 N.C. App. 50, 57, 791 S.E.2d 274, 279 (2016). This Court also held the term "court of competent jurisdiction" supported the proposition that the determination of felony child assault must have been made by a separate tribunal before a court could cease reunification efforts. *See id.* ("Use of this term implies that another tribunal in a collateral proceeding could have made the necessary determination, so long as it is a court of competent jurisdiction.").

The language was changed in 2018, however, to include that a trial court could cease reunification when a "court of competent jurisdiction *determines* or has determined" a felony assault on a child has occurred. *See* N.C. Gen. Stat. § 7B-901(c)(3) (2018) (emphasis added). The primary effect of this amendment and the changing of language tense is to allow a "court of competent jurisdiction" the present ability to cease reunification based on its determination that a felony child assault had occurred. A court of competent jurisdiction need not wait for a separate or collateral tribunal to determine the occurrence of a felony child assault before ceasing reunification efforts.

Mother contends the trial court here was not a "court of competent jurisdiction" to presently determine the occurrence of a felony child assault in stopping reunification efforts. In advancing this argument, Mother directs us to Section 7B-101 of the Juvenile Code, highlighting this section separately defines a "court" and a "court of competent jurisdiction." As defined within the Juvenile Code, the "court" is a "district court division of the General Court of Justice," but a "court of competent jurisdiction" is "[a] court having the power and authority of law to act at the time of acting over the subject matter of the cause." N.C. Gen. Stat. §§ 7B-101(6)-(7). Mother specifically contends "[a] civil district court exercising jurisdiction pursuant to the Juvenile Code is not a 'court of competent jurisdiction' to adjudicate felonies any more than a criminal superior court exercising criminal jurisdiction pursuant to the Criminal Code is 'a court of competent jurisdiction' to adjudicate abuse or neglect."

In her brief on appeal, Mother cites to our Supreme Court's decision in *In re L.N.H.*, which addresses the issue of a trial court's ability

to cease reunification efforts under Section 7B-901(c)(3)(iii). *See In re L.N.H.*, 382 N.C. at 548, 879 S.E.2d at 147. In that case, our Supreme Court stated:

> In our view, the record developed before the trial court contains ample evidence that tends, if believed, to show that [the] respondent-mother's actions in burning Lea's feet involved the commission of a felonious assault upon the child that resulted in serious bodily injury. Although the trial court did not make the findings necessary to permit the cessation of reunification efforts with [the] respondent- mother based upon N.C.G.S. § 7B-901(c)(3)(iii), it certainly could have done so had it chosen to make such a determination.

Id. In presenting this case, Mother argues this statement by our Supreme Court is only dicta as the trial court in that case did not cease reunification efforts under Section 7B-901(c)(3)(iii), and serves only to suggest what the trial court "could have done." We disagree. Though the trial court in that case did not cease reunification under Section 7B-901(c)(3)(iii), specifically, the cessation of reunification efforts was a central issue presented on appeal, and our Supreme Court reviewed the entire record to determine whether competent evidence supported the trial court's conclusions. *See id*. at 546, 879 S.E.2d at 145-46. In reviewing the entire record, our Supreme Court determined there was sufficient evidence to support the cessation of reunification efforts under Section 7B-901(c)(3)(iii) and reversed and remanded to this Court for further proceedings consistent with the opinion. *See id*. at 549, 879 S.E.2d at 147. This language from the Supreme Court is not dicta as it is necessary to the decision and central to the issues. *See Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." (citations omitted)).

Based on our Supreme Court's holdings in *In re L.N.H.*, a trial court conducting a juvenile adjudication and disposition for neglect and/or abuse *is* a "court of competent jurisdiction" to weigh the evidence in determining the existence of felony child assault for the purpose of ceasing reunification efforts. Further, the Supreme Court in *In re L.N.H.* specifically used the language "if believed" when discussing the "ample evidence" tending to show the respondent-mother's actions involved felonious assault upon her child and remanded to the trial court to allow it to make additional findings. *See In re L.N.H.*, 382 N.C. at 548, 879 S.E.2d at 147. *In re L.N.H.* supports the intention of the General Assembly's amendment of the Juvenile Code to allow trial courts, in conducting

juvenile proceedings, the present ability to determine whether to cease reunification without waiting for the felony assault charges to be adjudicated by a Superior Court. So long as a trial court acting under the Juvenile Code has ample evidence to find by clear, cogent, and convincing evidence the existence of a felony child assault, it may make the appropriate findings of fact and this may serve as grounds to cease reunification under Section 7B-901(c)(3)(iii).

We disagree with Mother's argument the trial court is not a "court of competent jurisdiction" to presently determine the existence of a felony child assault for the sole purpose of ceasing reunification. The trial court's findings of fact support the trial court's cessation of reunification efforts under 7B-901(c)(3)(iii). Similar to the facts presented in *In re L.N.H.*, here, both Mother and Father have been charged with felony child abuse inflicting serious injury due to the severe, unexplained, non-accidental injuries sustained by Nan while in the care of Parents. *See id.* at 538, 879 S.E.2d at 141.

We vacate the trial court's order as it relates to the cessation of reunification efforts under Section 7B-901(c)(1)(f), as the trial court did not make sufficient findings to support the existence of any "other" aggravated circumstances, separate from those relied on by the trial court during the initial adjudication of Nora. Otherwise, the trial court did not err by ordering cessation of reunification efforts as to both Mother and Father under Section 7B-901(c)(3)(iii) because the trial court found the existence of a felonious child assault against Nan.

IV. Conclusion

We conclude the trial court did not err in adjudicating Nora to be a neglected juvenile and did not err in ceasing reunification efforts as to both Mother and Father under Section 7B-901(c)(3)(iii). We reverse the trial court's adjudication of Nora as an abused juvenile. We also conclude neither Mother nor Father was denied their right to effective assistance of counsel.

AFFIRMED IN PART AND VACATED IN PART.

Judges CARPENTER and STADING concur.

IN THE MATTER OF Z.A.N.L.W.C., K.E.N.S., J.J.A.W.-S., H.O.J.-W

No. COA24-418

Filed 5 February 2025

Appeal and Error—notice of appeal—jurisdictional defect—not signed by respondent—appeal dismissed

An appeal from the trial court's orders terminating respondent-mother's parental rights to her children was dismissed for lack of jurisdiction because respondent did not sign the notice of appeal as required by N.C.G.S. § 7B-1001(c); although the notice of appeal was filed on respondent's behalf and signed by her attorney and guardian ad litem (who had been appointed pursuant to Civil Procedure Rule 17), there was no indication in the record that respondent had been adjudicated incompetent or that she wished to pursue an appeal.

Appeal by respondent-appellant mother from orders entered 1 February 2024 by Judge Resson O. Faircloth in District Court, Johnston County. Heard in the Court of Appeals 14 January 2025.

Senior Assistant County Attorney Mariamarta T. Conrad for petitioner-appellee Johnston County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Laura M. Merriman and Stephen V. Carey, for the guardian ad litem.

Robert W. Ewing for respondent-appellant mother.

STROUD, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights as to her four minor children. As Respondent-mother did not sign the notice of appeal of the termination order, this Court does not have jurisdiction and we therefore dismiss the appeal.

I. Background

Respondent-mother ("Mother") has four minor children born during the years of 2017 to 2021. The Johnston County Department of Social Services ("DSS") first filed juvenile petitions as to the oldest

two children, Zack and Kate,[1] on 2 October 2019 alleging the children were neglected and dependent "due to concerns with substance use, . . . [M]other's mental health, and improper care." On 6 November 2019, the trial court filed a continuance order for the initial adjudication hearing of Zack and Kate and appointed a guardian *ad litem* ("GAL") for Mother, noting "rule 17 GALs were appointed for [Mother] . . . . [Mother] is scheduled to give birth on [redacted] and additional time [is] required for healing and preparation for the hearing" but did not further explain the appointment of the GAL. On 3 December 2019, DSS alleged Mother's third child, Jack, was neglected and dependent, noting Mother did not currently have custody of Zack or Kate and other similar concerns involving substance use, Mother's mental health, and improper care. On 10 March 2020, Zack, Kate, and Jack were ultimately adjudicated dependent and were placed in DSS's custody. In early 2021, Mother's fourth child, Holly, was born and she tested positive for marijuana at birth. Upon Holly's discharge from the hospital, she was placed with temporary care providers and DSS soon filed a juvenile petition also alleging she was neglected and dependent, again based on allegations of Mother's substance use and mental health. On 20 July 2021, the trial court adjudicated Holly as dependent and ordered she remain in DSS's custody.

On 17 October 2022, DSS filed petitions for termination of parental rights as to all four children. The matters came on for hearing on 6 September 2023. On 1 February 2024, the trial court entered orders terminating Mother's parental rights, concluding there were grounds for termination under North Carolina General Statute Sections 7B-1111(a)(2), (a)(6), and (a)(7) as to Zack, Kate, and Jack, and (a)(2) and (a)(6) as to Holly. The trial court determined it was in the best interests of the children to terminate Mother's parental rights and ordered the children to remain in DSS's custody, granting DSS the authority to consent to adoption of the children. On 28 February 2024, Mother's trial counsel and Rule 17 GAL filed a notice of appeal on behalf of Mother, but Mother's signature was not included on the notice of appeal.

II. Jurisdiction

While Mother's attorney and Rule 17 GAL signed the notice of appeal, Mother did not. The termination order notes Mother was not in attendance at the hearing, but the record does not reveal any reason for her absence. Mother's counsel told the trial court he has not "had contact

1. Pseudonyms are used to protect the identities of the minor children.

with [Mother] since the last time she was in court, which was sometime ago" and moved to continue the case, but the trial court denied the motion. Further, on appeal, Mother's counsel does not address Mother's failure to sign the notice of appeal of the termination orders. However, even where neither party addresses jurisdiction, "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*." *In re M.C.*, 244 N.C. App. 410, 413, 781 S.E.2d 70, 73 (2015) (citation, quotation marks, and brackets omitted).

North Carolina General Statute Section 7B-1001 governs the "[r]ight to appeal" a juvenile matter and states "[n]otice of appeal shall be signed *by both the appealing party* and counsel for the appealing party, if any." N.C. Gen. Stat. § 7B-1001(c) (2023) (emphasis added). North Carolina General Statute Section 7B-1002 also identifies "[p]roper parties for appeal" and states:

> Appeal from an order permitted under G.S. 7B-1001 may be taken by:
>
> (1) A juvenile acting through the juvenile's guardian ad litem previously appointed under G.S. 7B-601.
>
> (2) A juvenile for whom no guardian ad litem has been appointed under G.S. 7B-601. If such an appeal is made, the court shall appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17 for the juvenile for the purposes of that appeal.
>
> (3) A county department of social services.
>
> (4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.
>
> (5) Any party that sought but failed to obtain termination of parental rights.

N.C. Gen. Stat. § 7B-1002 (2023).

This Court has previously discussed the failure of a parent to sign a notice of appeal in a termination of parental rights case:

> [A]ppellate Rule 3 governing notice of appeal for civil cases is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed. Similarly, when a criminal defendant has not properly

> given notice of appeal pursuant to Rule 4 governing notice of appeal for criminal cases, this Court is without jurisdiction to hear the appeal. Because Appellate Rules 3, 3A, and 4 all concern how and when appeals are to be taken, Rule 3A is similarly jurisdictional, and if not complied with, the appeal must be dismissed.
>
> Because we hold that a GAL's signature on the notice of appeal is not sufficient to grant this Court jurisdiction, we cannot address the merits of the appeal. Accordingly, we dismiss the matter.

In re L.B., 187 N.C. App. 326, 331-32, 653 S.E.2d 240, 244 (2007) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 362 N.C. 507, 666 S.E.2d 751 (2008). We note that *In re L.B.* was interpreting a prior version of North Carolina General Statute Section 7B-1101.1, which discusses a parent's right to a GAL in a juvenile matter. *See id.* at 328-29, 653 S.E.2d at 242. A large part of this Court's discussion involved a comparison of a Rule 17 GAL and a "guardian [appointed] pursuant to Chapter 35A[,]" and whether the GAL in *In re L.B.* was to "assist" or "replace" the parent's "authority to undertake acts of legal import themselves." *Id.* at 330-31, 653 S.E.2d at 243 (citations omitted). Still, we concluded

> although it is appropriate for the GAL to *assure* that the notice of appeal—or other pleading or legal document—is filed properly with the parents' signatures as required by North Carolina Rules of Appellate Procedure 3A(a), it is not appropriate for the GAL to sign the notice of appeal in place of the parents.

Id. at 331, 653 S.E.2d at 242 (emphasis in original).

In re L.B. separately discussed North Carolina General Statute Section 7B-1002, and noted that a parent's GAL is not a "proper party" who may give notice of appeal:

> Furthermore, pursuant to North Carolina General Statutes, section 7B-1001(b), written notice of appeal is to be given "by a proper party as defined in G.S. 7B-1002." N.C. Gen. Stat. § 7B-1001(b) (2005). Such proper parties are (1) a juvenile who is acting through his GAL; (2) a juvenile without a GAL, in which case "the court shall appoint one pursuant to G.S. 1A-1, Rule 17"; (3) DSS; (4) "a parent, a guardian appointed under G.S. 7B-600 for a juvenile or Chapter 35A of the General Statutes for a

> parent, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party"; and (5) any party who was unsuccessful in obtaining a termination of parental rights. N.C. Gen. Stat. § 7B-1002 (2005). *Nowhere in section 7B-1002 is a parent's GAL designated as a "proper party" who may give written notice of appeal pursuant to section 7B-1001.*

Id. at 331, 653 S.E.2d at 243 (emphasis added) (brackets omitted). Unlike North Carolina General Statute Section 7B-1101.1, North Carolina General Statute Section 7B-1002 has not been amended since this Court issued its opinion in *In re L.B. See id.*; *see also* N.C. Gen. Stat. § 7B-1002.

Further, our Supreme Court again reiterated in *In re J.L.F.*, where the father did not sign the notice of appeal "that was filed on his behalf in this case as required by N.C.G.S. § 7B-1001(c) (2019) and N.C. R. App. P. 3.1(b)[,]" the requirement that both the parent and the GAL, if any, sign the notice of appeal was jurisdictional:

> On the other hand, however, [the] respondent-father's trial counsel did attach a letter that he had received from [the] respondent-father, who remained in the custody of the Division of Adult Correction, in which [the] respondent-father indicated that he wished to note an appeal from the trial court's termination order. Although a parent's failure to sign the relevant notice of appeal has been held to constitute a jurisdictional defect, *see In re L.B.*, 187 N.C. App. 326, 332, 653 S.E.2d 240 (2007), *aff'd per curiam*, 362 N.C. 507, 666 S.E.2d 751 (2008), we conclude that the decision by [the] respondent-father's trial counsel to attach [the] respondent-father's letter to the notice of appeal resulted in substantial compliance with the signature requirement delineated in N.C.G.S. § 7B-1001(c) and N.C. R. App. P. 3.1(b), particularly given that neither DSS nor the guardian ad litem have sought to have [the] respondent-father's appeal dismissed.

In re J.L.F., 378 N.C. 445, 448, n. 4, 861 S.E.2d 744, 747, n. 4 (2021).

Here, our record does not include an order appointing the GAL for Mother; our record indicates in a continuance order dated 6 November 2019 that a GAL was appointed for Mother but does not explain the reasons for the appointment. According to several of the court reports in the record, Mother was "appointed [a GAL] to represent [her] through the court process. This was due to the concern for [her] comprehension

and understanding of the court." One of the disposition hearing court reports states that Mother was assigned a GAL "due to [her] cognitive limitations." There is no indication in the record that Mother had been adjudicated incompetent under Chapter 35A of the North Carolina General Statutes. The termination order indicates that Mother did not appear for the hearing, although she was served with notice and her attorney and "Rule 17-GAL Brooks Carter" were present at the hearing. Mother had appeared for some hearings in 2019 and 2020, before the petitions for termination were filed, but she did not file an answer to the termination petitions "due to a lack of contact between [Mother] with her [c]ourt-appointed attorney." The evidence indicated, and the trial court found, Mother had "cognitive limitations" as well as several mental health diagnoses and issues with substance abuse. But the trial court also found that "[M]other has had the ability to make reasonable progress to correct the conditions which led to the child's placement in foster care but did not do so."[2] Therefore, the information in our record indicates Mother was not incompetent as defined by North Carolina General Statute Section 35A-1101(7) and her "Rule 17 GAL" was not a proper party to file notice of appeal under North Carolina General Statute Section 7B-1002. *See* N.C. Gen. Stat. § 7B-1002. Mother was therefore required to sign the notice of appeal under North Carolina General Statute Section 7B-1001(c). *See In re L.B.*, 187 N.C. App. at 331-32, 653 S.E.2d at 244.

This case also differs from *In re J.L.F.* since not only was there nothing in our record from Mother "in which [she] indicated that [s]he wished to note an appeal from the trial court's termination order[,]" the record also shows Mother did not attend the termination hearing, her counsel did not give a reason Mother was not present, and on appeal she does not address her failure to sign the notice of appeal. *Id.* There is nothing in our record to suggest, as in *In re J.L.F.*, that Mother made any attempt to sign the notice of appeal, and as reiterated by our Supreme Court, her failure to sign the notice of appeal is a jurisdictional defect. *See id.* Thus, since the party appealing the termination order, Mother, did not sign the notice of appeal herself, nor was she in "substantial compliance with the signature requirement[,]" and this requirement is jurisdictional, we must dismiss the case. *Id.*; *see also In re L.B.*, 187 N.C. App. at 331, 653 S.E.2d at 242.

---

2. These facts are not in dispute. Mother did not challenge any of the findings of fact as to adjudication in her appellate brief; the only issue raised on appeal was the trial court's abuse of discretion in the disposition portion of the order.

III. Conclusion

As Mother did not sign the notice of appeal as required by North Carolina General Statute Section 7B-1001(c), we must dismiss the appeal since this Court does not have jurisdiction.

DISMISSED.

Judges CARPENTER and GRIFFIN concur.

COURTNEY ROY OBO G.E.M., PLAINTIFF
v.
BENJAMIN FREEMAN MARTIN, DEFENDANT

No. COA24-428

Filed 5 February 2025

Domestic Violence—protective order—on behalf of parties' child—good cause for renewal—child's continued, legitimate fear of father—sufficiency of evidence

In a case involving unmarried parents sharing joint custody of their thirteen-year-old daughter, the trial court erred in renewing a domestic violence protective order (DVPO) entered against the father on the child's behalf, where there was no competent evidence showing that the child had a continued, legitimate fear of her father as required to establish good cause for renewal. The court's findings of fact incorporated many allegations from the mother's original complaint seeking the DVPO, including that the father had recorded the child while she undressed, forced her to sleep in the same bed as him, and monitored her electronic devices. However, these allegations could not serve as the basis for renewing the DVPO because: (1) they were not supported by evidence presented at the renewal hearing; (2) after multiple investigations, neither the department of social services nor law enforcement found any evidence substantiating the allegations; and (3) because the DVPO was entered as a consent order without findings of fact or conclusions of law (pursuant to N.C.G.S. § 50B-3(b1)), it did not establish any facts alleged in the complaint as proven. Furthermore, the court failed to make findings about the child's actual subjective fear of the father, relying instead on the mother's unproven allegations and the child's vague and inconsistent testimony on that key issue.

ROY v. MARTIN

[297 N.C. App. 704 (2025)]

Appeal by defendant from order entered 15 December 2023 by Judge Jimmy L. Love Jr., in Johnston County District Court. Heard in the Court of Appeals 6 November 2024.

Walsh Estate & Family Law, PLLC, by Sean N. Walsh, for defendant-appellant.

The Green Firm, PLLC, by Bonnie Keith Green, for plaintiff-appellee.

FLOOD, Judge.

Defendant Benjamin Freeman Martin appeals from the trial court's order renewing Plaintiff Courtney Roy's domestic violence protective order ("DVPO") against Defendant, on behalf of G.M.,[1] a minor child. Defendant argues the trial court's order for renewal was not supported by competent evidence of good cause. Upon review, we conclude the trial court's order was not supported by competent evidence of good cause, and accordingly, we reverse the order.

I. Factual and Procedural Background

Defendant and Plaintiff are the biological parents of G.M., who was born in March 2009. In June 2012, the Wake County District Court entered a Chapter 50 custody order ("Custody Order") governing the custody and visitation rights of the parties as to G.M. Under the Custody Order, Plaintiff and Defendant shared "joint 50/50 custody" of G.M.

On 12 April 2022, Plaintiff filed a complaint against Defendant, seeking an *ex parte* DVPO for the benefit of G.M., which the trial court entered based solely on the allegations of Plaintiff's complaint, and the *ex parte* DVPO was entered before Defendant was served. Defendant was served with the summons, complaint, and *ex parte* DVPO on 13 April 2022.

The *ex parte* DVPO set the case for a return hearing on 22 April 2022. On 22 April 2022, both parties consented to continue the hearing to 6 May 2022; on 6 May, they consented to continue the hearing again to 27 May 2022. On 27 May 2022, the case was continued again, to 8 July 2022, to allow time for both parties' counsel to obtain and review records of investigations that had been conducted by the Johnston

1. A pseudonym is used to protect the identity of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

County Department of Social Services ("Johnston County DSS") based on multiple allegations over a period of years that had been made by Plaintiff against Defendant.

Plaintiff's motion for the *ex parte* DVPO contained three allegations:

> (1) On each of the child's weekly visits from March 2022 since the child's date of birth, Defendant has been recording the minor child while she is naked, and also in various states of dress and undress while changing clothes, through a video camera which [Defendant] has access to and which displays a bright blue light whenever he is recording her, which the minor child is aware of. The minor child has asked the Defendant on multiple occasions to stop recording her, but it continues to occur each time she spends the night at his home.
>
> (2) Despite having his own bed, Defendant requires that the minor child (13 years old) physically sleep in her [own] bed with the Defendant [45 year old] alongside her. . . each night she has an overnight visit. The minor child sleeps in an oversized t-shirt only. The minor child has also seen the Defendant naked[.]
>
> (3) On each of the child's weekly visits from March 2022 since the child's date of birth. Defendant has placed recording devices on the minor child's electronics and cell phone provided by Defendant, which records video and audio of everything the minor child is doing. The minor child has been forced to leave these electronics in her room when she showers and use[s] the bathroom, so that [she is] not being watched by Defendant.

The motion also noted that there was, as to Defendant, a "pending investigation being conducted by [Johnston County DSS]" regarding the allegations.

On 6 June 2022, the trial court entered an order requiring Johnston County DSS to submit the "juvenile CPS[2] records" regarding G.M. to the trial court for in camera inspection, providing that the trial court would review the records, and if the file "contains relevant information to the current pending custody [sic] action[,]" the trial court would order disclosure or use of the information to counsel for the parties, with specific

2. We understand this to mean "Child Protective Services."

protective provisions. On 8 July 2022, counsel for the parties again consented to continue the hearing until 15 July 2022.

The trial court never held a hearing on the domestic violence complaint, but instead, on 15 July 2022, the parties entered into a domestic violence protective consent order ("Consent DVPO"). In the Consent DVPO, Defendant agreed to have no contact with Plaintiff or G.M.; not to "assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace, or other means), or interfere with [G.M.]"; and to stay away from "any place where [Plaintiff] works" and "[G.M.]'s school." The parties stipulated that "no findings of fact and conclusions of law will be included in this consent protective order." The Consent DVPO set an expiration date of 14 July 2023.

On 29 June 2023, the parties entered into a Consent Order to Modify Custody in Johnston County File No. 22CVD002221-500, in which Defendant was prohibited from having any communication or visitation with G.M., and Plaintiff was granted sole legal and physical custody of G.M.[3]

On 6 July 2023, Plaintiff moved to renew the *ex parte* DVPO. In her motion to renew, Plaintiff repeated the same allegations as quoted above from the original complaint. Plaintiff did not allege any violation of the DVPO by Defendant, but she added the following allegations since the entry of the Consent DVPO:

> [T]he minor child remains in fear of continued harassment that rises to such a level as to inflict substantial emotional distress, and which is detrimental to her safety, health and wellbeing, in that:
>
> 4. The minor child continues to experience intense anxiety over the fear that Defendant will attempt contact, communication of any kind, and show up at her school or home.
>
> 5. On April 13 2023[,] the minor child had to be rushed to two emergency therapy sessions due to distress caused by a letter and subpoena she received from [Defendant's] attorney regarding the parties' previous chapter 50 custody matter. The letter was addressed to her personally which made her feel threatened. The minor child did not

3. Our Record does not include information on whether the original Wake County Chapter 50 custody case was moved to Johnston County or if this Consent Order was entered in another Chapter 50 custody proceeding.

> test well in school the following day due to receiving the letter[, which] caused further distress for her. The minor child reports that she feels sad, annoyed, scared and wants nothing to do with [Defendant], and she wishes he would just leave her alone.
>
> 6. The minor child continues to fear that her electronics are being hacked by [Defendant]; and
>
> 7. The minor child is afraid to see [Defendant].

On 7 September 2023, the trial court entered another Protective Order for CPS records directing that Johnston County Child Protective Services[4] ("Johnston County CPS") produce records of investigations regarding G.M. for in camera review, so the trial court could determine whether the records contained relevant information. A hearing was held on 15 December 2023. Both parties testified at the hearing, and portions of records from the Johnston County CPS investigations were produced to the trial court.

The Johnston County CPS records indicated generally that Plaintiff made multiple reports of some form of abuse or neglect by Defendant to Johnston County CPS since 2014; each report was investigated, and Johnston County CPS closed each case without taking any action. During this time, Plaintiff and Defendant shared joint custody of G.M., and G.M. spent half of the time with each parent. Plaintiff first reported "concerns for the child when she is with [Defendant]" when G.M. was about five years old, in 2014. Plaintiff reported vague concerns that Defendant "has a lot of different girlfriends and marriages and a bunch of children," and that Plaintiff did not know "how [G.M.] is being taken care of with [Defendant]." Plaintiff reported that G.M. may be wearing clothes that were too small or inappropriate for the weather in the summer and that Defendant gives G.M. "ice cream for breakfast." After an investigation involving speaking with various people knowledgeable about G.M., including medical and therapy personnel who provided care for her, Johnston County CPS concluded that: there was no maltreatment, were no safety issues, were no significant assessed risk factors;

---

4. The Order also refers at one point to Wake County Child Protective Services ("Wake County CPS"). It is not clear if this is a typographical error in the order. The records included in the 9(d) supplement to the Record were produced by Johnston County DSS but also included some records from Wake County CPS. Because Defendant lived in Wake County, social workers from Wake County DSS assisted Johnston County DSS in the investigation.

and that G.M. was not in need of Johnston County CPS services. The first case was closed on 14 October 2014.

On 23 October 2014, Plaintiff again made a report to Johnston County CPS regarding Defendant. The social worker noted that Plaintiff was "a little upset" and "she first wanted to know why the case before this one was closed" and "she feels nothing is being done." Plaintiff repeated her general complaints regarding G.M.'s care by Defendant. Again, Johnston County CPS investigated Plaintiff's claims, including examination of G.M. for signs of abuse and consultations with G.M.'s medical and therapy providers and school. Ultimately, Johnston County CPS again concluded there was no need for CPS services.

On 31 March 2022, prior to Plaintiff filing the complaint in this matter, Plaintiff made another report regarding Defendant to Johnston County CPS. Plaintiff reported "that [Defendant] has watched [G.M.] undress and dress in her room previously and made [G.M.] uncomfortable." Again, Johnston County DSS did an extensive investigation, including interviews of the parties and others with knowledge about G.M., as well as a Child Medical Evaluation by the Cary Police Department. The case report noted there had been "multiple reports on this family, all of them were unsubstantiated or SNR."[5] Ultimately, Johnston County CPS concluded there were no safety concerns, and the case was closed with "services not recommended." In summary, the Johnston County CPS records indicated that Plaintiff's allegations of Defendant's actions as stated in the complaint for the DVPO were without any factual basis.

At the hearing on renewal of the DVPO, the testimony presented by both Defendant and G.M. also failed to support Plaintiff's allegations. Regarding the first allegation that Defendant recorded G.M. while she was naked, Defendant denied ever recording G.M. No recording or record of Defendant's recording G.M. was introduced into evidence. The only evidence as to this allegation came from DSS's report, which stated, G.M. "says she reported cameras in the room, but it was years ago." Johnston County CPS records indicate this claim was investigated and not substantiated. Defendant informed Johnston County CPS that he had used a "nanny cam" in his home for about three months when G.M. was about ten years old. Johnston County CPS found no other indication of camera use or recording of G.M.

As to the second allegation that Defendant required G.M. to allow him to sleep in her bed, Defendant testified, "[a]t night, [G.M.] wanted

5. In context of the report, "SNR" means "services not recommended."

me to come down and hum a song. We had a song. It's called Boadicea by Enya. I would hum the song and say good night[,] and I was married, so I would walk upstairs and sleep next to my wife." G.M. testified on direct examination:

> Q. Anything uncomfortable ever happen when you guys were sleeping in the same bed?
>
> A. Not that I remember, no.
>
> Q. Okay. And was this [Defendant']s idea to sleep in bed with him or who[se] idea was it?
>
> A. Well, I was still sort of clinging on to like -- I was at the age of still wanted to sleep, so --
>
> Q. Sure.

G.M. later testified on cross-examination:

> Q. And you also told them that nothing had ever happened with your father around the bed; is that right?
>
> A. Not that I remember, no.
>
> Q. And in fact, what you told the social workers was that you just wanted your own space. Does that sound right?
>
> A. Yes.

As to the third, and final, allegation that Defendant was surveilling G.M.'s electronic devices, G.M. testified:

> Q. Okay. Other than recording, anything else that happened with dad that made you uncomfortable that makes you still afraid today?
>
> A. He would listen in on my conversations on my technology and he would, like get in my business on the technology and stuff. So sometimes I could tell he was on my -- so I'd be on my computer and you could tell he was on there watching me.

Defendant testified to this allegation, stating, "[w]ell, I pay the bill and she has a tendency of trying to watch Youtube videos quietly that were not age appropriate. So I blocked them like any parent."

On direct examination, G.M. was questioned on whether she was afraid of Defendant, and she explained that she is "scared that he's going

to try to do something, like try to come up with something and stuff." When pressed on this answer, she testified:

> Q. Okay. You said – you just said something about afraid he's going to try to something. Can you tell me what it is that you're – like what kind of scenarios are you afraid may happen with your dad?
>
> A. I'm afraid he's going to convince me to come back or he's going to be sorry or something and do – he's best at manipulating.
>
> Q. Do you have any fear of physical harm from your dad?
>
> MR. WALSH: I'm going to object to that, Your Honor. That's a leading question.
>
> MS. VAN PATTEN: It's a yes or no.
>
> JUDGE LOVE: Overruled. I'll allow it.
>
> A. Yes.
>
> Q. Okay. What kind of physical harm are you afraid of?
>
> A. Scared that he's going to get mad at me and – 'cause why I did this, and I'm scared he's going to hurt me or something.

When G.M. was questioned on cross-examination as to whether she remained afraid of Defendant, she testified:

> Q. [G.M.], you said you're worried your – what you're afraid is that your dad might convince you to come back. Is that what you told the Court before?
>
> A. Yes, sir.
>
> Q. And you're afraid that your dad would get mad at you?
>
> A. Yes.
>
> Q. Okay, but yet, he's never done anything physically violent to you; is that right?
>
> A. Not that I remember.

After the hearing, the trial court rendered its ruling to renew the DVPO, but indicated that the meaning of "good cause" was not clear, stating that:

> Well, there's not a lot of case law on 50(c)'s[6] and [G.M.] did testify she's afraid of the Defendant, that would be afraid to see him and so that's the question. So I guess the Court of Appeals [or] Supreme Court will have to decide is whether that – and I know what your argument is, Mr. Walsh, but whether that's irrational or you know, not based on facts or what. But you know, use this for good cause showing she's still scared. I mean, I – I'm going to grant the renewal and – and I'm hoping you'll take it up because I want somebody to tell me, give us some guidelines on this. Because I mean, the way it is now, good cause shown doesn't mean a whole lot.

The trial court entered an order renewing the DVPO. The order included findings regarding the procedural history of the case. The trial court also found as follows:

> 6. In the *[e]x [p]arte* DVPO Order, the [trial c]ourt made the following relevant findings of fact regarding danger to the minor child [G.M.]:
>
> a. That [Defendant] has placed the minor child in fear of continued harassment that rises to such a level as to inflict substantial emotional distress;
>
> b. That the minor child is exposed to a substantial risk of emotional injury and it is in the best interest of and is necessary for the safety of the minor child that [D]efendant stay away from the minor child and not remove the minor child from [Plaintiff];
>
> c. The minor child disclosed to [Plaintiff] on or about April 7th 2022, that as recently as March 1-7 2022, that:
>
> d. On each of the child's weekly visits from March 1-7, 2022, since the child's date of birth, [Defendant] has been recording the minor child while she is naked, and also in various states of undress while changing clothes, through a video camera which he has access to and which displays a bright blue light whenever he is recording her, which the minor child is aware of. The minor child has asked the

---

6. Plaintiff sought renewal of the Chapter 50B DVPO under N.C.G.S. § 50B-3(b). No claim was made under Chapter 50C, so we assume the reference to Chapter 50C was a *lapsus linguae*.

> [Defendant] on multiple occasions to stop recording her, but it continues to occur each time she spends the night at his home;
>
> e. Despite having his own bed, Defendant requires that the minor child (13 years old) physically sleep in her [own] bed with the Defendant [45 year old] alongside her . . . each night she has an overnight visit. The minor child sleeps in an oversized t[-]shirt only. The minor child has also seen [Defendant] naked; and
>
> f. On each of the child's weekly visits from March 1-7 2022, since the child's date of birth, [Defendant] has placed recording devices on the minor child's electronics and cell phone provided by [Defendant], which records video and audio of everything the minor child is doing. The minor child has been forced to leave these electronics in her room when she showers and use[s] the bathroom, so that she is not being watched by [Defendant].

The trial court also found as follows:

> 11. That within the [trial c]ourt's discretion, the [trial c]ourt has hereby found that good cause exists to grant Plaintiff's Motion to Renew the July 15 2022 [DVPO], for reasons including but not limited to the following:
>
> a. Plaintiff minor child testified that she remains in fear of Defendant for her and her family;
>
> b. Plaintiff minor child testified that she remains in fear of seeing the Defendant out in public for fear of what he may do or say to her; and
>
> c. Plaintiff minor child testified that she remains afraid of receiving physical harm at the hands of Defendant.

Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review a final judgment from a district court, pursuant to N.C.G.S. § 7A-27(b)(2) (2023).

III. Standard of Review

"The standard of review of a trial court's order renewing a [DVPO] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence[,]" and "whether

those factual findings in turn support the judge's ultimate conclusions of law." *Ponder v. Ponder*, 247 N.C. App. 301, 306 (2016) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Real Time Resols., Inc. v. Cole*, 293 N.C. App. 632, 635 (2024) (citation omitted) (cleaned up).

"The trial court's conclusions of law are reviewable *de novo*." *Id.* at 635 (citation omitted) (cleaned up). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337 (2009) (citations and internal quotation marks omitted).

IV. Analysis

On appeal, Defendant argues there is no competent evidence to support the trial court's findings of fact, and contends Plaintiff failed to show good cause to renew the DVPO, by failing to demonstrate a continued legitimate fear of Defendant on the part of G.M. We agree.

"For a [trial] court to renew a protective order, a plaintiff seeking the renewal must show good cause." *Ponder*, 247 N.C. App. at 306 (citation and internal quotations omitted); *see also* N.C.G.S. § 50B-3(b) (2023) ("The court may renew a protective order for good cause."); *see also* N.C.G.S. § 50B-1 (2023) (providing a DVPO is appropriate in situations where a person "attempt[s] to cause bodily injury, or intentionally caus[es] bodily injury[,]" or places one in "fear of imminent serious bodily injury or continued harassment," or commits "any act defined in [N.C.G.S. §] 14-27.21 through [N.C.G.S. §] 14-27.33").

Per prior North Carolina appellate caselaw, a showing of good cause requires a plaintiff to demonstrate the minor child's continued, legitimate fear of the defendant. *See*, *e.g.*, *Comstock v. Comstock*, 244 N.C. App. 20, 25 (2015) (affirming there was good cause to renew the DVPO based on the trial court's findings regarding the plaintiff's continued fear of the defendant, where the defendant "continued to harass and threaten" the plaintiff even with the DVPO in effect); *see also Jabari v. Jabari*, 283 N.C. App. 513, 520–21 (2022) (affirming there was good cause to support the finding that the plaintiff "remains in fear of [the d]efendant" where, among other things, the defendant "had been stalking [her and the children]," and the defendant had been "charged with felony witness intimidation because he 'just was threatening' her").

Additionally, "[t]he plain language used by our legislature does not require a trial court to attempt to determine whether the plaintiff's actual subjective fear is objectively reasonable under the circumstances."

Brandon v. Brandon, 132 N.C. App. 646, 655 (1999). The trial court must, however, make a finding that the trial court believes the plaintiff is in actual fear of the defendant to issue a DVPO. *Id.* at 654 (providing that "[a]lthough [the p]laintiff testified that she was afraid of [the d]efendant . . . the trial court made no finding regarding [the p]laintiff's subjective fear[,]" and "[w]e therefore cannot know whether the trial court believed [the p]laintiff actually feared [the d]efendant[.]" Thus, "this conclusion cannot provide grounds for issuance of the DVPO").

In *Forehand v. Forehand*, we affirmed the renewal of a DVPO for good cause, where the trial court found that "good cause" existed to renew the DVPO based on:

> (1) [the] defendant's emails with "vulgar and angry language"; (2) the fact that [the] "plaintiff continues to be in fear of the [defendant] due to his angry attitude —particularly surrounding custody issues"; (3) the "poor exchange" of the drug test results required in their Chapter 50 action which has "heighten[ed the] plaintiff's anxiety and fear"; (4) [the] defendant's past attempts to cause bodily injury to plaintiff in September 2012; (5) [the] defendant's past conduct that placed plaintiff in fear of imminent serious bodily injury; (6) the threats [the] defendant made while he was hospitalized at WakeMed hospital in September 2012; (7) [the] defendant's past threats to commit suicide and commitments based on his attempts to commit suicide; and (8) [the] defendant's past issues with drug use.

238 N.C. App. 270, 274 (2014). Upon review, we concluded that there was competent evidence in support of a finding of good cause, "based on [the] defendant's past conduct in addition to [the] plaintiff's continued fear of [the] defendant." *Id.* at 275.

Forehand, however, is different from this case in another important way. In *Forehand*, the trial court had issued the original DVPO with findings of fact and conclusions of law, but renewed the DVPO after making new findings of facts. We addressed this situation of *Forehand* in *Ponder*, explaining:

> In *Forehand*, the trial court made eight findings of fact supporting its conclusion that "good cause" existed to renew the original DVPO. This Court held the fact that the findings of fact to support renewal of the DVPO rested, in large part, on acts which also served as the basis for issuance of the original DVPO in the first place was immaterial.

> The findings of fact in an original DVPO may provide the basis for "good cause" to renew the DVPO, but only if the trial court makes new findings of fact, at the time the renewal order is entered, to support its conclusion that the "good cause" to renew is based upon the findings in the original DVPO. [In *Ponder*,] the trial court incorporated by reference the original DVPO, but did not find as fact that these, or any other, acts which supported the original DVPO demonstrated "good cause" to renew the DVPO.

Ponder, 247 N.C. App. at 307.

Here, there were no findings of fact in the "original DVPO" that could provide "good cause" to renew the DVPO, nor was there any evidence which tended to support Plaintiff's allegations in the original complaint or in the motion to renew the DVPO. We first note that the trial court's Finding of Fact No. 6 is a quote of the allegations in the original complaint described as the "*relevant findings of fact* regarding danger to the minor child [G.M]" in the *ex parte* DVPO. The *allegations* quoted in Finding of Fact No. 6, however, were not binding findings of fact made by any trial court; these are a quote of Plaintiff's allegations in her original complaint. The *ex parte* DVPO issued on 12 April 2022 – before Defendant was served with the complaint and before any adversarial hearing – simply incorporated the allegations of Plaintiff's complaint.

To the extent the trial court relied upon these allegations as "relevant findings of fact," the trial court erred, and there was no evidence presented at the renewal hearing to support these allegations. In the Consent DVPO entered on 15 July 2022, the parties stipulated that "*no findings of fact* and conclusions of law will be included in this consent protective order."

N.C.G.S. § 50B-3(b1) allows entry of a DVPO with no findings of fact or conclusions of law, providing:

> A consent protective order may be entered pursuant to this Chapter without findings of fact and conclusions of law if the parties agree in writing that no findings of fact and conclusions of law will be included in the consent protective order. The consent protective order shall be valid and enforceable and shall have the same force and effect as a protective order entered with findings of fact and conclusions of law.

N.C.G.S. § 50B-3(b1) (2023).

Although the Consent DVPO was effective as a DVPO, it did not establish any facts as proven, and none of the evidence presented at the hearing on renewal supported these allegations. The allegations of the complaint seeking the DVPO, as incorporated into the *ex parte* DVPO, were not transformed into findings of fact by entry of the Consent DVPO where the DVPO was entered pursuant to N.C.G.S. § 50B-3(b1) with *no* findings of fact. *See* N.C.G.S. § 50B-3(b1). Therefore, Finding of Fact 6 is not supported by the evidence where the trial court made no new findings of fact. *See Ponder*, 247 N.C. App. at 307.

Finding of Fact No. 11 is also not supported by the evidence. Here, there is no competent evidence to support the finding that G.M. has a continued legitimate fear of Defendant regarding the need for a protective order against a violent offense. *See* N.C.G.S. § 50B-1. G.M. did not testify that she was afraid or in fear of Defendant for any of the reasons alleged in the original complaint for the *ex parte* DVPO or as repeated in the motion to renew the DVPO. There was no evidence of Defendant ever recording G.M. The Johnston County DSS report was based solely on the allegations Plaintiff and G.M. stated to them, but ultimately there was no evidence whatsoever that Defendant had ever recorded G.M. in any inappropriate manner. Plaintiff had alleged Defendant had been recording G.M. "*on each of the child's weekly visits* from March 2022 since the child's date of birth"—a period of 13 years—and during this time, G.M was spending half of the time with Defendant, but multiple CPS and law enforcement investigations confirmed no such recording had occurred.

The only evidence introduced before the trial court that G.M. had any sort of continued "fear" was G.M.'s testimony that she was "afraid [Defendant is] going to convince me to come back or he's going to be sorry or something and do—he's best at manipulating[,]" and, after being directly asked about physical harm, that she was "[s]cared that he's going to get mad at me and—'cause why I did this, and I'm scared he's going to hurt me or something." Despite this testimony, G.M. later admitted she never recalled Defendant ever physically hurting her before.

G.M. was also fearful that Defendant would "listen in on my conversations on my technology and he would, like get in my business on the technology and stuff." Defendant acknowledged that he monitored G.M.'s computer and use of social media—as any responsible parent would for a thirteen-year-old child. Although appropriate parental monitoring of a child's use of her computer or cell phone may irritate the

child or even make her fearful, this is simply not the type of "fear" that can constitute "good cause" for a DVPO.[7] Moreover, the trial court made no findings regarding its actual belief of G.M.'s fear of Defendant; the trial court only restated G.M.'s testimony, which is not enough to issue a DVPO. *See Brandon*, 132 N.C. App. at 654 (holding there was not enough evidence to support the trial court's conclusion where it made findings of fact only as to the plaintiff's testimony of fear, but did not make any findings regarding the plaintiff's subjective fear).

Per the relevant law, delineated above, there was no "competent evidence" to show good cause to renew a DVPO, since: there was no Record evidence of violence by Defendant as to G.M., G.M. did not testify as to any actual fear of physical harm, and no findings were made regarding G.M.'s actual subjective fear of Defendant. *See Real Time Resols.*, 293 N.C. App. at 635 (requiring competent evidence to support findings of fact); *see also* N.C.G.S. § 50B-1 (providing a DVPO is appropriate in situations where a person "attempt[s] to cause bodily injury, or intentionally caus[es] bodily injury[,]" or places one in "fear of imminent serious bodily injury or continued harassment"); *Brandon*, 132 N.C. App. at 654 (requiring findings of fact regarding the plaintiff's subjective fear). G.M.'s vague testimony, without more, is not "adequate to support the finding" that she has a continued legitimate fear of Defendant, *see Real Time Resols.*, 293 N.C. App. at 635, and we accordingly reverse and vacate the trial court's order renewing the DVPO against Defendant.

V. Conclusion

Upon review, we conclude the trial court's order renewing the DVPO against Defendant was not supported by competent evidence, as the Record evidence failed to demonstrate good cause, which is required for a showing of continued, legitimate fear on the part of G.M. We therefore reverse the trial court's order.

REVERSED.

Judges GORE and STROUD concur.

---

7. We note that monitoring of use of electronic devices of an adult by another adult presents a very different situation than that of a *parent* supervising a minor child.

STATE OF NORTH CAROLINA
v.
ROGER DALE NOBLES

No. COA24-458

Filed 5 February 2025

Jury—juror misconduct—discussing the case outside the courtroom—investigation by trial court—no abuse of discretion—no showing of prejudice

In a prosecution for first-degree murder, the trial court did not abuse its discretion in removing a juror and an alternate juror who had allegedly discussed the facts of the case outside of the courtroom, where, after an eyewitness reported the alleged misconduct, the trial court promptly held a hearing and conducted a thorough investigation, during which it determined that the evidence—including testimony from the eyewitness and from the jurors involved, as well as video footage (taken by the eyewitness) showing part of the jurors' out-of-court conversation—substantiated the allegations of juror misconduct. The court properly acted within its discretion to ensure an impartial jury; furthermore, defendant failed to demonstrate any prejudice resulting from the jurors' removal or that the second alternate juror whom the court selected to replace the removed juror was incompetent or biased.

Appeal by defendant from judgment entered 23 August 2023 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General J. Blake Norman, for the State.

Ryan Legal Services, PLLC, by John E. Ryan III, for defendant.

ARROWOOD, Judge.

Roger Nobles ("defendant") appeals the jury verdict of guilty of first-degree murder and subsequent imposition of a life sentence without the possibility of parole. For the following reasons, we find the defendant received a fair trial free from prejudicial error.

I. Background

A. Commission of the Crime

During the trial, the witness' and defendant's testimony tended to show the following. On 3 January 2022, a motorcyclist, Steven Addison ("Addison"), and defendant were stopped at an intersection in Fayetteville, North Carolina. Addison split two of the lanes approaching the traffic light and stopped next to defendant's truck. Defendant told Addison he was breaking the law, and Addison and defendant's son began to argue. Both parties proceeded through the intersection before stopping at the next intersection. Addison and defendant's son continued to argue with each other; Addison left his bike and defendant's son exited the vehicle. Defendant testified that he was worried about what could happen to his son "because of his [son's] temper." Defendant then pulled his gun out of its holster, showed Addison that he had a gun, then fired, killing Addison. Defendant then left the scene and went home, where the sheriff's department was waiting for him.

B. Juror Misconduct

On 22 August, the court conducted a hearing on juror misconduct. The court announced that "some jurors were overheard discussing the case in contradiction of the jury instructions that they were given not to discuss the case." The court first brought in Juror 9, who stated that he had not discussed the case with anyone outside the courtroom or jury deliberation room. Alternate Juror 1[1] was called and likewise denied speaking about the case. The court then put on record that it had received information that Jurors 9 and 13 had been at the snack bar discussing how the facts could support a lesser charge. The court heard testimony from Rhonda Shirley ("Ms. Shirley"), a volunteer with the Fayetteville Police Community Accountability Task Force ("PACT"), who stated that she observes cases to learn how to be a private investigator. She testified that she was getting lunch in the deli and sat near two jurors who began discussing details of the case for which they were jurors. Once she heard them discussing the details, she began recording their conversation. They discussed how they could "line up the evidence to maintain [defendant's] innocence." On cross-examination, the State questioned Ms. Shirley on the relationship between the president of the Fayetteville PACT, Chilleko Hurst ("Mr. Hurst"), and the family of the victim. Hurst had a relationship with Addison's family and had been

1. This juror is referred to as Juror 13 in portions of the transcript and as such in defendant's brief.

attempting to provide them with support. Ms. Shirely testified that she had never discussed the case with Mr. Hurst, nor had he ever expressed his opinion on the case to her. She stated that while she did ask Mr. Hurst, in general terms, how to handle a situation such as the one she had just encountered, he instructed her to speak with the former president of PACT, Kathy Greggs, who provided her with the steps to follow.

The hearing continued on the following day, when the recording taken by Ms. Shirley was played. Judge Adams noted that the court had had the opportunity to review the video, and stated that it showed three jurors at the table: Juror 6, Juror 9, and Alternate Juror 1. Juror 6 was called, who denied discussing the case with anyone, or overhearing anyone discussing the case. Judge Adams ultimately ruled that audio quality from the recording rendered it unhelpful, and that the decision would turn on witness testimony. Judge Adams dismissed Juror 9 and Alternate Juror 1, with Alternate Juror 2 taking Juror 9's place, and made the following statement:

> The Court has considered the testimony of the witness under oath and has also considered the statements made by all three jurors in making this determination. The conversation that was recorded was between juror number 9 and juror number 13. Juror number 6 was not included as having been involved in the conversation at all, and the juror number 6 as so indicated that not only did they not participate in such a conversation but also that they did not overhear such a conversation. In my discretion I am going to remove those two jurors.

Defendant's counsel opposed the trial court's exercise of its discretion, arguing that either the defense should have an opportunity to exercise a preemptory challenge as to Juror 6, or that if Juror 6 was not to be excused, none of the jurors should have been excused. The trial court noted the objections for the record, while also noting "that throughout this entire process the Court has acted within its discretion."

Defendant was subsequently found guilty of first-degree murder and sentenced to life in prison without the possibility of parole. Defendant gave notice of appeal in open court.

II. Discussion

Defendant raises one issue on appeal, whether the trial court abused its discretion by dismissing Juror 9 and Alternate Juror 1. For the following reasons, we find that the trial court did not abuse its discretion.

"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. Galbreath*, 906 S.E.2d 514, 517 (N.C. Ct. App. 2024) (quoting *State v. Rutherford*, 70 N.C. App. 674, 677 (1984)). Upon an allegation of juror misconduct, the trial court must make appropriate investigations "to determine if misconduct has occurred and if the defendant has been prejudiced." *Id.* (citing *State v. Drake*, 31 N.C. App. 187, 191 (1976)). The trial court's determination on the existence and extent of jury misconduct is given great weight and deference on appeal, as these determinations and the effect of possible misconduct "depend on facts and circumstances specific to the case." *Id.* (citing *Drake*, 31 N.C. App. at 190). "[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 (2015) (quotation marks and citation omitted).

Accordingly, this court reviews the decision to dismiss a juror, and the determination to remove a juror for misconduct, for abuse of discretion. *See State v. Davis*, 325 N.C. 607, 621–22 (1989); *State v. Drake*, 31 N.C. App. 187, 190 (1976). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Davis v. Davis*, 360 N.C. 518, 523 (2006) (internal quotation marks and citation omitted).

"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." *Galbreath*, 906 S.E.2d at 517 (citation omitted).

In this case, the trial court became aware of possible juror misconduct between Juror 9 and Alternate Juror 1. The trial court promptly conducted a hearing on the allegations and made a thorough investigation, hearing testimony from witnesses and reviewing video footage of the alleged misconduct. Following the investigation and hearing, the trial court determined, in its discretion, that Juror 9 and Alternate Juror 1 should be removed.

Defendant presents a somewhat novel argument as the first part of his appeal, as is evidenced by his lack of citations to cases that contain a similar factual scenario as his own. Cases concerning juror misconduct generally involve an appeal by a defendant that a juror was not properly investigated, or was not removed when their presence prejudiced the defendant. *See, e.g.*, *State v. Salentine*, 237 N.C. App. 76 (2014) (no abuse of discretion in declining to find a mistrial and conduct further

investigation into juror misconduct given the deference due the trial court); *State v. Harris*, 145 N.C. App. 570 (2001) ("Not every violation of a trial court's instruction to jurors is such prejudicial misconduct as to require a mistrial.").

By contrast, defendant argues that the removal of a juror, which he contends was arbitrary, prejudiced him *per se* when the trial court refused to reopen *voir dire*. At no point, however, does defendant argue that the initial *voir dire* process suffered from any fatal defect; rather, he appears to attack the system of alternate jurors itself. Defendant cites to *State v. McKenna*: "[s]o long as the jurors who are actually empaneled are competent and qualified to serve, defendant may not complain . . . ." 289 N.C. 668, 681 (1976). Defendant also cites to *State v. Gell*: "The goal of jury selection is to ensure that a fair impartial jury is empaneled." 351 N.C. 192, 200 (2000) (citations omitted). Defendant follows this citation by stating that "[s]uch a jury was empaneled in this case – and it included Juror 9 and Juror 13."

However, the fair and impartial jury *also* included Alternate Juror 2, who replaced Juror 9. Defendant makes no argument that Alternate Juror 2 was incompetent to serve as a juror, or that they would be unfair or partial towards one side. If defendant did not wish there to be any possibility that Alternate Juror 2 serve on the jury, his opportunity to have that juror removed was during *voir dire*, which he failed to do.

More importantly, defendant has failed to show how he was prejudiced by the removal of Juror 9 and Alternate Juror 1. The trial court promptly conducted a hearing on the alleged misconduct, investigated the allegations and evidence, and in its discretion excused those jurors. Defendant has failed to show " 'such serious improprieties as would make it impossible to attain a fair and impartial verdict.' " *Jones*, 241 N.C. App. at 138 (quoting *State v. Dye*, 207 N.C. App. 473, 481–82 (2010)). Therefore, we hold that the trial court did not abuse its discretion in removing Juror 9 and Alternate Juror 1.

III. Conclusion

For the foregoing reasons, we find that the trial court exercised its discretion in removing the juror and alternate and that defendant received a fair trial.

NO ERROR.

Judges COLLINS and STADING concur.

IN RE D.E.-E.Y.

[297 N.C. App. 724 (2025)]

IN THE MATTER OF D.E.-E.Y., L.E.P., T.R.Y.

No. COA24-564

Filed 5 February 2025

Termination of Parental Rights—appointed counsel—withdrawal permitted at start of termination hearing—no inquiry—abuse of discretion

In a proceeding for termination of a mother's parental rights to her minor children, the district court abused its discretion in allowing an oral motion by respondent-mother's appointed counsel to withdraw at the start of a termination hearing—on the basis of appointed counsel's assertion that he had no contact with respondent-mother in over a year—where respondent-mother was not present and there was no further inquiry by the court into counsel's efforts to contact respondent-mother to provide her with notice of his intention to withdraw. The termination order entered was vacated, and the matter was remanded to the district court for a hearing, after adequate notice to respondent-mother, to determine whether appointed counsel had attempted to contact respondent-mother regarding his intent to withdraw and whether he had justifiable cause to make such a request.

Judge ARROWOOD concurring by separate opinion.

Judge STADING dissenting.

Appeal by Respondent-Mother from orders entered 4 March 2024 by Judge Christopher A. Freeman in Rockingham County District Court. Heard in the Court of Appeals 15 January 2025.

Robert W. Ewing for Respondent-Appellant Mother.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Amelia L. Serrat, for Petitioner-Appellee Guardian ad Litem.

No brief filed for Petitioner-Appellee Rockingham County Department of Health and Human Services.

COLLINS, Judge.

IN RE D.E.-E.Y.

[297 N.C. App. 724 (2025)]

Mother appeals from the trial court's orders terminating her parental rights to her minor children, Larry, Donna, and Tina.[1] Mother contends that the trial court erred by allowing Mother's counsel to withdraw from representing her at the beginning of the termination hearing. Because the record contains no indication that Mother's counsel had made any effort to notify, much less actually notified, Mother of his intention to seek leave of court to withdraw from representing her, the trial court abused its discretion by allowing her counsel's motion. *See In re D.E.G.*, 228 N.C. App. 381, 387 (2013). The termination orders are vacated and the case remanded to the Rockingham County District Court for further proceedings.

I. Background

Mother is the biological parent of Larry (born in 2015), Donna (born in 2020), and Tina (born in 2021). On or about 30 October 2021, Rockingham County Department of Health and Human Services ("DHHS") received a neglect report regarding Larry, Donna, and Tina. According to the report, a fourth child of Mother was "observed with marks and bruises on his chest, stomach[,] and sides."[2]

DHHS filed a petition alleging that Larry, Donna, and Tina were abused, neglected, and dependent juveniles. A hearing for nonsecure custody was held on 4 November 2021. At this hearing, Mother was served with a Juvenile Summons and Notice of Hearing, which indicated that attorney James Reaves had been temporarily assigned to represent her. Both Mother and Reaves were present at this hearing. Reaves was present and Mother was absent for a pre-adjudication hearing on 7 December 2021. Both Reaves and Mother were present for another pre-adjudication hearing on 22 December 2021.

The children were adjudicated to be neglected and dependent on 12 January 2022. A dispositional hearing was held the same day, and the children were ordered to remain in DHHS custody. Reaves and Mother were present for both hearings.

Reaves was present for permanency planning hearings on the following dates: 7 April 2022, 2 June 2022, 29 August 2022, 17 November 2022, 15 December 2022, 19 January 2023, 6 July 2023, and 27 November 2023. Mother was present for the June 2022, August 2022, and January 2023

1. We use pseudonyms to protect the identity of minor children. *See* N.C. R. App. P. 42.

2. This child has since been placed in the custody of his biological father and is not a subject of this appeal.

hearings. A permanency planning hearing was also held on 5 May 2022, at which neither Reaves nor Mother were present.

DHHS filed motions on 12 October 2023 to terminate Mother's parental rights to Larry, Donna, and Tina. A termination hearing was held on 19 February 2024. Reaves was present at the hearing; Mother was not. At the beginning of the hearing, Reaves orally moved to withdraw as Mother's counsel, stating that he had not had contact with Mother in "over a year." Over no objection from opposing counsel and without further inquiry from the trial court, Reaves' motion was allowed.

A DHHS foster care social worker testified at the termination hearing that Mother had made no effort to correct her identified areas of need to successfully reunify with the children. Since 12 October 2023, Mother had not performed any drug screens and had only seen the children in person once. The social worker also expressed concern over the continuing domestic violence disputes between Mother and her fiancée. The children's guardian ad litem testified that it would be in the children's best interests to terminate Mother's parental rights and clear the children to be adopted. All three children had been living with the same foster family and had formed a bond with the family. The trial court concluded that grounds existed to terminate Mother's parental rights and that termination would be in the children's best interests.

The trial court entered judgments terminating Mother's parental rights to Larry, Donna, and Tina on 4 March 2024. Mother appeals.

II. Discussion

Mother argues that the trial court erred by allowing her appointed counsel to withdraw on the day of the termination hearing without having notified Mother of his intention to withdraw.

A. Standard of Review

"A trial court's decision to grant or deny an attorney's motion to withdraw is reviewed on appeal for an abuse of discretion." *In re T.A.M.*, 378 N.C. 64, 71 (2021) (citation omitted). 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 (2015) (citation omitted).

B. Analysis

"Parents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, 181 N.C. App. 278, 282 (2007) (quotation marks and citation omitted); *see also* N.C. Gen. Stat.

§ 7B-1101.1 (2023). "After making an appearance in a particular case, an attorney may not cease representing [their] client in the absence of (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court." *In re D.E.G.*, 228 N.C. App. at 386 (quotation marks, brackets, and citation omitted).

While the trial court has discretion to allow or deny an attorney's motion when there is justifiable cause and prior notice to the client, when an attorney "has given his client no prior notice of an intent to withdraw, the trial judge has no discretion and must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Id.* (quotation marks and citations omitted).

> As a result, before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.

Id. at 386-87 (citation omitted).

Here, Reaves was appointed to represent Mother in November 2021, immediately after DHHS filed its petition alleging that the children were abused, neglected, and dependent. Although Mother's attendance at subsequent hearings was inconsistent, Reaves was Mother's counsel of record and represented her from November 2021 until the termination hearing on 19 February 2024. At the beginning of the termination hearing, Reaves orally moved to withdraw as Mother's counsel. Without further inquiry, the trial court allowed the motion. Because the record contains no indication that Mother's counsel had made any effort to notify, much less actually notified, Mother of his intention to seek leave of court to withdraw from representing her, the trial court abused its discretion by allowing Reaves' motion. *See id.* at 387.

The guardian ad litem contends that the trial court did not err because it acted pursuant to N.C. Gen. Stat. § 7B-1101.1(a), which, it argues, required the trial court to dismiss Reaves as Mother's counsel given her failure to appear at the termination hearing. This same argument has been raised and rejected by this Court in similar situations. *See*, *e.g.*, *In re D.E.G.*, 228 N.C. App. at 387-88.

When a termination of parental rights petition is filed, "unless the parent is already represented by counsel, the clerk shall appoint

provisional counsel for each respondent parent named in the petition[.]" N.C. Gen. Stat. § 7B-1101.1(a). If the respondent parent fails to appear at "the first hearing after service upon the respondent parent, the court shall dismiss the provisional counsel." *Id.*

Here, the guardian ad litem's argument "rests upon the basic legal principle that termination proceedings are independent from any underlying abuse, neglect[,] or dependency proceeding," and assumes that Mother was being represented by provisional counsel at the beginning of the termination hearing. *In re D.E.G.*, 228 N.C. App. at 388 (citation omitted). This assumption, however, is misguided; the appointment of provisional counsel "is unnecessary in the event that the parent is already represented by counsel." *Id.* (quotation marks omitted); N.C. Gen. Stat. § 7B-1101.1(a). At the time DHHS filed its termination of parental rights petition on 12 October 2023, Reaves had been representing Mother for approximately two years. Because Reaves was not provisional counsel at the termination proceeding that Mother failed to attend, the trial court was not required to dismiss Reaves pursuant to N.C. Gen. Stat. § 7B-1101.1(a).

Accordingly, in light of the trial court's erroneous decision to allow Reaves' motion to withdraw from his representation of Mother, the termination order must be vacated and the case remanded to the Rockingham County District Court. On remand,

> the trial court should, after providing [Mother] with adequate notice, conduct a hearing for the purpose of determining the extent, if any, to which [Mother's] trial counsel had attempted to notify [Mother] of his intentions to seek leave of court to withdraw from his representation of [Mother] and whether he had justifiable cause for making that request. In the event that adequate notice was given to [Mother] and in the event that [Mother's] trial counsel had justifiable cause for being relieved of any obligation to continue representing [Mother], the trial court should allow the withdrawal motion and reinstate the termination order[s], with [Mother] having the right to seek appellate review of the trial court's determination with respect to [her] trial counsel's withdrawal motion by noting an appeal from the reinstated termination order[s]. If the trial court determines that [Mother's] trial counsel did not provide his client with adequate notice of his intention to seek leave of court to withdraw from his representation of [Mother] or that [Mother's] trial counsel failed to show

> adequate justification for the allowance of that request, the trial court should conduct a new termination hearing and enter [] new order[s] addressing the issues raised by the [DHHS] termination [motions].

In re D.E.G., 228 N.C. App. at 389.

III. Conclusion

The trial court abused its discretion by allowing Mother's counsel to withdraw because Mother's counsel neither provided actual notice nor attempted to provide notice of his intention to withdraw from Mother's representation. Accordingly, the termination orders must be vacated and the case remanded to the Rockingham County District Court for further proceedings.

VACATED AND REMANDED.

Judge ARROWOOD concurs by separate opinion.

Judge STADING dissents by separate opinion.

ARROWOOD, Judge, concurring.

I concur fully with the opinion that the judgment must be vacated because the record is devoid of evidence of what, if any, efforts appointed counsel made to contact the appellant prior to being allowed to withdraw from representation.

I write separately, however, to note that in my opinion, the Record contains sufficient evidence to support findings and conclusions that the appellant has failed to be involved with her children's lives to the extent that parental rights would be subject to termination. "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re A.S.D.*, 378 N.C. 425, 428 (2021) (quoting *In re E.H.P.*, 372 N.C. 388, 395 (2019)). Here, the trial court found that grounds for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6). Although the result of this appeal is determined by the issue of representation, respondent-mother's failure to take the steps necessary to make adequate progress on her case plan with DSS to remedy the issues of neglect and dependency, together with her failure to attend the court dates regarding the children's future, would in other circumstances be sufficient to support termination of parental rights.

STADING, Judge, dissenting.

In re T.A.M. instructs us to consider the trial court's actions not only through the lens of whether it "respected the sanctity of [a parent's] statutory right to counsel," but also whether "it reasonably balanced and honored the purpose and policy of this State to promote finding permanency for the juvenile at the earliest possible age and to put the best interest of the juvenile first where there is a conflict with those of a parent." 378 N.C. 64, 75, 859 S.E.2d 163, 170 (2021) (citing N.C. Gen. Stat. § 7B-1100(2)–(3) (2019)). An application of this standard leads me to dissent from the majority opinion.

This case is marked by Mother's lack of participation and persistent absence. "[S]uch cases as these are fact-specific and hence dependent on the unique facts. . . ." *In re T.A.M.*, 378 N.C. at 74, 859 S.E.2d at 170. Here, Mother made minimal efforts to correct her identified areas of need to successfully reunify with her children. She did not attend permanency planning hearings in April 2022, November 2022, December 2022, July 2023, or November 2023. Nor had Mother submitted to any drug screens since January 2023. In fact, as a result of a positive drug screen on 29 November 2022, Mother's unsupervised visits with the children were terminated. To that end, Mother also has not consistently participated in visitation. For example, from July 2023 to November 2023, Mother was "offered four possible visits with the children and [she] only exercised one . . . ."

In its order, the trial court found that the attorney "made a preliminary motion to withdraw as attorney of record . . . due to lack of contact as [the attorney] has not had contact with [Mother] in close to a year and [the attorney] has no updated contact information on [Mother]." The attorney indicated his ability to "advocate" was frustrated by Mother's lack of communication over the course of the previous year. *See Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999) ("[A] lawyer cannot properly represent a client with whom he has no contact."). Thus, the trial court faced a dilemma of either leaving an attorney in place who could not provide effective assistance, continuing the matter and appointing another attorney which would further delay the proceedings, or releasing the attorney unable to provide effective assistance and moving forward with the hearing. *See id.* at 577–78, 515 S.E.2d at 445. Given its choices, the trial court "put the best interest of the juvenile first where there [was] a conflict with those of [the] parent" and did not abuse its discretion. *In re T.A.M.*, 378 N.C. at 75, 859 S.E.2d at 170. I would thus affirm the trial court's termination order.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 FEBRUARY 2025)

ANDERSON v. WMCI CHARLOTTE II, LLC No. 24-476	Mecklenburg (23CVS015937)	Reversed and Remanded
CAMERON v. NEWMAN No. 23-1120	Wake (21SP1929)	Affirmed and Remanded
IN RE A.R.B. No. 24-515	Henderson (20JT000172)	Affirmed
IN RE I.G.J. No. 24-655	Cabarrus (22JT000171)	Affirmed
IN RE J.L.W. No. 24-620	Forsyth (22JT000070)	Affirmed
IN RE L.-A.S.N.-C. No. 24-622	Mecklenburg (22JT000190-590)	Affirmed
IN RE L.L.A. No. 24-560	Wilkes (23JT000127)	Affirmed.
IN RE Z.C.H. No. 24-554	Sampson (18JT000029) (18JT000030)	Affirmed
PETER MILLAR, LLC v. SHAW'S MENSWEAR, INC. No. 24-370	Durham (19CVS1958)	Reversed In Part and Remanded; Dismissed In Part.
STATE v. AGUILAR No. 24-457	Wake (21CR211824-910) (21CR211825-910) (21CR211826-910)	No Error
STATE v. CLARK No. 23-1156	Union (18CRS54471) (18CRS54472)	Affirmed
STATE v. DAVIS No. 24-408	Mecklenburg (19CRS228105) (20CRS2479)	Dismissed In Part; Dismissed Without Prejudice In Part.
STATE v. GAUSE No. 24-576	Mecklenburg (07CRS211736-38)	Dismissed

STATE v. METCALF No. 24-415	Wake (19CR223713-910) (19CR223714-910) (21CR208217-910) (21CR208222-910) (21CR212920-910)	Vacated and Remanded
STATE v. WARD No. 24-574	Hoke (19CRS000477) (19CRS050253)	No Error.
STATE v. WEBB No. 24-625	Pasquotank (20CR051323) (21CR000745)	No Error

FISH v. STETINA

[297 N.C. App. 733 (2025)]

JOHN M. FISH, PLAINTIFF
v.
WAYNE DOUGLAS STETINA, DEFENDANT

No. COA23-1115

Filed 19 February 2025

1. Collateral Estoppel and Res Judicata—issue preclusion—distinguished from law-of-the-case—alienation of affection—admission of evidence—potentially probative of previously litigated issue

In plaintiff's second lawsuit bringing the same alienation of affection claim against defendant, where defendant's motion for summary judgment in the first lawsuit was granted as to plaintiff's criminal conversation claim, the trial court did not err in admitting into evidence certain phone calls and data from a location-sharing app placing defendant and plaintiff's ex-wife at the same hotel during the same time period. Defendant's argument—that plaintiff violated the law-of-the-case doctrine where, by introducing this evidence, he improperly relitigated the issue of pre-separation sexual intercourse—lacked merit for two reasons: first, because two separate lawsuits were involved, the proper doctrine for analyzing the argument was that of issue preclusion, not law-of-the-case; second, although the court in the first lawsuit necessarily determined at summary judgment that defendant did not have pre-separation sexual intercourse with plaintiff's ex-wife, issue preclusion principles did not bar plaintiff from introducing evidence that may have been probative of pre-separation sexual intercourse.

2. Appeal and Error—preservation of issues—admission of evidence—different objections stated at trial and on appeal

In an alienation of affection case, defendant failed to preserve for appellate review his objection to evidence (placing him and plaintiff's ex-wife at the same hotel during the same time period) on hearsay grounds where, at trial, he explicitly objected to the evidence's admission on the ground that no foundation for the evidence had been laid, and he did not specifically object to the evidence as lacking the requisite foundation for satisfying the business record exception to the hearsay rule (which was the argument he put forth on appeal). Although defendant did preserve his general foundation objection for appeal, he abandoned any argument to that effect by failing to argue it in his appellate brief.

3. Alienation of Affections—motion for directed verdict—malice—sufficiency of evidence

In an alienation of affection case, the trial court properly denied defendant's motion for a directed verdict where plaintiff had presented sufficient evidence that defendant acted with malice, including phone records and location data documenting numerous interactions between defendant and plaintiff's ex-wife prior to her separation from plaintiff. To be sure, the doctrine of issue preclusion prevented the jury from considering the phone and location records as proof that defendant and plaintiff's ex-wife engaged in pre-separation sexual intercourse, since that particular issue had already been determined (in the negative) in a prior lawsuit. However, a reasonable jury could still conclude that defendant's repeated phone conversations and visits with plaintiff's ex-wife amounted to "intentional conduct that would probably affect the marital relationship" between the spouses.

4. Damages and Remedies—alienation of affection—punitive damages—proof of aggravating circumstances beyond malice—sufficiency

The trial court in an alienation of affection case properly submitted the issue of punitive damages to the jury, where plaintiff presented sufficient evidence of aggravating circumstances beyond the malice required to prove alienation of affection and to support an award of compensatory damages. Specifically, plaintiff introduced evidence showing that defendant intentionally deleted all of his text messages with plaintiff's ex-wife upon learning that he might be sued, which constituted spoliation of evidence and was the type of intentional conduct that went beyond the implied malice necessary for establishing alienation of affection.

5. Alienation of Affections—evidence of out-of-state conduct—where alienation of affection is not a recognized tort—admissibility

In an alienation of affection case, where defendant's alleged conduct spanned multiple states of which North Carolina was the only one that recognized the tort of alienation of affection, plaintiff's evidence of defendant's out-of-state conduct was still admissible, since it was relevant to the issue of where the tortious injury occurred. Even if the location of the injury had not been disputed by the parties or presented to the jury, the evidence was still relevant, as defendant's out-of-state conduct made it more likely to be true

that defendant "produced the loss of [plaintiff and his ex-wife's] love and affection."

Appeal by Defendant from judgment entered 3 April 2023 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 13 August 2024.

Wesley E. Starnes, PC, by Wesley E. Starnes, for Defendant-Appellant.

Pope McMillan, P.A., by Clark D. Tew, for Plaintiff-Appellee.

CARPENTER, Judge.

Wayne Douglas Stetina ("Defendant") appeals a jury award of compensatory and punitive damages in favor of John M. Fish ("Plaintiff") on his alienation of affection claim. On appeal, Defendant argues the trial court erred by: (1) admitting certain evidence that was barred by the law-of-the-case doctrine; (2) allowing Plaintiff to present evidence from Life360 (the "App"); (3) denying Defendant's motion for directed verdict; (4) submitting the issue of punitive damages to the jury; and (5) admitting evidence of Defendant's out-of-state conduct. After careful review, we discern no error.

I. Factual and Procedural Background

On 29 June 2020, Plaintiff sued Defendant on claims of alienation of affection and criminal conversation in Catawba County Superior Court. In his complaint, Plaintiff requested compensatory and punitive damages. Among his other allegations, Plaintiff alleged that Defendant had sexual intercourse with Plaintiff's wife ("Wife") before Plaintiff and Wife separated.

On 26 July 2020, Defendant moved for summary judgment on both claims. On 8 November 2020, Defendant amended and refiled his summary judgment motion. On 23 February 2022, the trial court filed an order (the "Order") granting Defendant summary judgment on the criminal conversation claim and denying summary judgment on the alienation of affection claim. In the Order, the trial court "conclude[d] that there [was] no genuine issue as to any material fact related to Plaintiff's claim for criminal conversation." The trial court did not further explain its grant of summary judgment. Plaintiff did not appeal the Order.[1]

1. Because Plaintiff did not appeal from the Order, we will not opine on the Order.

On 21 March 2022, Plaintiff voluntarily dismissed his 29 June 2020 complaint. On 4 May 2022, Plaintiff filed a new complaint against Defendant asserting only a claim for alienation of affection.[2] On 6 March 2023, Plaintiff's case proceeded to trial and the evidence tended to show the following.

On 16 January 1998, Plaintiff and Wife married. During their marriage, Wife became involved in a charity bicycling organization called Ride to Recovery ("R2R"). Through her involvement with R2R, Wife met Defendant, a former Olympic bicyclist. Defendant, who lived in California, and Wife, who lived in North Carolina, began exchanging phone calls sometime in 2016. Wife maintained, however, that their phone conversations only concerned R2R.

Over time, Defendant and Wife's phone conversations increased in both frequency and duration. In January 2016, Defendant and Wife spoke on the phone 9 times for a total of 188 minutes. Similarly, in February 2016, Defendant and Wife spoke on the phone 10 times for a total of 213 minutes. In August 2016, Defendant and Wife spoke on the phone 47 times for a total of 776 minutes. Finally, by March 2017, Defendant and Wife spoke on the phone 138 times for a total of 2,234 minutes. Prior to separating from Wife, Plaintiff was not aware of Defendant. Defendant, on the other hand, knew Wife was married to Plaintiff.

Using the App, a global-positioning-system application, Plaintiff learned Wife was at a hotel in Boone, North Carolina in early July 2017. Defendant was at the hotel at the same time as Wife, and the two did not call each other during this period. When Plaintiff testified concerning the App, Defendant's counsel objected, asserting lack of foundation.

In late July and early August of 2017, Wife traveled to Nevada and Colorado. Defendant also traveled to Colorado during the same period but denied seeing Wife during his trip. From late July until 2 August 2017, there were no phone calls between Wife and Defendant. Other than the trip to Boone in early July 2017, when Wife was in Colorado, this was the only time in July and August 2017 in which Defendant and Wife did not call each other.

Plaintiff and Wife separated on 17 August 2017. On that day, Wife left the marital home to live in Plaintiff and Wife's vacation home (the "mountain home") in Blowing Rock, North Carolina. Plaintiff and Wife

---

2. The docket number of the "original lawsuit" was 20 CVS 1640. The docket number of the "present lawsuit" is 22 CVS 931. *See Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011).

gave conflicting testimony concerning the inner workings of their marriage and why they eventually separated.

In December 2017, phone records showed that wife was in Irvine, California, where Defendant worked. Again, from 7 December 2017 until 11 December 2017, there were no phone calls between Defendant and Wife. In January 2018, Defendant traveled to North Carolina and stayed with Wife in the mountain home.

Wife denied she and Defendant had sexual relations prior to her separation from Plaintiff. Wife admitted that Defendant stayed with her at the mountain home in January 2018, but she maintained that all of her interactions with Defendant were platonic. Wife testified that she and Defendant began dating in 2018, and that the pair was still a couple as of the trial.

On 6 February 2018, Plaintiff filed for divorce. After the divorce litigation, the trial court ordered Plaintiff to pay Wife $764,000 in alimony. When Defendant learned that Plaintiff might sue him, he deleted all of his text messages with Wife. He did not, however, delete any other text conversations.

At the close of Plaintiff's alienation of affection case, Defendant moved for a directed verdict. The trial court denied Defendant's motion. At the close of the evidence, Defendant again moved for a directed verdict, which the trial court denied. When instructing the jury, the trial court did not tell the jury that they could or should consider any pre-separation sexual intercourse between Defendant and Wife. The trial court's only mention of "sex" when instructing the jury concerned the sexual relationship between Plaintiff and Wife during their marriage.

On 14 March 2023, the jury found Defendant liable for alienation of affection. The jury awarded Plaintiff $804,000 in compensatory damages and $500,000 in punitive damages. On 3 April 2023, the trial court entered judgment accordingly. On 10 April 2023, Defendant moved for judgment notwithstanding the verdict, and, in the alternative, a new trial. On 10 May 2023, the trial court denied Defendant's motion. On 12 May 2023, Defendant filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

The issues are whether the trial court erred by: (1) admitting certain evidence that was barred by the law-of-the-case doctrine; (2) allowing

Plaintiff to present evidence from the App; (3) denying Defendant's motion for directed verdict; (4) submitting the issue of punitive damages to the jury; and (5) admitting evidence of Defendant's out-of-state conduct.

IV. Analysis

A. Evidence of Alleged Pre-Separation Sexual Contact

[1] Defendant's first and primary argument on appeal is that the trial court erred by admitting certain evidence because it was barred by the law-of-the-case doctrine. According to Defendant, the Order necessarily concluded, as a matter of law, that Defendant and Wife did not have pre-separation sexual intercourse. Defendant maintains the Order precluded Plaintiff from introducing evidence of phone calls and location data from the App because the evidence was probative of pre-separation sexual intercourse between Defendant and Wife. We agree with Defendant that the Order concluded he did not have pre-separation sexual intercourse with Wife and that Plaintiff was barred from re-litigating this issue in the present case. However, we disagree with Defendant that the issue was re-litigated by virtue of Plaintiff offering evidence of the phone calls and location data from the App.

1. Standard of Review

Whether the law-of-the-case doctrine applies is a question of law. *Royster v. McNamara*, 218 N.C. App. 520, 529–30, 723 S.E.2d 122, 129 (2012). Similarly, whether a trial court "is barred from hearing a specific claim or issue is a question of law unrelated to any specific facts of a case." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (2008). This Court reviews questions of law de novo. *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013) (citing *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). 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*, 356 N.C. at 647, 576 S.E.2d at 319).

This Court " 'review[s] a trial court's rulings . . . on the admission of evidence for an abuse of discretion.' " *Ingram v. Henderson Cnty. Hosp. Corp., Inc.*, 259 N.C. App. 266, 290, 815 S.E.2d 719, 734 (2018) (quoting *State v. Hernendez*, 184 N.C. App. 344, 348, 646 S.E.2d 579, 582 (2007)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985)).

2. Criminal Conversation and Alienation of Affection

There are two causes of action relevant to Defendant's law-of-the-case argument: criminal conversation and alienation of affection. Criminal conversation requires a plaintiff to prove that there was an " 'actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture.' " *Nunn v. Allen*, 154 N.C. App. 523, 535, 574 S.E.2d 35, 43 (2002) (quoting *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996)).

Alienation of affection, on the other hand, requires a plaintiff to prove: " '(1) there was a marriage with love and affection existing between the husband and wife; (2) that love and affection was alienated; and (3) the malicious acts of the defendant produced the loss of that love and affection.' " *Id.* at 532–33, 574 S.E.2d at 41–42 (quoting *Pharr v. Beck*, 147 N.C. App. 268, 271, 554 S.E.2d 851, 854 (2001)). "Malice is conclusively presumed by a showing that the defendant engaged in sexual intercourse with the plaintiff's spouse," *Rodriguez v. Lemus*, 257 N.C. App. 493, 495–96, 810 S.E.2d 1, 3 (2018), but malice does not require proof of sexual intercourse, *id.* at 497, 810 S.E.2d at 4 (explaining "[t]his Court has held that intentional acts by a defendant other than sexual intercourse satisfied the malice element of alienation of affection").

The date of separation is critical to both claims as "[n]o act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent." N.C. Gen. Stat. § 52-13(a) (2023).

3. Issue Preclusion and Law-of-the-Case Doctrine

First, we must determine which doctrine applies to this case: law-of-the-case or issue preclusion. Although both doctrines generally bar re-litigating issues, they operate differently. On appeal, Defendant urges this Court to apply the law-of-the-case doctrine. For the reasons outlined below, we conclude issue preclusion, not law-of-the-case, is the applicable doctrine.

Issue preclusion, also known as "collateral estoppel" and "estoppel by judgment," prohibits re-litigation of an issue resolved in a final judgment " 'involving identical parties or parties in privity with a party or parties to the prior suit.' " *State v. Safrit*, 145 N.C. App. 541, 552, 551 S.E.2d 516, 523–24 (2001) (quoting *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 576 (1962)). Issue preclusion requires: "(1) a prior suit resulting in a final judgment on the merits; (2) identical issues

involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211 (2002).

" '[A]n issue is actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and [is] in fact determined.' " *See Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011) (quoting *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008)). Concerning the second element, "[a] very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical. If they are not identical, then the doctrine of collateral estoppel does not apply." *Beckwith v. Llewellyn*, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990).

Although the law-of-the-case doctrine is similar to issue preclusion in that it prevents re-litigation of an issue, *see Royster*, 218 N.C. App. at 529–30, 723 S.E.2d at 129, the two doctrines differ in one key respect: issue preclusion prevents re-litigation in a *future* lawsuit, *see Safrit*, 145 N.C. App. at 552, 551 S.E.2d at 523–24 (emphasis added), while the law-of-the-case doctrine prevents re-litigation of an issue in the *same* lawsuit, *see Royster*, 218 N.C. App. at 529–30, 723 S.E.2d at 129. "Lawsuits" are distinguished by their trial-court docket numbers. *See Williams*, 217 N.C. App. at 3–6, 719 S.E.2d at 91–93 (analyzing issue preclusion and referring to the "original lawsuit" and the "present lawsuit" by their distinct trial-court docket numbers).

Here, Plaintiff did not appeal from the Order granting summary judgment in favor of Defendant for the criminal conversation claim. Instead, after the trial court issued the Order, Plaintiff filed a notice of voluntary dismissal and subsequently filed a new complaint asserting only an alienation of affection claim. Because Plaintiff voluntarily dismissed his original lawsuit after the trial court issued the Order, and he did not appeal from the Order, it is a final judgment concerning criminal conversation. *See Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55 (2000) ("In general, a cause of action determined by an order for summary judgment is a final judgment on the merits."); *Veazy v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950) ("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.").

The Order concerned the original lawsuit, docketed as 20 CVS 1640, and this appeal concerns Plaintiff's subsequent lawsuit, docketed as 22 CVS 931. So issue preclusion, not law-of the-case, is the applicable

doctrine since we are dealing with two separate lawsuits: the "original lawsuit" and the "present lawsuit." *See Williams*, 217 N.C. App. at 3–6, 719 S.E.2d at 91–93. Therefore, we assess Defendant's assertions through the issue-preclusion framework.

As an aside, we note that the applicable voluntary dismissal principles under Rule 41 do not change our conclusion that issue preclusion is the appropriate doctrine to apply here. The procedural posture of this case is rather unusual and is unlikely to be duplicated. Because Plaintiff filed his notice of voluntary dismissal after presenting arguments on both of his claims at the summary judgment hearing, Plaintiff "rest[ed] his case" within the meaning of Rule 41(a)(1)(i). *See* N.C. R. Civ. P. 41(a)(1)(i) (providing a plaintiff may dismiss an action or claim "by filing a notice of dismissal at any time *before the plaintiff rests his case*") (emphasis added); *see also Troy v. Tucker*, 126 N.C. App. 213, 216, 484 S.E.2d 98, 99 (1997) (concluding "[the] plaintiff's filing of her voluntary dismissal was unauthorized" because she "had rested her case at the summary judgment hearing"). Therefore, Plaintiff's notice of voluntary dismissal was unauthorized and Defendant could have asserted, in his responsive pleading to Plaintiff's new complaint, that Plaintiff's voluntary dismissal was with prejudice and barred Plaintiff from pursuing the alienation of affection claim in his new lawsuit. *See Pardue v. Darnell*, 148 N.C. App. 152, 157, 557 S.E.2d 172, 176 (2001) (holding where the plaintiff rested his case at trial and then attempted to take a voluntary dismissal, the dismissal operated as a dismissal with prejudice "barring [the plaintiff] from refiling suit against [the] defendant" and entitling defendant "to judgment as a matter of law" in a later-filed action based on the same claim or claims). But Defendant did not assert the affirmative defense of claim preclusion, otherwise known as res judicata, in his responsive pleading to Plaintiff's new complaint. *See Smith v. Polsky*, 251 N.C. App. 589, 595, 796 S.E.2d 354, 359 (2017) ("[A] voluntary dismissal with prejudice is, by operation of law, a final judgment on the merits implicating the doctrine of res judicata."); *Cnty. of Rutherford By & Through Child Support Enf't Agency ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 73, 394 S.E.2d 263, 264 (1990) ("[R]es judicata is an affirmative defense and must be set forth affirmatively in the pleadings."); *see also* N.C. Gen. Stat. § 1A-1, Rule 8(c) (2023). Thus, Plaintiff's alienation of affection claim properly proceeded to trial.

4. Discussion

Now equipped with the appropriate doctrine, we turn to the facts. Here, the Order granted Defendant summary judgment concerning criminal conversation. Although the Order did not explain its grant of

summary judgment beyond concluding "that there [was] no genuine issue as to any material fact" for the criminal conversation claim, it necessarily determined, as a matter of law, that Defendant did not have pre-separation sexual intercourse with Wife.

First, the issue of pre-separation sexual intercourse was "submitted for determination" in the original lawsuit, since Plaintiff alleged it in his complaint. *See Williams*, 217 N.C. App. at 6, 719 S.E.2d at 93. Second, pre-separation sexual intercourse is an element of criminal conversation, which Plaintiff also alleged in his complaint. *See Nunn*, 154 N.C. App. at 535, 574 S.E.2d at 43. Finally, Defendant admitted that Plaintiff and Wife's marriage was valid. Thus, the only disputed element of criminal conversation was Defendant's alleged pre-separation sexual intercourse with Wife. *See id.* at 535, 574 S.E.2d at 43. Accordingly, since the Order granted Defendant summary judgment concerning criminal conversation, the trial court concluded that Defendant did not have pre-separation sexual intercourse with Wife. *See id.* at 535, 574 S.E.2d at 43.

Because the issue of pre-separation sexual intercourse was resolved by the trial court in the Order, a final judgment, *see Green*, 137 N.C. App. at 310, 528 S.E.2d at 55, and was necessary to the judgment, *see McDonald*, 152 N.C. App. at 230, 567 S.E.2d at 211, issue preclusion principles applied. Accordingly, the parties were precluded from re-litigating the issue of whether Defendant and Wife had pre-separation sexual intercourse.

Here, the trial court complied with issue-preclusion principles and did not re-litigate the issue of whether Defendant and Wife had pre-separation sexual intercourse. The trial court did not instruct the jury to consider pre-separation sexual intercourse and the only mention of "sex" in the instructions concerned the sexual relationship between Plaintiff and Wife.

Defendant, however, argues that issue preclusion entitles him to more. Defendant asserts that issue preclusion prohibited Plaintiff from offering any evidence that *may* be probative of pre-separation sexual intercourse between Defendant and Wife. According to Defendant, Plaintiff was precluded from introducing evidence of Defendant and Wife's phone calls and their locations via the App because such evidence could have persuaded the jury that Defendant and Wife had pre-separation sexual intercourse, which the Order already rejected. In Defendant's view, by introducing this evidence, Plaintiff was "relitigating" the issue. We disagree with Defendant.

Issue preclusion does indeed prevent the re-litigation of issues, but issues and evidence are not the same. Prohibiting re-litigation means that certain legal theories are predetermined, as a matter of law. *See*

McCallum v. North Carolina Coop. Extension Serv. of N.C. State Univ., 142 N.C. App. 48, 56, 542 S.E.2d 227, 234 (2001). It does not mean, however, that Plaintiff's evidence was inadmissible because it *may* have been probative of whether Defendant and Wife had pre-separation sexual intercourse. The relevant inquiry is whether pre-separation sexual intercourse was indeed litigated in the subsequent action. *See Safrit*, 145 N.C. App. at 552, 551 S.E.2d at 523–24 (quoting *Masters*, 256 N.C. at 524, 124 S.E.2d at 576). In the instant case, as indicated above, it was not.

Under Defendant's approach, trial courts would need to examine each piece of evidence to discern whether it is probative of an already litigated issue. Which begs the question: How probative? We decline to open Pandora's box. Accordingly, the trial court did not violate the doctrine of issue preclusion by admitting Plaintiff's phone-call and location evidence from the App that may have been probative of pre-separation sexual intercourse. *See McDonald*, 152 N.C. App. at 230, 567 S.E.2d at 211.

B. Location Evidence from the App

[2] Next, Defendant argues that the trial court erred by admitting evidence from the App because the evidence lacked foundation for admission as a business record and was thus inadmissible hearsay. Defendant argues that he objected to the App evidence "on the grounds that this evidence was hearsay." We disagree with Defendant and dismiss his argument as unpreserved.

"In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)); *see State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) ("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].") (internal quotation marks and citations omitted). In order to preserve an issue, the objection must "clearly present[] the alleged error to the trial court." N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (2023).

Additionally, "[i]t is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) (citing N.C. R. App. P. 28(b)(6)); *see State v. Evans*, 251 N.C. App. 610, 625, 795 S.E.2d 444, 455 (2017) (deeming an argument abandoned because the appellant did "not set forth any legal argument or citation to authority").

Here, Plaintiff offered evidence from the App to prove that Defendant and Wife were simultaneously in the same location. Below is the relevant testimony:

> **Plaintiff's Counsel**: So let's talk about what happened in July of 2017. What occurred in that month?
>
> . . . .
>
> **Plaintiff**: I looked at Life360 and I thought—
>
> **Defense Counsel**: Objection.
>
> **Plaintiff**: – isn't it odd –
>
> **Defense Counsel**: No foundation laid for Life360.
>
> **Trial Court**: Sustained.
>
> **Plaintiff's Counsel**: Okay. Let's talk about this for a second. You have an application on your phone that you've discussed called Life360; correct?
>
> **Plaintiff**: Correct.
>
> **Plaintiff's Counse**l: What is that application?
>
> **Plaintiff**: It's an application that allows family members or whoever to track one another's location. We primarily had it for the safety of our children.
>
> **Plaintiff's Counsel**: How long had you and [Wife] used Life360?
>
> **Plaintiff**: Four or five years or more.
>
> **Plaintiff's Counsel**: Okay. And did [Wife] –
>
> **Plaintiff**: Probably once they started driving.
>
> **Plaintiff's Counsel**: Did [Wife] have access to Life360 on her phone as well?
>
> **Plaintiff**: Yes.
>
> **Plaintiff's Counsel**: Was Life360, this application, something that tracked both your location and [Wife's] location?
>
> **Plaintiff**: Yes.
>
> **Defense Counsel**: Objection.
>
> **Plaintiff's Counsel**: As well as your daughters?
>
> **Plaintiff**: Yes.
>
> **Defense Counsel**: Object for the record.
>
> **Trial Court**: Overruled.
>
> **Plaintiff's Counsel**: How would this application send you notifications, or why would this application send you notifications?

Defense Counsel: Objection.

Trial Court: Overruled.

Defendant specifically objected to the App evidence for lack of foundation. Defendant later lodged several general objections without specifying a basis. Now Defendant argues that his "foundation" objection concerned the requisite foundation to satisfy the business-record exception to the hearsay rule.

Usually, objections for lack of foundation concern the "authentication or identification" necessary to show that the proposed evidence "is what its proponent claims." *See* N.C. Gen. Stat. § 8C-1, Rule 901(a) (2023). Here, Defendant's counsel merely objected to the App based on lack of "foundation." Defendant's counsel did not mention hearsay. Without specifying that a "foundation" objection actually concerns a hearsay exception, the objection does not "clearly present[]" a hearsay question to the trial court. *See id.*, Rule 103(a)(1). Therefore, Defendant did not preserve a hearsay argument, *see id.*, and he cannot "swap horses" and make a hearsay argument on appeal, *see Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

Further, any authentication argument under Rule 901 is now abandoned. On appeal, Defendant's sole argument about the App concerns hearsay and the business-record exception, and he only cites hearsay authorities. Therefore, because Defendant cites no authority and makes no argument concerning authentication, he abandoned his only preserved argument. *See Evans*, 251 N.C. App. at 625, 795 S.E.2d at 455; *see* N.C. R. App. P. 28(b)(6).

C. Motion for Directed Verdict

[3] In his third argument, Defendant asserts that the trial court erred by denying his motion for a directed verdict because Plaintiff offered no evidence of malice. Defendant echoes his first argument here, asserting that evidence of Defendant and Wife's phone call and location records must be precluded, and thus Plaintiff offered no evidence of malice. We disagree with Defendant.

We review directed-verdict rulings de novo. *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 351, 666 S.E.2d 127, 135 (2008) (citing *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)). A directed verdict "is appropriate only when the issue submitted presents a question of law based on admitted facts where no other conclusion can reasonably be reached." *Ferguson v. Williams*, 101 N.C. App. 265, 271, 399 S.E.2d 389, 393 (1991) (citing *Seaman v. McQueen*, 51 N.C. App. 500, 503, 277 S.E.2d 118, 120 (1981)). In making this determination:

> the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 369, 329 S.E.2d 333, 337–38 (1985) (citing *Farmer v. Chaney*, 292 N.C. 451, 452–53, 233 S.E.2d 582, 584 (1977)).

Concerning alienation of affection, "[a] malicious act has been loosely defined to include any intentional conduct that would probably affect the marital relationship." *Beavers v. McMican*, 385 N.C. 629, 635, 898 S.E.2d 690, 696 (2024) (quoting *Rodriguez*, 257 N.C. App. at 495, 810 S.E.2d at 1).

Here, as detailed above, the trial court did not err by admitting evidence of Defendant and Wife's phone call and location records. The jury could not have concluded this evidence proved that Defendant and Wife had pre-separation sexual intercourse, because issue preclusion prevented that issue from being presented to the jury for determination. Nonetheless, when viewed "in the light most favorable to" Plaintiff, *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38, a reasonable jury could still conclude that Defendant and Wife's telephone conversations and repeated visits amounted to "intentional conduct that would probably affect the marital relationship" between Plaintiff and Wife, *see Beavers*, 385 N.C. at 635, 898 S.E.2d at 696. Therefore, the trial court did not err by denying Defendant's motion for a directed verdict. *See Ferguson*, 101 N.C. App. at 271, 399 S.E.2d at 393.

D. Punitive Damages

[4] In his next argument, Defendant asserts that the trial court erred by submitting the issue of punitive damages to the jury. We disagree with Defendant.

We review the legality of jury instructions de novo. *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). For a jury to award punitive damages under an alienation of affection theory, "there must be evidence of circumstances of aggravation beyond the proof of malice necessary to satisfy the elements of the tort to sustain a recovery of compensatory damages." *Nunn*, 154 N.C. App. at 538, 574 S.E.2d at 44–45 (quoting *Ward v. Beaton*, 141 N.C. App. 44, 49–50, 539 S.E.2d 30, 34 (2000)). "Evidence of [pre-separation] 'sexual relations' has been held

to satisfy this requirement." *Id.* at 538, 574 S.E.2d at 45 (citing *Ward*, 141 N.C. App. at 49–50, 539 S.E.2d at 34). In the absence of such evidence, a plaintiff faces a greater challenge in submitting the punitive-damages question to the jury. *See Cottle v. Johnson*, 179 N.C. 426, 431, 102 S.E. 769, 771 (1920) (ordering a new trial where plaintiff received punitive damages for alienation of affection in a case where the plaintiff did not prove criminal conversation).

For example, evidence of "problems caused in [a] marriage and increase[ed] amount[] of time spent with plaintiff's wife," in the absence of evidence of pre-separation sexual intercourse, was held to be insufficient to send the punitive-damages question to the jury. *Chappell v. Redding*, 67 N.C. App. 397, 403, 313 S.E.2d 239, 243 (1984).

Here, as detailed above, the Order settled the question of whether Defendant and Wife had pre-separation sexual intercourse: The trial court determined they did not. *See Nunn*, 154 N.C. App. at 535, 574 S.E.2d at 43; *McDonald*, 152 N.C. App. at 230, 567 S.E.2d at 211. Nonetheless, Plaintiff still offered sufficient evidence to send the punitive-damages question to the jury.

Specifically, Plaintiff offered evidence that Defendant deleted all of his text messages with Wife upon learning that he might be sued, thereby intentionally spoliating evidence. Such evidence goes beyond "the malice implied by law from the conduct of defendant in alienating the affections between the spouses." *Chappell*, 67 N.C. App. at 403, 313 S.E.2d at 243.

Thus, Plaintiff established sufficient evidence of aggravation to send the punitive-damages question to the jury even in the absence of evidence of pre-separation sexual relations. Accordingly, the trial court did not err by sending the punitive-damages question to the jury.

E. Out-of-State Conduct

[5] In his final argument, Defendant asserts that the trial court erred by admitting evidence purporting to show that he met with Wife in Nevada, a state that does not recognize the tort of alienation of affection. According to Defendant, Plaintiff should have been barred from introducing such evidence because the question of where the tortious injury occurred was not at issue in this case and the jury was permitted to find alienation of affection based upon actions that occurred in Nevada. We disagree with Defendant.

To support his argument, Defendant cites two cases: *Darnell v. Rupplin*, 91 N.C. App. 349, 371 S.E.2d 743 (1988) and *Jones v. Skelley*,

195 N.C. App. 500, 673 S.E.2d 385 (2009). Defendant's reliance on these cases, however, is misplaced. Defendant's challenge is an evidentiary one. The rules Defendant cites from *Darnell* and *Jones* concern the trial court's determination of what substantive law applies in an alienation of affection case and whether a plaintiff can establish a valid cause of action for the same. *See Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745; *Jones*, 195 N.C. App. at 506, 673 S.E.2d at 389–90. Choice of law concepts are distinct from admissibility of evidence. Consequently, we focus our attention on the relevant inquiry—whether the evidence was admissible.

" 'The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence.' " *State v. James*, 224 N.C. App. 164, 166, 735 S.E.2d 627, 629 (quoting *State v. Bodden*, 190 N.C. App. 505, 512, 661 S.E.2d 23, 27 (2008)). An abuse of discretion occurs 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.' " *James*, at 166, 735 S.E.2d at 629 (quoting *State v. Elliot*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006)).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2023). "Irrelevant evidence is evidence 'having no tendency to prove a fact at issue in the case.' " *State v. Davis*, 287 N.C. App. 456, 465, 883 S.E.2d 98, 105 (2023) (quoting *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368 (1992)). Generally, relevant evidence is admissible, unless the Constitution, the legislature, or the Rules of Evidence provide otherwise. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2023). Additionally, 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." N.C. Gen. Stat. § 8C-1, Rule 403 (2023).

In *Darnell* and *Jones*, each of the defendant's out-of-state conduct was relevant to the issue of where the tortious injury occurred—a necessary determination to establish a valid cause of action and to ascertain which state's law applies. *See Hayes v. Waltz*, 246 N.C. App. 438, 443, 784 S.E.2d 607, 613 (2013) (explaining that a plaintiff must show that the alienating conduct occurred in either North Carolina or another state that recognizes the tort to establish a valid cause of action for alienation of affection); *see also Jones*, 195 N.C. App. at 506, 673 S.E.2d at 389–90

(explaining that the law of the state where the tortious injury occurred, that is, where the alleged alienating conduct took place, is the applicable substantive law).

Specifically, in *Darnell*, the jury considered evidence of the defendant's acts occurring in four jurisdictions: North Carolina, Maryland, Virginia, and Washington, D.C. 91 N.C. App. at 351, 371 S.E.2d at 745. Of these, North Carolina was the only jurisdiction that recognized alienation of affection. *Id.* at 351, 371 S.E.2d at 745. On appeal, the defendant contended that a material issue of fact existed concerning in which jurisdiction the tort of alienation of affection took place and argued that this issue should have been submitted to the jury for determination. *Id.* at 350, 371 S.E.2d at 744. We held that "it is for the jury, *considering all the evidence*, to determine in which [jurisdiction] plaintiff's injury occurred." *Id.* at 354, 371 S.E.2d at 747 (emphasis added). Notably, we did not hold, or in any way indicate, that the evidence of the defendant's conduct occurring in Maryland, Virginia, and Washington, D.C. was inadmissible.

Similarly, in *Jones*, the defendant's alleged alienating conduct occurred in two states: North Carolina and South Carolina. 195 N.C. App. at 505–08, 673 S.E.2d at 389–90. Of the two, North Carolina was the only state that recognized alienation of affection. *Id.* at 505, 673 S.E.2d at 389. In *Jones*, we concluded that the trial court improperly granted summary judgment in favor of the defendant, explaining "a material question of fact exists as to whether the alleged alienation of [spouse's] affections occurred in North Carolina or South Carolina . . . ." *Id.* at 507–08, 673 S.E.2d at 389–90. Similarly, we did not hold, or in any way indicate, that the evidence of the defendant's South Carolina conduct was inadmissible.

Based on these cases, it is clear to us that in alienation of affection cases where the defendant's conduct spans multiple states, the question of where the injury occurred is, in most instances, at issue. Therefore, it is a question for the jury "*considering all the evidence*." *See Darnell*, 91 N.C. App. at 371, 354 S.E.2d at 747 (emphasis added). In such cases, all of the defendant's alleged alienating acts, including those acts occurring in states that do not recognize the tort, are potentially relevant for determining where the injury occurred.

Defendant, however, contends that "no such issue existed in the present case for the jury to determine." In other words, Defendant suggests that there was no dispute over whether Plaintiff's injury occurred in North Carolina, so the evidence of his Nevada conduct should have been excluded because it could not support Plaintiff's claim. By doing

so, Defendant necessarily concedes that the injury took place in North Carolina. But Defendant's assertion overlooks a critical point: the evidence of his out-of-state conduct was admissible, regardless of whether an issue existed as to where the injury occurred.

Here, as in *Darnell* and *Jones*, Defendant's conduct spanned multiple states: North Carolina, Nevada, and Colorado. Like in *Darnell* and *Jones*, North Carolina is the only state that recognizes alienation of affection. *Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745; *Jones*, 195 N.C. App. at 505, 673 S.E.2d at 389. So, it was Plaintiff's burden to prove that the tortious injury, the alienating conduct, occurred in North Carolina. *See Bassiri v. Pilling*, 287 N.C. App. 538, 546, 884 S.E.2d 165, 171 (2023) (explaining that if the defendant's conduct spans multiple states and North Carolina is the only state involved that recognizes the tort of alienation of affection "the sufficiency of the claim . . . [is] dependent upon whether the alleged injury occurred in North Carolina"). Consequently, the jury was tasked with determining in which state the tortious injury occurred. Therefore, the evidence of Defendant's out-of-state conduct was admissible for this purpose. *See Darnell*, 91 N.C. App. at 371, 354 S.E.2d at 747.

If we were to indulge the argument that the question of where the injury occurred was not at issue in this case, the evidence was, nonetheless, admissible because it was relevant and not otherwise barred. *See* N.C. Gen. Stat. § 8C-1, Rules 401 and 402. Defendant's Nevada conduct, "makes the existence of any fact that is of consequence to the determination of [alienation of affection] more or less probable than it would be without the evidence." *See* N.C. Gen. Stat. § 8C-1, Rule 401. Stated differently, Defendant's Nevada conduct makes it more likely to be true that Defendant "produced the loss of [Plaintiff and Wife's] love and affection." *See Nunn*, 154 N.C. App. at 533, 574 S.E.2d 35, 41–42 (citations omitted). Therefore, the evidence was relevant and because there was no existing rule barring the evidence, it was admissible, subject to any Rule 403 concerns. *See* N.C. Gen. Stat. § 8C-1, Rules 402 and 403. The trial court considered the applicable law and, in its discretion, determined the probative value of the evidence was not "substantially outweighed" by the risk of "unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403.

If Defendant was concerned that the jury would improperly base its verdict on acts that would not support a claim for alienation of affection, Defendant should have requested a limiting instruction to this end; Defendant did not do so. *See State v. Coffey*, 326 N.C. 268, 286, 389 S.E.2d 48, 59 (1990) ("The admission of evidence which is competent

for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions."). Accordingly, the trial court did not abuse its discretion by admitting the evidence.

V. Conclusion

In sum, the trial court did not violate the doctrine of issue preclusion by admitting Plaintiff's phone-call and location evidence, did not err by denying Defendant's motion for a directed verdict, did not err by sending the punitive-damages question to the jury, and did not err by admitting evidence of Defendant's out-of-state conduct. The issue of whether the trial court erred by admitting evidence from the App is not preserved for our review.

NO ERROR.

Judges ZACHARY and WOOD concur.

CHAD GARDNER, LISA GARDNER, LONNIE NORTON, HOPE NORTON, THE TOWN OF DOBBINS HEIGHTS AND THE CITY OF HAMLET, PLAINTIFFS
v.
RICHMOND COUNTY, DEFENDANT

No. COA21-600-2

Filed 19 February 2025

Zoning—standing—allegations sufficient—pleading of special damages not required

In a declaratory action brought by four individual and two municipal plaintiffs (a city and a town)—seeking a determination that the county's rezoning of certain property (from primarily residential to wholly heavy industrial) was void—the trial court erred in allowing defendant county's motion to dismiss as to the town on the basis of lack of standing. The town's complaint sufficiently alleged a direct and adverse effect from the rezoning decision, including that it implicated a public water supply system installed in a creek proximate to the subject property that served the town. Further, unlike challenges to quasi-judicial rezoning, challenges to legislative rezoning—such as the act of the county's board of commissioners at issue in this case—do not require a pleading of special damages.

Appeal by plaintiff Town of Dobbins Heights from order entered 14 June 2021 by Judge Dawn M. Layton in Superior Court, Richmond County. Heard in the Court of Appeals 5 April 2022 and opinion filed 2 May 2023. Remanded to this Court by order of the North Carolina Supreme Court 18 October 2024.

The Brough Law Firm, PLLC, by T.C. Morphis, Jr. and Brady N. Herman, for plaintiff-appellant.

McGuireWoods LLP, by Henry L. Kitchin, Jr. and Caroline E. Keen, for defendant-appellee.

STROUD, Judge.

Plaintiff-Appellant Town of Dobbins Heights ("Plaintiff") appeals from the part of the trial court's order granting Defendant-Appellee Richmond County's 12(b)(1) motion to dismiss due to Plaintiff's lack of standing. Because Plaintiff made sufficient allegations to establish standing to bring a declaratory judgment action and did not need to further plead special damages, we reverse the trial court's order as is applied to Plaintiff.

I. Background

On 3 December 2020, four individual plaintiffs and two municipal plaintiffs filed a verified complaint in Superior Court, Richmond County "seeking a declaratory judgment that the rezoning" of certain property "by the Richmond County Board of Commissioners on [8 October 2020] is void and of no effect[.]" The municipal plaintiffs included the City of Hamlet and Plaintiff Town of Dobbins Heights.

Plaintiffs allege that in August 2020, the Seaboard Coastline Railroad Company ("CSX") submitted a rezoning application to the Richmond County Board of Commissioners seeking to rezone about 167 acres of property ("the Property") owned by CSX in southeastern Richmond County from "Rural-Residential" and "Agricultural Residential" to "Heavy Industrial." These residential zoning districts were established in about 2003 under a "Zoning Ordinance" adopted by Defendant that "govern[ed] and regulate[d] the use of land in Richmond County located outside municipal corporate limits." The complaint alleged "[t]he Property is [located] approximately one and a half miles from Hamlet's extraterritorial jurisdiction, and approximately two and [a] half miles from both Hamlet's and Dobbins Heights[']s] corporate limits." Located "less than 2,500 feet" from the Property is the "Marks Creek Property," a

parcel that holds "a body of water that both the Town of Dobbins Heights and the City of Hamlet use as their primary source of drinking water."

CSX sought to rezone the Property to allow an Ohio-based corporation, International Tie Disposal, LLC, to construct and operate a biochar production facility. This facility, as stated in the "Air Quality Construction Permit Application" submitted by International Tie to the North Carolina Department of Environmental Quality, would " 'cook[]' untreated lumber and creosote-treated railroad ties through a pyrolysis process" to produce charcoal. The complaint alleges "creosote is a known carcinogen, and the burning of carcinogens can create harmful toxins and air pollution that are detrimental to the health of humans and animals." The "pyrolysis process" would also allegedly emit air pollutants such as "nitrogen oxide, carbon monoxide, volatile organic compounds (including methanol), . . . particulate matter[,] . . . benzene, methylene chloride, chloroform, tetrachloroethylene ('PCE'), and trichloroethylene ('TCE')."

On 8 September 2020, the Richmond County Planning Board met to consider CSX's rezoning application and "unanimously voted to recommend approval to the County" Board of Commissioners, the entity responsible for granting or denying zoning amendments. On 6 October 2020, the Board of Commissioners met and held a public hearing to consider the rezoning application. At this hearing, Board of Commissioners' staff presented emails and letters submitted by local residents expressing their concerns about the application and proposed biochar facility. These residents expressed concerns about "decreasing property values, financial declines in nearby businesses, increasing air and water pollution, increasing traffic and noise, and . . . significant environmental impacts to wildlife and the surrounding area." The Nortons, individual plaintiffs in this action, expressed concerns about the quality of community drinking water because of the close proximity of the proposed site to the Marks Creek Property.

The Board of Commissioners reconvened on 8 October 2020 to vote on CSX's rezoning application. Board of Commissioners' staff presented additional emails and letters submitted within 24 hours after the close of the 6 October 2020 public hearing. After hearing and considering the final rounds of public comments, the Board of Commissioners voted to approve CSX's rezoning application; the Property was rezoned to Heavy Industrial.

The municipal plaintiffs alleged they have standing to challenge the rezoning "because International Tie's proposed biochar production

facility plant will have a significant negative impact" on the water supply and "general quality of life for the residents[.]" Specifically, they contend: they have "a specific personal and legal interest in the subject matter affected by the Rezoning and are directly and adversely affected thereby"; International Tie's use of the Property would be "an invasion of a legally protected interest that is concrete, particularized, actual and imminent"; and that an infringement on this interest would be "fairly traceable to the Rezoning, and it is likely as opposed to merely speculative that these injuries will be redressed by a decision in this case that is favorable to the Municipal Plaintiffs."

Plaintiffs first claim Defendant failed to comply with the statutory requirements for consistency statements under North Carolina General Statute Section 153A-341(b) (repealed and recodified in North Carolina General Statute Section 160D-605 (2023)).[1] Second, Plaintiffs claim Defendant failed to consider all permissible uses allowed in the Heavy Industrial zoning district, and thus "the [r]ezoning is void and of no effect under the doctrine established in *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971)[,] and more recently articulated in *Hall v. City of Durham*, 323 N.C. 293, 372 S.E.2d 564 (1988)." Plaintiffs requested the trial court to declare the zoning amendment "void and of no effect," among other relief.

On 5 February 2021, Defendant served upon Plaintiffs a motion to dismiss under Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending a lack of standing and that Plaintiffs failed to assert any claims upon which relief could be granted. Defendant's motion asserted the municipal plaintiffs lacked standing to bring a declaratory judgment action because a declaratory judgment action could only be challenged "by a person who has a specific personal and legal interest in the subject

---

1. Chapters 153A and 160A of the General Statutes were repealed, rewritten, and reenacted in Chapter 160D by North Carolina Session Laws 2019-111 and 2020-25 (amending Session Law 2019-111) in June 2020. *See* 2019 N.C. Sess. Law 111, § 2.2; 2020 N.C. Sess. Law 25. North Carolina General Statute Section 160D-605, governing statements of consistency, became effective 19 June 2020, shortly before the complaint was filed in this case. *See* N.C. Gen. Stat. § 160D-605 (2020). However, the Session Law enacting North Carolina General Statute Section 160D-605 stated "[v]alid local government development regulations" in effect when the amendments became effective "remain in effect but local governments shall amend those regulations to conform to the provisions of" the amendments "on or before July 1, 2021[;]" in other words, local governments had approximately one year to comply with the amendments. *See* 2020 N.C. Sess. Laws 25, § 51(b). Here, both parties and the trial court relied on North Carolina General Statute Section 153A-341(b) in the proceeding below, and no party addresses whether Defendant's zoning ordinance is compliant with North Carolina General Statute Section 160D-605.

matter affected by the zoning ordinance and who is directly and adversely affected thereby." Defendant also argued the municipal plaintiffs must show special damages "distinct from the rest of the community."

On 24 May 2021, the trial court held a hearing on Defendant's motion to dismiss. As to the first claim regarding North Carolina General Statute Section 153A-341(b), the trial court allowed Defendant's motion and dismissed the claim as to all parties, stating "[t]he [c]ourt finds that the consistency statement adopted by the Richmond County Board of Commissioners is sufficient under N.C. Gen. Stat. § 153A-341(b) and is, therefore, not subject to further review by the [c]ourt." As to the second claim that the Board of Commissioners "failed to consider all permissible uses in the Heavy Industrial zoning district[,]" the trial court denied the motion to dismiss. Further, the trial court denied Defendant's motion to dismiss for lack of standing under Rule 12(b)(1) as to the City of Hamlet, but granted the motion as to lack of standing as applied to Plaintiff.

On 6 July 2021, Plaintiff timely appealed "the portion of the [trial court's] Order granting the Motion to Dismiss as to the Town of Dobbins Heights for lack of standing pursuant to N.C. R. Civ. P. 12(b)(1)."

Originally, this Court dismissed Plaintiff's appeal as interlocutory, holding Plaintiff "failed to demonstrate a substantial right that would be impacted by this Court's failure to immediately hear its appeal[.]" *See Gardner v. Richmond Cnty.*, No. COA21-600, 288 N.C. App. 637, 885 S.E.2d 862, slip op. at 3 (2023) (unpublished). On discretionary review, our Supreme Court held Plaintiff "did more than baldly assert a right of immediate appeal under *Creek Pointe*[,]" and "adequately explained why the particular facts of this case satisfy the substantial rights test based on the holding in *Creek Pointe*." *Gardner v. Richmond Cnty.*, 386 N.C. 594, 595, 906 S.E.2d 464, 464 (2024) (per curiam) (citation omitted). Our Supreme Court reversed and remanded to this Court to "address the parties' competing arguments regarding the issue of standing." *Id.*

II. Standing

Plaintiff argues it has standing to challenge Defendant's rezoning amendment under the North Carolina Declaratory Judgment Act ("DJA"), N.C. Gen Stat. § 1-253 (2023), as well as the standard established by our Supreme Court's holding in *Committee to Elect Dan Forest v. Employees Political Action Committee (EMPAC)*, 376 N.C. 558, 853 S.E.2d 698 (2021). Defendant argues, however, Plaintiff "mischaracterizes the standing analysis in *Committee to Elect Dan Forest*" and has not "satisf[ied] the DJA's requirements to bring a claim under the Act."

Further, Defendant also argues Plaintiff was required to allege special damages that were separate and distinct from the rest of the community to have standing. We reverse the trial court's order granting Defendant's motion to dismiss as Plaintiff's allegations assert standing to challenge Defendant's rezoning decision and it was not required to plead special damages.

"Standing is properly challenged by a 12(b)(1) motion to dismiss, or 12(b)(6) motion to dismiss for a failure to state a claim upon which relief may be granted." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011) (citation omitted). This Court reviews a trial court's granting of a motion to dismiss for lack of standing *de novo*:

> A ruling on a motion to dismiss for want of standing is reviewed de novo. In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party. In our analysis of standing, we also consider that North Carolina is a notice pleading jurisdiction, and as a general rule, there is no particular formulation that must be included in a complaint or filing in order to invoke jurisdiction or provide notice of the subject of the suit to the opposing party.

Metcalf v. Black Dog Realty, LLC, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009) (citations and quotation marks omitted).

In *Taylor v. City of Raleigh*, our Supreme Court determined a party has standing to challenge a rezoning ordinance when they have "a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby." 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976) (citations omitted). Following *Taylor*, in light of the Supreme Court of the United States' decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351 (1992), this Court applied a three-part test in determining whether a party had standing to challenge legislative rezoning decisions:

> The three elements of standing are:
>
> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Morgan v. Nash Cnty., 224 N.C. App. 60, 65, 735 S.E.2d 615, 619 (2012) (citations and quotation marks omitted). The North Carolina Supreme Court further discussed statutorily conferred standing in *Committee to Elect Dan Forest*:

> In summary, our courts have recognized the broad authority of the legislature to create causes of action, such as "citizen-suits" and "private attorney general actions," even where personal, factual injury did not previously exist, in order to vindicate the public interest. *In such cases, the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute.* There is no further constitutional requirement because the issue does not implicate the concerns that motivate our standing doctrine. The existence of the legal right is enough.

Comm. to Elect Dan Forest, 376 N.C. at 599, 853 S.E.2d at 727-28 (emphasis added) (citation omitted). Our Supreme Court held the North Carolina Constitution does not impose a requirement to allege an "injury in fact" when challenging the validity of a statute, but instead that limit is imposed as "a rule of prudential self-restraint" in cases challenging the constitutionality of government action to ensure our courts only address actual controversies. *Id.* at 608, 853 S.E.2d at 733. As to establishing a specific claim under a statute:

> When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "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, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, *even where a plaintiff has no factual injury and the action is solely in the public interest*, the plaintiff has standing to vindicate the legal right so long as he is *in the class of persons on whom the statute confers a cause of action.*

Id. (emphasis added) (citation, quotation marks, and footnote omitted). As to showing a plaintiff was among "the class of persons on whom the

statute confers a cause of action[,]" *see id.*, the Court further explained *via* a footnote:

> Showing a party falls within the class of persons on whom the statute confers a cause of action may require a showing of some special injury depending on the statutory terms. For instance, our zoning statutes confer standing to maintain a cause of action in the nature of certiorari appealing a quasi-judicial zoning action on certain classes of persons, including persons who will suffer special damages as the result of the decision being appealed. In certain cases, a cause of action may be implied from the statutory scheme. For example, to be entitled to administrative hearing under the NCAPA, a petitioner must show they are a "party aggrieved" by agency action, but where the underlying organic statute does not expressly create a right to a hearing, we have nevertheless held that those who alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the underlying statute, would have a right to an administrative hearing under the NCAPA as a "person aggrieved."

Id. at 608 n. 51, 853 S.E.2d at 733 n. 51 (citations, quotation marks, and brackets omitted).

Under our Supreme Court's decision in *Committee to Elect Dan Forest*, a two-step analysis determines whether a plaintiff has standing to challenge a legislative zoning amendment. First, it must be determined whether an alleged statute confers a cause of action to a plaintiff. *See id.* at 599, 853 S.E.2d at 727. If a statutory cause of action is conferred, it must then be determined whether the plaintiff has satisfied and sufficiently alleged the statutory requirements in bringing a claim. *See id.*

Defendant does not challenge the first step in the analysis, conceding the DJA *does* confer a legal right and cause of action on a Plaintiff. As for the second step in the analysis, whether Plaintiff has "satisfie[d] the requirements to bring a claim under the statute[,]" *id.*, the DJA provides:

> Any person . . . whose rights, status or other legal relations are *affected* by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2023) (emphasis added). Under the DJA, so long as Plaintiff sufficiently alleged it was "affected by" Defendant's decision to rezone the Property, Plaintiff is within the class of persons upon whom the DJA confers a cause of action, and Plaintiff is "guarantee[d] standing to sue" and seek a declaratory judgment to clarify its legal rights and relations. *See Comm. to Elect Dan Forest*, 376 N.C. at 607, 853 S.E.2d at 733. Defendant contends Plaintiff is not among the class of persons sufficiently "affected by" the rezoning ordinance and does not have standing to challenge the ordinance.

As to whether Plaintiff has sufficiently alleged it was "affected by" the rezoning decision, Plaintiff refers this Court to the allegations of the complaint and argues the allegations sufficiently allege the infringement of a legal right. Defendant, however, argues the holding in *Taylor* is still the sole test to determine whether a plaintiff is sufficiently "affected by" a zoning decision and that *Committee to Elect Dan Forest* does not abrogate *Taylor*. Defendant contends, under *Taylor*, Plaintiff has not met the standard in alleging it was "directly and adversely affected" by the zoning decision. *See Taylor*, 290 N.C. at 620, 227 S.E.2d at 583.

To an extent, we agree with Defendant's argument that *Committee to Elect Dan Forest* does not abrogate *Taylor*; instead, it lays out a broader framework within which *Taylor* fits. In *Taylor*, our Supreme Court determined municipal zoning ordinances may only be challenged through the DJA "by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby." *Id.*

In *Taylor*, the plaintiff landowners challenged a rezoning ordinance that would allow the defendant to construct new apartment buildings and townhomes. Our Supreme Court held "[t]he undisputed evidence discloses that the impact of the rezoning ordinance on any of the plaintiffs was minimal." *Id.* In support of this holding, the Court noted "[t]he property of [the] plaintiffs Dunn on Boxwood Drive is one-half mile or more from the northern (closest) boundary of the rezoned 39.89 acres and the property of the other plaintiffs is farther from said northern boundary." *Id.* Additionally, "[p]rior to the bringing of this action neither [the] plaintiffs nor any of those who protested the rezoning of the entire 85-acre tract had attacked, by protest or by lawsuit, the rezoning of the 39.89 acres farthest from them." *Id.* The rezoning amendment at issue also "did not, for the first time, authorize multi-family dwellings in the area; it merely increased the permissible types and units of dwellings." *Id.* at 621, 227 S.E.2d at 583-84. The *Taylor* Court concluded:

> On this record we would be unwilling to hold that plaintiffs have established that they are persons aggrieved by the rezoning ordinance. However, in the circumstances here involved, we do not base decision solely on the ground [the] plaintiffs are not sufficiently directly and adversely affected by the rezoning ordinance to entitle them to attack it. Rather, we treat [the] plaintiffs' tenuous standing as a circumstance in considering whether [the] plaintiffs' belated attack on the rezoning ordinance is barred by laches.

Id. at 621, 227 S.E.2d at 584 (citation omitted).

We believe the facts presented here, and the allegations in Plaintiff's complaint, taken as true and in the light most favorable to Plaintiff are distinguishable from those present in *Taylor*. Here, unlike *Taylor*, the proposed rezoning ordinance would completely change the permitted uses of the Property at issue from primarily residential to wholly Heavy Industrial. *See id.* This rezoning would explicitly allow for the erection of International Tie's biochar production facility, an operation entirely different from residential land use.

In the complaint, Plaintiff clearly alleges how the erection of this biochar facility would directly and negatively impact the community, such as the burning of carcinogens, releasing a number of "toxic and harmful air pollutants," potential contamination to local water supply, and "traffic from industry" that "would disproportionally affect the road network of" Plaintiff. We note the only differences between the allegations of the municipal plaintiffs are that the City of Hamlet owns the public water supply system installed in Marks Creek, even though this system "serves over 10,000 people, including the residents of the City of Hamlet" *and* Plaintiff, and that there is a small difference between the proximity of each municipality's borders to the Property.

Plaintiff has satisfied the requirements to bring a claim under the DJA in sufficiently alleging it was "affected by" Defendant's rezoning ordinance. The DJA establishes a "legal right" for Plaintiff to challenge Defendant's rezoning ordinance, and the assertion of an "injury in fact" was not required for Plaintiff to have standing to challenge the ordinance. *See Comm. to Elect Dan Forest*, 376 N.C. at 608, 853 S.E.2d at 733. Further, even in applying the standard in *Taylor*, Plaintiff has sufficiently alleged a direct and adverse effect from the rezoning amendment.

As for Defendant's second argument asserting Plaintiff was required to allege special damages, separate and distinct from the rest

of the community, we do not agree. In *Village Creek Property Owners' Association Inc. v. Town of Edenton*, this Court considered whether "a party seeking to challenge a zoning ordinance by way of a declaratory judgment action is required to allege special damages[.]" 135 N.C. App. 482, 485, 520 S.E.2d 793, 795 (1999). In *Village Creek*, the "[d]efendants argue[d] [the p]laintiffs' complaint was properly dismissed for lack of standing because [the p]laintiffs failed to allege special damages in their complaint." *Id.* (footnote omitted). This Court disagreed, concluding:

> A party has standing to challenge a zoning ordinance in an action for declaratory judgment only when it has a specific personal and legal interest in the subject matter affected by the zoning ordinance and is directly and adversely affected thereby. The standing requirement for a declaratory judgment action is therefore similar to the requirement that a party seeking review of a municipal decision by writ of certiorari suffer damages distinct from the rest of the community. When a party seeks review by writ of certiorari, however, our courts have imposed an additional requirement that the party allege special damages in its complaint. This requirement arises from N.C. Gen. Stat. § 160A-388(b) and N.C. Gen. Stat. § 160A-388(e), which allow only "aggrieved" persons to seek review by writ of certiorari.
>
> In contrast, the Declaratory Judgment Act, authorizing the filing of declaratory judgment actions, does not require a party seeking relief be an "aggrieved" person or to otherwise allege special damages. Furthermore, our courts have not previously held that special damages must be alleged in a declaratory judgment action.
>
> . . . .
>
> Because the zoning statute (the source of the requirement that special damages be alleged in the context of writ of certiorari petitions) does not require parties to be "aggrieved" in order to file a declaratory judgment action and because the Declaratory Judgment Act does not require a pleading of special damages, we hold it is not required. [The p]laintiffs' complaint should therefore not be dismissed for lack of standing based on [the p]laintiffs' failure to allege special damages.

Id. at 485-86, 520 S.E.2d at 795-96 (citations, quotation marks, ellipses, emphasis, and footnote omitted).

Further, this Court in *Village Creek* noted:

> We are aware of this Court's opinion in *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986), which states a party challenging a rezoning ordinance via a declaratory judgment action "must allege and show damages distinct from the rest of the community." *Id.* (citing *Heery*, 61 N.C. App. at 612, 300 S.E.2d at 869). The North Carolina Supreme Court addressed the *Davis* opinion in *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 503–04 n. 4, 434 S.E.2d 604, 610 n. 4 (1993), and, without deciding the issue, noted that *Davis* "alludes to a requirement for 'special damages' distinct from those of the rest of the community to confer standing to challenge a rezoning." *Id.* The *Lancaster* court also noted, however, that the test for standing provided in *Davis* was taken from cases challenging standing in quasi-judicial, rather than legislative, actions. *Id.* We therefore do not read *Davis* as requiring a party challenging a legislative zoning decision in a declaratory judgment action to allege special damages in its complaint.

Id. at 486 n.4, 520 S.E.2d at 796 n.4. Therefore, challenges to quasi-judicial zoning decisions require a pleading of special damages, but challenges to legislative zoning decisions do not. *See id.* In distinguishing quasi-judicial zoning decisions from legislative zoning decisions, this Court in *Kerik v. Davidson County* explained:

> [W]e recognize that zoning decisions regarding conditional use and special use permits are quasi-judicial in nature, and thus require judicial review[.]
>
> . . . .
>
> However, in the case *sub judice*, we are dealing with a Board of Commissioners' rezoning decision.
>
> . . . .
>
> Accordingly, adoption, amendment, or repeal of a zoning ordinance is a legislative decision that must be made by the elected governing board—the city council or the county board of commissioners[.] In other words, rezoning is a legislative act[.]

145 N.C. App. 222, 227-28, 551 S.E.2d 186, 190 (2001) (citations, quotations marks, original brackets, and emphasis omitted).

Here, Defendant's rezoning amendment was a legislative act decided by the Board of Commissioners. Because this amendment was legislative, not quasi-judicial, Plaintiff was *not* required to allege special damages within its complaint, separate and distinct from the general community.

For the foregoing reasons, Plaintiff sufficiently alleged it was "affected by" Defendant's rezoning ordinance. Plaintiff is within the "class of persons" upon which the DJA has conferred a legal right and cause of action to challenge the ordinance. This alleged "infringement of a legal right" was sufficient for Plaintiff to obtain standing, and Plaintiff was not further required to allege an "injury in fact," nor special damages.

III. Conclusion

Plaintiff's complaint sufficiently alleged it was "affected by" Defendant's rezoning ordinance, allowing it standing under the DJA to bring its declaratory judgment action. Because Plaintiff has sufficiently asserted standing, the trial court erred in granting Defendant's 12(b)(1) motion to dismiss. We reverse the trial court's order granting Defendant's motion to dismiss as applied to Plaintiff and remand.

REVERSED AND REMANDED.

Judges TYSON and ZACHARY concur.

HANSLEY v. HANSLEY

[297 N.C. App. 764 (2025)]

CURTIS HANSLEY AND WIFE, MARJORIE J. HANSLEY, PLAINTIFFS
v.
JAMES HANSLEY, JR., ZANETTA GRANT, TERRI DONNELL, JOSEPH POLLOCK, JOHN POLLOCK, CARL HANSLEY, MYRNA HANSLEY, ANDREA HANSLEY, GLENDA HANSLEY, OLIVER HANSLEY, SR., DESIREE HANSLEY, CHARLES MCKOY, GERALDINE POLLOCK, RICHARD T. RODGERS, IN HIS APPOINTED CAPACITY AS COMMISSIONER, AND HAMPSTEAD INVESTMENTS, LLC, DEFENDANTS

No. COA24-267

Filed 19 February 2025

Civil Procedure—Rule 60—partition order—void for lack of personal jurisdiction—abuse of discretion

In a special proceeding initiated by the filing of a petition to partition real property, where the clerk of court entered an order of default allowing the petition without requiring proof of service of the summons and petition on appellee respondents—who failed to appear in the proceeding—the trial court abused its discretion in denying the Civil Procedure Rule 60 motion for relief filed by appellee respondents because N.C.G.S. § 1-75.11 (regarding proof of service required before entering judgment against defendants who failed to timely appear in an action) rather than N.C.G.S. § 1-75.10 (regarding proof of service required before entering judgment against defendants who appear in an action but challenge service) was applicable, and no affidavit or other evidence was filed in the superior court to establish grounds for personal jurisdiction, as mandated by section 1-75.11.

Appeal by Plaintiffs from orders entered 18 May 2023 and 28 July 2023 by Judge G. Frank Jones in Pender County Superior Court. Heard in the Court of Appeals 9 October 2024.

Q Byrd Law, by Quintin D. Byrd, Esq., for Plaintiffs-Appellants.

Blackburn & Ording, PLLC, by Kenneth Ording, Esq., for Defendants-Appellees.

COLLINS, Judge.

The dispositive issue on appeal is whether the clerk had jurisdiction to enter an order granting a petition to partition real property. This case is governed by N.C. Gen. Stat. § 1-75.11 and controlled by *Hill v. Hill*,

11 N.C. App. 1 (1971).[1] Because the clerk failed to require proof of service of the summons and petition upon respondents, who failed to appear in the proceeding, before entering the order, the order was void for lack of personal jurisdiction. Accordingly, the trial court abused its discretion by denying Plaintiffs relief pursuant to Rule 60.

I. Background

A special proceeding in 2022 SP 155 was commenced on 30 August 2022 by James Hansley ("James")[2] filing a Petition to Partition Real Property. A Certificate of Service signed by James' attorney on 31 August 2022 certifies that a "copy of the foregoing Petition was served upon the Respondents via USPS Certified first class mail postage paid return receipt requested" and lists all the respondents' names and addresses, including Curtis Hansley and Marjorie J. Hansley ("the Hansleys").[3] The Certificate of Service is file stamped, but the stamp is illegible.

James filed an Amended Petition to Partition Real Property on 9 September 2022. A Certificate of Service signed by James' attorney on that date certifies that a "copy of the foregoing Petition was served upon the Respondents via USPS Certified first class mail postage paid return receipt requested" and lists all the respondents' names and addresses, including the Hansleys.

James also caused an Amended Summons to be issued on 9 September 2022. In the section designated for the names of the respondents is the typed notation, "See Attached List." The second page of the Amended Summons where Return of Service is intended to be noted is blank. The attached list lists the names and addresses of all the respondents, including the Hansleys.

On 9 November 2022, James filed a Notice of Hearing on his Petition to Partition Property for 1 December 2022 before the Pender County Clerk of Court. The Notice of Hearing included a Certificate of Mail signed by James' attorney which certifies that a "copy of the foregoing Notice of Hearing was served upon the Respondents via USPS first class mail requested" and lists the names and addresses of all the respondents, including the Hansleys.

---

1. Neither authority was cited by either party to this Court or to the trial court.

2. James Hansley is Petitioner in the special proceeding and Defendant in the present action.

3. Curtis Hansley and Marjorie J. Hansley are Respondents in the special proceeding and Plaintiffs in the present action.

Also on 9 November 2022, the Deputy Assistant Clerk of Superior Court entered an Entry of Default allowing James' Motion of Entry of Default[4] and stating,

> [T]he Court has reviewed the record herein and has determined that the Respondents have been served with summons and complaint and have failed to plead or appear with the time allowed by the Rules of Civil Procedure, or that Respondents are otherwise subject to default judgment as provided by the Rules, and that Petitioner is entitled to Entry of Default against Respondents.

The Petition to Partition Real Property was heard by the Clerk on 1 December 2022. None of the respondents, including the Hansleys, were present. On 14 December 2022, the Clerk entered an Order granting the Petition ("Partition Order"), ordering the subject property partitioned via private sale, and ordering James' costs and attorney fees be paid out of the sales proceeds.

The Clerk found, in pertinent part:

> 5. All Respondents in this proceeding have been duly served with the Petition to Partition Real property and the amended Petition and the Special Proceeding Summons.
>
> 6. None of the Respondents have answered the Petition and an entry of default was entered on November 9, 2022.

The Clerk appointed Richard Rodgers to sell the Property. The Clerk further ordered the sales proceeds be divided between the respondents according to their interests.

A Certificate of Mail was signed by James' attorney on 16 December 2022 and filed with the Court on 19 December 2022 certifying that a "copy of the foregoing Order[5] was served upon the Respondents via USPS first class mail requested" and listing the names and addresses of all the respondents, including the Hansleys.

On 27 January 2023, Rodgers filed a Report of Sale stating that, in accordance with the Partition Order, he had offered the Property at a private sale and had received a bid from Hampstead Investment Group, LLC ("Hampstead") in the amount of $230,000. A Certificate of

---

4. This document is not included in the Record but is referenced in the Entry of Default.

5. Presumably the Partition Order.

Service signed by Rodgers and filed with the Court on 27 January 2023 states, "This signature below is a certification that on the date below, the Petitioner(s), by and through its attorney, served upon the below Petitioner and Respondents a Report of Sale by depositing the same into the custody of the United States Postal Service, postage pre-paid, addressed to:" and lists the names and addresses of all the respondents, including the Hansleys. The Hansleys allege that this was their first notice of the partition proceeding.

On 20 February 2023, copies of United States Postal Service Return Receipts For Certified Mail were filed with the Pender County Clerk of Superior Court. Included with the filing were copies of two Return Receipts addressed to "Curtis & Marjorie Hansley." The first Return Receipt indicates that it was delivered on 2 September 2022. In the section designated to be completed upon delivery, the signature is illegible and the box for "agent" is checked. The second Return Receipt indicates that it was delivered on 15 September 2022. In the section designated to be completed upon delivery, the signature is illegible and the box for addressee is checked.

The bidding on the Property continued until 17 April 2023 when Hampstead entered the winning bid of $489,195. Rodgers filed a Motion for Confirmation of this bid on 20 April 2023. On 1 May 2023, the Clerk entered an Order for Confirmation, ordering Rodgers to deliver a deed to Hampstead.

On 4 May 2023, the Hansleys filed a Complaint for Mandatory Injunctive Relief and Set Aside of Court's Order against James, all other respondents to the special proceeding, Rodgers, and Hampstead. The basis of the Hansleys' complaint was an alleged lack of personal jurisdiction over them for lack of service of the Petition, Amended Petition, or Amended Summons.

James filed a Pre-Answer Motion to Dismiss on 11 May 2023. On 12 May 2023, James filed an Answer and Motion to Dismiss and also filed an Affidavit averring the following:

> 1) that a copy of the summons and complaint in the action entitled James Hansley, Jr. vs Curtis Hansley et al, File # 22SP155, was deposited in the post office for mailing by registered or certified mail, return receipt requested;" (sic)
>
> 2) that it was in fact received as evidenced by the attached registry receipt.
>
> 3) Copy of receipt and green card attached.

This matter was heard on 15 May 2023 in superior court. On 18 May 2023, the trial court denied the Hansleys relief pursuant to Rule 60(b) and dismissed their complaint with prejudice. The Hansleys timely filed a Rule 59 Motion for New Trial, asserting that they had discovered new evidence indicating that they had not been served with the petition and summons. The Rule 59 Motion came on for hearing on 25 July 2023; the trial court dismissed the Motion by order entered 28 July 2023.

On 28 August 2023, the Hansleys filed and served Notice of Appeal from both the 18 May 2023 order and the 28 July 2023 order.

II. Discussion

The Hansleys argue solely that the trial court abused its discretion by denying them relief pursuant to Rule 60(b)[6] because the Partition Order was void for lack of personal jurisdiction.

The standard of review of a trial court's denial of relief pursuant to Rule 60(b) is abuse of discretion. *Harris v. Harris*, 307 N.C. 684, 690 (1983). A trial court abuses its discretion when it makes an error of law. *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2 (2020).

Our General Statutes allow a court to "relieve a party . . . from a final judgment, order, or proceeding" where "[t]he judgment is void." N.C. Gen. Stat § 1A-1, Rule 60(b)(4) (2023). A judgment is void where the court lacks personal jurisdiction over the defendant. *See Hill*, 11 N.C. App. at 10.

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," *Fender v. Deaton*, 130 N.C. App 657, 659 (1998) (citation omitted), or (2) the defendant's voluntary appearance or consent to the court's jurisdiction. *Grimsley v. Nelson*, 342 N.C. 542, 545 (1996) (citations omitted). "[W]ithout such jurisdiction, a judgment against [a] defendant is void." *Freeman v. Freeman*, 155 N.C. App. 603, 606-07 (2002) (citations omitted).

---

6. Rule 60(b) applies to a final judgment, order, or proceeding entered by the trial court while Rule 60(c) applies to the same entered by the clerk. The Hansleys incorrectly alleged under Rule 60(b), instead of Rule 60(c), that the Partition Order was void for lack of personal jurisdiction over them. Regardless, this Court conducts the same analysis under both Rule 60(b) and (c). *See Flinn v. Laughinghouse*, 68 N.C. App. 476, 478 (1984) ("The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action. [N.C. Gen. Stat. §] 1A-1, Rule 60(b). Rule 60(c) incidentally establishes the same power in judges with respect to judgments rendered by the clerk.").

Rule 4 of the North Carolina Rules of Civil Procedure provides the methods of service of a summons and complaint to obtain personal jurisdiction over a defendant. Rule 4(j)(1)(c) permits service by certified mail "[b]y mailing a copy of the summons and of the complaint, . . . return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (2023).

"In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of [N.C. Gen. Stat. §] 1A-1, Rule 55, as well as [N.C. Gen. Stat. §] 1-75.11." *Hill*, 11 N.C. App. at 6-7. Pursuant to Rule 55, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead . . . and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default." N.C. Gen. Stat. § 1A-1, Rule 55(a) (2023). "[E]ntry of default does not require submission of jurisdictional proof." *Silverman v. Tate*, 61 N.C. App. 670, 673 (1983) (citations omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 55(a).

Unlike entry of default, however, "[w]here a defendant fails to appear in the action within apt time the court shall, *before entering a judgment against such defendant*, require proof of service of the summons in the manner required by [N.C. Gen. Stat. §] 1-75.10 . . . ." N.C. Gen. Stat. § 1-75.11 (2023) (emphasis added). Additionally, "[w]here a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, *to be made and filed*, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. . . ." N.C. Gen. Stat. § 1-75.11(1) (emphasis added).

Under N.C. Gen. Stat. § 1-75.10, where service of process is alleged to have been made by registered or certified mail pursuant to Rule 4(j)(1)(c), proof of service shall be 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).

Here, on James' motion, the Clerk entered default. This complied with Rule 55(a) and did not require jurisdictional proof. However, *before entering judgment*, the Clerk failed to "require proof of service of the summons." N.C. Gen. Stat. § 1-75.11. The Clerk concluded in the Partition Order that it had personal jurisdiction over the parties based on the following finding: "All Respondents in this proceeding have been duly served with the Petition to Partition Real property and the amended Petition and the Special Proceeding Summons." But there is no evidence in the record to support this finding at the time the Partition Order was entered – such evidence was filed months after the Partition Order was entered.

Approximately two months after the Partition Order was entered, on 20 February 2023, copies of United States Postal Service Return Receipts For Certified Mail were filed with the Clerk. Included with the filing were copies of two Return Receipts addressed to "Curtis & Marjorie Hansley." Approximately five months after the Partition Order was entered, on 12 May 2023, James' attorney filed an affidavit averring that service had been made. As the Clerk failed to "require proof of service of the summons" before entering the Partition Order, the Partition Order was void for lack of personal jurisdiction over the Hansleys. *See* N.C. Gen. Stat. § 1-75.11.

In his answer to the Hansleys' lawsuit and in his appellate brief, James asserts that he was not required to file an affidavit averring proof of service because he did not move for entry of default judgment.[7] This reflects a misapprehension of the law.

It is true that "[b]efore judgment by default may be had on service by registered or certified mail, [or] signature confirmation . . . , the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of [section] 1-75.10(a)(4), 1-75.10(a)(5), or 1-75.10(a)(6), as appropriate." N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2023). However, applicable in this case is N.C. Gen. Stat. § 1-75.11, titled "Judgment against nonappearing defendant, proof of jurisdiction," which requires proof of service of the summons in the manner required by section 1-75.10 before judgment is entered against a nonappearing defendant, even where a plaintiff has not moved for default judgment. N.C. Gen. Stat. § 1-75.11.

---

7. James' attorney also filed a "Motion to Strike Plaintiffs-Appellants' Reply Brief" with this Court on 12 September 2024. We deny the motion to strike.

James also argues, "[T]he filing of the Affidavit and the green, return-receipt cards was only triggered when [the Hansleys] commenced their lawsuit and challenged the service of summons, then section 1-75.10(a) and 1-75.10(a)(4) of the North Carolina General Statutes make it necessary for the filing of those documents and only because the [Hansleys] challenged the service." This too reflects a misapprehension of the law.

Section 1-75.10 governs proof of service of summons when a defendant appears in an action and challenges proof of service upon him. On the other hand, Section 1-75.11 governs proof of service of summons "[w]here a defendant fails to appear in the action within apt time," N.C. Gen. Stat. § 1-75.11, and a judgment is entered against them. In this case, the Hansleys failed to appear in the partition action. Default was entered by the Clerk and judgment was ultimately entered against them. Contrary to James' argument, the Hansleys' present action was not an appearance in the special proceeding for purposes of challenging jurisdiction.

III. Conclusion

Because the Clerk failed to require proof of service of the summons and petition in the manner required by N.C. Gen. Stat. §§ 1-75.10 and 1-75.11 before entering the Partition Order, the Partition Order is void for lack of personal jurisdiction. Accordingly, the trial court abused its discretion by denying the Hansleys' Rule 60(b) motion. The trial court's order denying the Hansleys relief pursuant to Rule 60(b) is reversed, the Clerk's Partition Order entered 14 December 2022 is vacated, and the matter is remanded to the trial court for remand to the Clerk for further proceedings.[8]

VACATED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge DILLON and Judge CARPENTER concur.

---

8. We note that N.C. Gen. Stat. § 1-108 provides that title to property acquired by a third party in good faith through a partition sale cannot be affected by a Rule 60 order setting aside the judgment ordering the sale. However, we further note that no party makes any argument under this statute, and there is nothing in the record indicating that title to the property subject to this action ever passed to Hampstead Investments, the high bidder at the partition sale.

IN RE G.B.G.

[297 N.C. App. 772 (2025)]

IN THE MATTER OF G.B.G. & R.J.W.
NO. COA24-473

Filed 19 February 2025

1. Appeal and Error—appellate jurisdiction—child neglect matter—proper party to sign notice of appeal—authorized representative

The notice of appeal in a child neglect and dependency matter—from an order dismissing allegations of neglect and dependency—was sufficient to confer jurisdiction on the appellate court where the notice was signed by a social worker as the authorized representative of the director of the county department of social services, as allowed by statute. Therefore, the appellate court denied respondent-parents' motion to dismiss the appeal and dismissed the department's petition for writ of certiorari as moot.

2. Appeal and Error—interlocutory order—child neglect matter—temporary dispositional order—appeal dismissed

A trial court's order dismissing an allegation that a child was a dependent juvenile was interlocutory because it was a temporary dispositional order; although the trial court also adjudicated the child as a neglected juvenile, the trial court's dismissal did not fully resolve the dependency claim because the order only contained an interim disposition and the matter had been scheduled for a disposition hearing. Therefore, the county department of social services' appeal challenging the temporary dispositional order was dismissed without prejudice.

3. Appeal and Error—appeal in child neglect matter—motion to strike guardian ad litem brief—proper party

In an appeal in a child neglect matter, in which the trial court dismissed allegations of neglect and dependency, the appellate court denied respondent-parents' motion to strike the guardian ad litem's brief, since the guardian ad litem (GAL) was a proper party in the matter. Although respondents argued that the GAL had not appealed and that it was merely standing in the stead of the county department of social services, which had appealed, respondents failed to cite to any binding authority or to a violation of a specific rule in support of their argument.

4. Child Abuse, Dependency, and Neglect—neglect allegation dismissed—lack of injurious environment—neglect of sibling differentiated

The trial court did not err by dismissing a county department of social services' allegation that respondent-parents' one-and-a-half-year-old baby was neglected, where the court's findings of fact were supported by evidence and, in turn, supported the court's conclusions. Although respondent-mother's fifteen-year-old daughter, who had recently joined the household, was adjudicated neglected (based on the teen's untreated mental health issues and attempts at self-harm, and respondent-mother's inadequate response), the teenager's situation was sufficiently different from the younger child's to warrant differing results on allegations of neglect. Similarly, there was no evidence that any arguments between respondent-father and the teenager (who was not his biological daughter) or respondent-father's prior usage of alcohol—for which respondent-father had sought treatment—had any adverse effect on the younger child or put her at substantial risk of impairment. Finally, the trial court had discretion to draw inferences from the evidence about whether conditions of the home rendered it an injurious environment for the younger child.

5. Child Abuse, Dependency, and Neglect—dependency allegation dismissed—at least one parent able to care for child

The trial court did not err by dismissing a county department of social services' allegation that a child was a dependent juvenile where, because there was evidence that at least one parent was able to provide care for the child, the trial court had no reason to consider whether respondent-parents had alternative childcare.

Appeal by Petitioner Watauga County Department of Social Services from order entered 21 February 2024 by Judge Matthew Rupp in Watauga County District Court. Heard in the Court of Appeals 8 October 2024.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer for the respondent-appellee mother.

Attorney Anne C. Wright for the petitioner-appellant Watauga County DSS.

Robinson & Lawing, L.L.P., by Attorney Christopher M. Watford for the respondent-appellee father.

Guardian ad Litem Program, by Staff Counsel Michelle FormyDuval Lynch for the respondent-appellee Guardian ad Litem.

STADING, Judge.

The Watauga County Department of Social Services ("WCDSS" or "Petitioner") appeals the trial court's dismissal of its petition alleging that R.J.W. ("Rose")[1] was a dependent and neglected juvenile. Additionally, Petitioner appeals from the interlocutory order after the trial court: (1) adjudicated G.B.G. ("Gemma") a neglected juvenile; and (2) dismissed its petition alleging that Gemma was a dependent juvenile. After careful review, we dismiss part of the appeal and affirm the trial court.

I. Background

Respondent-Mother ("Mother") and Respondent-Father ("Father") (collectively, "Respondents") lived together with their one-year-old biological daughter, Rose. In early 2023, the Columbus County Department of Social Services ("CCDSS") reached out to Mother and asked if her fifteen-year-old child by another father—Gemma—could come live with her and Father.[2] Mother notified CCDSS that she "was not ready, [her] house was a mess, [and that she] didn't know how to take care of [the] mental problems that [Gemma] was having." Nevertheless, Mother "consented" to this request in February 2023.

Soon thereafter, Respondents faced difficulties managing Gemma's behavior. The record reflects that Gemma would become "aggravated really easy with [Rose]," Mother, and Father. Gemma "would start throwing things[,] [s]he would not listen[,] [and] she . . . got violent with [Rose] . . . ." Mother, concerned with Gemma's behavior and wellbeing, sought assistance from Daymark Recovery Services due to Gemma being "on a lot of medications when [Mother] got her."

During the summer of 2023, Respondents arranged for Gemma to attend group therapy sessions, but "the class did not work with [their] schedule because [Gemma] didn't get home sometimes until after six . . . ." At the same time, Father battled alcohol addiction. Mother conceded "there was yelling, there [was] name calling, . . . and that [Father] was bipolar and needed medication." Mother stated that Father "had punched walls and thrown things when he was drinking, and . . . that she ha[d] told [Gemma] over and over to stay in her room, but that [Gemma]

---

1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the minor children).

2. Mother and Father are the biological parents of Rose, but Mother and a non-party are the biological parents of Gemma.

trie[d] to get in the middle" of these altercations. Gemma also engaged in self-harm behaviors. One incident involved Gemma cutting herself with scissors, and the second incident involved cutting herself with a butterknife. In response, Mother took Gemma to the hospital for treatment.

On 5 September 2023, WCDSS received a report indicating concerns about Gemma and Rose due to Father's ongoing alcohol addiction, fighting in the home, and Gemma's mental health. On 8 September 2023, a social worker visited the home and investigated these allegations. The social worker observed that the family home was in disarray. There were piles of trash, debris blocking the back entryway, clutter making it difficult to move within the home, dirty dishes, and dead bugs in the kitchen.

Upon speaking with Mother, the social worker learned that Father consumed alcohol regularly, suffered from bipolar disorder, called Mother names, and punched holes in the wall. Father told the social worker he struggled with alcohol addiction and mental health issues, but that Mother also "had mental health issues." He stated, "he had tried everything for his drinking," but still consumed "four to five [drinks] a day and dr[ank] almost every single day." Father said "he was going to go to detox but that he really wasn't willing to go beyond that because he needed to work and that as long as he was working[,] he would maintain sobriety." After the walkthrough and interviews, WCDSS requested that Mother place the children with a temporary safety provider, which she did.

On 11 September 2023, Mother and the social worker engaged in a follow-up discussion. According to the social worker:

> [Mother] indicated to me that she knew that things that were occurring in the home were not okay, that she had grown up in a home where there was a lot of fighting and her mom had addiction issues. And she does not want this for her kids. She knows the whole situation is not good and admits that they do need help. I thanked her for being honest with me . . . . She says that she cannot separate from [Father]. She would push him further, but at the same time, she would make sure that she and [Father] . . . will do what is needed to change the situation because she does not want to lose her children.

On 14 September 2023, WCDSS filed petitions alleging that Gemma and Rose were dependent and neglected juveniles. That same day, WCDSS was granted nonsecure custody of Gemma and Rose. On 21 February

2024, the trial court determined Gemma was a neglected juvenile, dismissed WCDSS's petition as to Rose, and dismissed the allegation of dependency as to Gemma.

With respect to Rose, the trial court's order stated:

> 5. Dismissal of Petition as to Juvenile [Rose]. As to [Rose], the Court concludes, as a matter of law, that [WCDSS] did not meet its burden of proof of showing by clear, cogent, and convincing evidence that the Juvenile was Neglected or Dependent. The Court bases this conclusion on the following findings of fact:
>
> - [ ] Mother and [ ] Father resided with [Rose] in a home cluttered with personal belongings. No evidence was presented tending to show that [Rose] was affected by the cluttered home or that such personal belongings created the potential of injury to [Rose].
> - [ ] Mother and [ ] Father left household cleaning products on countertops and the kitchen stove. No evidence was presented tending to show that such cleaning products were accessible and/or dangerous to [Rose]. Such cleaning products are commonplace in homes in this community.
> - [ ] Father testified that he suffers from alcohol addiction and entered alcohol rehabilitation twice in 2023. [ ] [Father] also testified that he no longer drinks alcohol and attends AA meetings 2-3 times per week. This testimony was uncontroverted. Furthermore, no evidence was presented showing that any alcohol consumption by [ ] [Father] affects his child, [Rose].
> - Finally, [ ] Mother and [ ] Father [ ] engage in arguments in the household. Such arguments have become less frequent since [ ] [Father] has been actively engaging in alcohol abstinence and attending AA meetings. No evidence was presented showing that [Rose] was present during such arguments nor that she was affected by such arguments in any way.

As for Gemma's dependency allegation, the trial court dismissed it because: (1) Respondents "have stable housing" and have lived together "in the same home . . . for four years"; (2) Father "attempted to be a father figure to [Gemma]"; and (3) both have provided "supervision to [Gemma]" despite her "behavioral health issues."

The trial court made the following findings to determine that Gemma was a neglected juvenile:

> a. [Gemma] suffers from untreated mental health issues, and Respondents have done very little, if anything, to treat such issues.
>
> b. Respondent[s] . . . have been aware of [Gemma's] mental health issues since at least March 2023 without taking appropriate steps to address them.
>
> c. Respondents have acknowledged that [Gemma] needs inpatient treatment before she can return home.
>
> d. [Gemma] used scissors to cut her arms and a butter knife to cut her throat in the fall of 2023. Respondent[s] . . . did not take sufficient measures to address these issues. After this incident, [ ] Mother failed to take [Gemma] to an important mental health appointment because [ ] Mother overslept. Exacerbating matters, [ ] Mother the failed to reschedule the appointment for her daughter.
>
> e. [ ] Mother provided no justifiable reasons for not attending nor ensuring [Gemma] attends online appointments to address the Juvenile's mental health needs.
>
> f. Respondent[s] . . . have engaged in name-calling and yelling in the presence of [Gemma]. [Gemma] has attempted to break up these arguments between Respondent[s] . . . .
>
> g. [Gemma] has also been present when such arguments have escalated to the point where [ ] [Father] has punched walls in their shared home, causing holes in the walls. [ ] [Father] also broke an interior door during one of these incidents during which [Gemma] was present.

Petitioner entered its notice of appeal on 29 February 2024. Respondents moved to dismiss the appeal since the notice of appeal lacked the signature of WCDSS's director. Petitioner responded to the motion to dismiss and alternatively petitioned for a writ of *certiorari* ("PWC") concerning the lack of the director's signature. Respondents also moved to strike the Guardian *ad Litem*'s ("GAL") brief for failure to timely file its notice of appeal because the GAL was, in effect, standing in the shoes of the appellant. In response, the GAL moved to disregard

or strike Respondents' motion, and in the alternative, moved to align with the Petitioner.

II. Jurisdiction

[1] We first address this Court's jurisdiction to consider Petitioner's appeal in view of: (1) Respondents' motion to dismiss; (2) Petitioner's PWC; and (3) whether the adjudication and dismissal pertaining to Gemma is interlocutory. For the reasons below, we deny Respondents' motion to dismiss the appeal. We also dismiss Petitioner's PWC as moot given that their notice of appeal properly conferred jurisdiction for the dismissal of the petition concerning Rose. We further decline review of the allegations pertaining to Gemma because the trial court's order is a temporary dispositional order.

"[T]o confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. N.C. Dep't of Revenue*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal. In addition, the rules of the Supreme Court that regulate appeals, such as Rule 3, are mandatory and must be observed." *Putman v. Alexander*, 194 N.C. App. 578, 582, 670 S.E.2d 610, 614 (2009) (cleaned up). Rule 3(b) provides that "[a]ny party entitled to an appeal under N.C. [Gen. Stat.] § 7B-1001(a) may take appeal by filing notice of appeal with the clerk of superior court in the time and manner set out in N.C. [Gen. Stat.] § 7B-1001(b) and (c) . . . ." N.C. R. App. P. 3(b) (2023). Turning to Section 7B-1001, the notice of appeal "shall be signed by both the appealing party and counsel for the appealing party." N.C. Gen. Stat. § 7B-1001(c) (2023).

In their motion to dismiss, Respondents argue that Petitioner's notice of appeal is defective because it "was signed only by DSS trial counsel, DSS appellate counsel, and a social worker supervisor." Specifically, Respondents contend that "[b]ecause [Petitioner's] notice of appeal was not signed by the Watauga County DSS director, the appeal must be dismissed." Our statute provides, "[t]he director may delegate to one or more members of his staff the authority to act as his representative." *Id.* § 108A-14(b) (2023). The notice of appeal was signed by the social worker as "Supervisor and Authorized Representative of Director of Watauga County Department of Social Services." Consequently, Petitioner's notice of appeal is sufficient to confer jurisdiction on this Court for Rose's petition. We therefore dismiss Petitioner's PWC as moot.

[2] While we have jurisdiction to address Petitioner's appeal concerning the dismissal of Rose's petition, we decline to review the dismissal of Gemma's dependency allegation since this order is a temporary dispositional order. *See* N.C. Gen. Stat. § 7B-1001(a)(3) (2023). "As a general matter, there is no right of immediate appeal from an interlocutory order, '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.' " *Matter of T.E.*, 252 N.C. App. 427, 797 S.E.2d 386 (2017) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). "N.C. Gen. Stat. § 7B–1001(a)(3) specifies that an adjudication order may only be appealed along with a corresponding disposition order, which is lacking in this case." *In re P.S.*, 242 N.C. App. 430, 432, 775 S.E.2d 370, 371 (2015). *See In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) ("Section 7B–1001 specifically delineates the juvenile orders that may be appealed and does not provide that a party may appeal a temporary dispositional order.").

Here, the trial court's order is captioned as the following: "ORDER ON ADJUDICATION AND INTERIM DISPOSITION[.]" Moreover, the last line of the trial court's order reads: "Next [h]earing. This matter shall be set for Disposition during the February 19-20, 2024, Juvenile Session of Watauga County District Court or as soon thereafter as it may be heard." Though the trial court disposed of Petitioner's dependency claim concerning Gemma by dismissal, it did not fully resolve that matter since the adjudication of neglect only contained an interim disposition and was scheduled for a disposition hearing. *See In re P.S.*, 242 N.C. App. at 432, 775 S.E.2d at 372. Therefore, the appeal challenging the temporary dispositional order for Gemma is dismissed without prejudice.

III. Motion to Strike GAL's Brief

[3] Respondents' move this Court to strike the GAL's brief. Citing unpublished authority, Respondents contend this Court should disregard the GAL's brief because "despite not appealing, [the] GAL is essentially operating as an appellant by tacitly endorsing [WC]DSS'[s] request for reversal of the trial court's order." However, the GAL is a party to this matter and absent reference to a violation of a specific rule or binding authority, we decline to strike its brief.

IV. Analysis

Having resolved jurisdiction, two issues remain for our consideration: whether the trial court committed error by (1) failing to determine that Rose was a neglected juvenile; and (2) failing to determine

that Rose was a dependent juvenile. After careful review, we affirm the trial court.

"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). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

We have a two-step process for abuse and neglect petition 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." *In re K.W.*, 272 N.C. App. at 493, 846 S.E.2d at 589.

A. Neglect

[4] Petitioner first contends the trial court erred by failing to determine that Rose was a neglected juvenile at the adjudication phase. Specifically, Petitioner asserts that Rose is a neglected juvenile and that the trial court erred by not adjudicating her as such based on: (1) "the domestic violence in the home"; (2) the fact that Gemma was adjudicated neglected and lived in the same home; (3) the fact that the trial court considered improper evidence of Father's abstention and treatment for alcohol abuse; and (4) "the unsafe conditions of the home." *See* N.C. Gen. Stat. § 7B-101(15)(e) (2023).

A neglected juvenile is:

> Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15

> or (ii) whose parent, guardian, custodian, or caretaker does 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 G.S.14-321.2.
>
> g. Has placed the juvenile for care or adoption in violation of law.
>
> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

Id. § 7B-101(15)(a)-(g) (2023). "Our review of the numerous cases where 'neglect' or a 'neglected juvenile' has been found shows that 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. 279, 283, 582 S.E.2d 255, 258 (2003). "In order to adjudicate a juvenile neglected, our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline." *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698 (citation and internal quotation marks omitted).

1. Domestic Violence

To support their contention, Petitioner first argues that since "Rose was in the home . . . when domestic violence was occurring," she was exposed to an "injurious environment." Yet when looking at the trial court's findings, nothing suggests that Rose was affected. Rather, the record shows that Gemma tried to intervene against Mother's wishes. *See In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984) ("[O]ur appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.").

The record also lacks sufficient evidence that Rose was at risk moving forward because of this activity. The findings instead indicate that "[s]uch arguments have become less frequent since [ ] [Father] has been actively engaging in alcohol abstinence and attending AA meetings." *See In re C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592 (citations omitted) ("[T]o adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a substantial risk of such impairment."). We therefore hold that the trial court's findings are supported by clear, cogent, and convincing evidence and its findings support its conclusion of dismissal. *See id.* (quoting *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999) ("Section 7B-101(15) affords the trial court 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.").

2. Differing Neglect Adjudications – Rose vs. Gemma

Petitioner next argues that because Gemma was adjudicated a neglected juvenile, it was error not to reach the same conclusion for Rose. *E.g.*, *In re Q.A.*, 245 N.C. App. 71, 74–75, 781 S.E.2d 862, 865 (2016) (holding that the trial court erred by adjudicating only two out of five children to be neglected where they were exposed to the same injurious environment including a lack of plumbing, electricity, and food.).

Our statute provides, "[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another . . . has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15). But here, the facts surrounding Gemma's adjudication and Rose's dismissal are inherently different, especially given that Gemma was fifteen years old while Rose was one-and-a-half years old. The findings of the trial court demonstrate that Gemma suffered from "untreated mental health

issues[,]" that Respondents provided no reasonable treatment, and that Gemma engaged in self-harm twice. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent."). Moreover, the findings demonstrate exposure to an injurious environment specific to Gemma, given that she was exposed to and participated in domestic conflicts within the home. A court "may not adjudicate a juvenile neglected solely based upon previous [DSS] involvement relating to other children. Rather, in concluding that a juvenile lives in an [injurious environment], . . . the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *In re A.W.*, 377 N.C. 238, 248, 856 S.E.2d 841, 850 (2021) (quoting *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698). Thus, we see no similarities between Rose's and Gemma's situation that would warrant adjudicating both as neglected. *See In re A.W.*, 377 N.C. at 248, 856 S.E.2d at 850; *see also In re C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592.

3. Improper Evidence – Father

Petitioner next contends that the trial court improperly considered evidence of Father's abstention from alcohol as well as his Alcoholics Anonymous ("AA") meeting attendance when adjudicating Rose because this conduct occurred after the filing of the petition.

Adjudication hearings "shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." N.C. Gen. Stat. § 7B-802 (2023). To that end, "the conditions underlying determination of whether a juvenile is an abused, neglected, or dependent juvenile are fixed at the time of the filing of the petition. This inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party." *In re L.N.H.*, 382 N.C. 536, 543, 879 S.E.2d 138, 144 (2022). "When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error." *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

Here, the trial court found that Father suffered from alcohol addiction and entered rehabilitation twice in 2023. The record shows that Father began abstaining from alcohol following removal of the children on 8 September 2023 but was "in detox prior to [the WCDSS social worker's] initiation." In other words, the record shows Father's abstention from alcohol occurred before the filing of Rose's petition on 14 September 2023. This testimony "was uncontroverted, so the

[c]ourt accept[ed] the same as fact." *In re B.S.O.*, 234 N.C. App. at 708, 760 S.E.2d at 62 (cleaned up) ("An appellant is bound by any unchallenged findings of fact."). We therefore overrule this argument by Petitioner.

4. Unsafe Conditions

Petitioner last contends that the trial court committed error by dismissing Rose's neglect petition because there were "unsafe conditions" in the home. Specifically, Petitioner asserts that the trial court erroneously determined that "no evidence was presented tending to show that [the] household cleaning products left on countertops and the stove were accessible and/or dangerous to [Rose]."

"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 omitted).

Here, the trial court found that Respondents "left household cleaning products on countertops and the kitchen stove" and that "no evidence was presented tending to show such cleaning products were accessible and/or dangerous to [Rose]." The record contains two photographs submitted into evidence that show a bottle of bug spray on the back of the stove, a bottle of Lysol on the back part of the stove, and a bottle of Mr. Clean left on a countertop. At the hearing, the social worker who took those pictures testified "it's possible" Rose could access the cleaning products. Accordingly, the trial court's finding is supported by clear, cogent, and convincing record evidence. *See In re C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592.

Petitioner next contends that the "cluttered and dirty condition of the home" indicated that the environment was injurious to Rose. However, the trial court found that "[n]o evidence was presented tending to show that [Rose] was affected by the cluttered home or that such personal belongings created the potential of injury to [Rose]." Since the trial court was free to determine which inferences to draw from the evidence, we see no basis to disturb this finding. *See In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) ("[I]n order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm."); *see also Matter of M.M.*, 272 N.C. App. 55, 69, 845 S.E.2d 888, 898 (2020) ("[T]he trial court alone determines which inferences to draw and which to reject.").

B. Dependency

[5] Petitioner contends that the trial court committed error by failing to determine that Rose was a dependent juvenile. Specifically, Petitioner argues dismissal was improper because Respondents failed to provide an alternative childcare arrangement—which the trial court also failed to consider. Because the record shows that at least one parent could take care of Rose, we cannot say the trial court failed to consider whether Respondents had alternative childcare. Furthermore, Respondents are not required to provide evidence concerning an alternative child care arrangement since it is the responsibility of DSS to provide evidence they needed such arrangement and did not have one.

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 childcare arrangement." N.C. Gen. Stat § 7B-101(9). In determining dependency, "the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in a reversal of the court. *In re K.D.*, 178 N.C. App. 322, 328, 631 S.E.2d 150, 155 (2006). For dependency determinations, "a child cannot be adjudicated dependent" if they have at least one parent capable of "provid[ing] or arrang[ing] for adequate care and supervision." *In re Q.M.*, 275 N.C. App. 34, 42, 852 S.E.2d 687, 693 (2020) (citation omitted).

Here, the trial court made findings that Mother and Father lived with Rose in a home that, although cluttered, did not present a danger to her. Likewise, while cleaning supplies were left on countertops, nothing in the record suggests these items were accessible or hazardous to Rose. Father acknowledged past struggles with alcohol and mental health; yet he testified—without contradiction—that he stopped drinking and attended AA meetings multiple times per week. The trial court determined there was no evidence "showing that any alcohol consumption by [Father] affect[ed] his child, [Rose]." Though Mother admitted arguments occurred in the home, the trial court found no indication that Rose was present or harmed by them and that these incidents diminished once Father addressed his drinking. On these facts, we glean that at least one parent was able to supervise or care for Rose. *See id.*

Accordingly, the trial court correctly concluded that Rose was not a dependent juvenile.

V. Conclusion

We deny Respondents' motion to dismiss Petitioner's appeal as to each child. Petitioner's PWC is thus rendered moot. We also deny Respondents' motion to strike the GAL's brief. Since the trial court's order concerning Gemma's petition is a temporary dispositional order, Petitioner's appeal is interlocutory and dismissed without prejudice. Last, after considering the trial court's dismissal of Rose's petition, we affirm the trial court's disposition.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ARROWOOD and WOOD concur.

IN THE MATTER OF K.J.P.W.

No. COA24-497

Filed 19 February 2025

Termination of Parental Rights—grounds for termination—willful abandonment—willfulness—Rule 17 guardian appointment not dispositive

In a termination of parental rights action brought by a child's legal guardians, the trial court properly terminated respondent-mother's rights based on willful abandonment (N.C.G.S. § 7B-1111(a)(7)), where the trial court's determination that respondent acted willfully was supported by the unchallenged findings of fact and, further, was not precluded by respondent's having been appointed a guardian pursuant to Civil Procedure Rule 17, which did not constitute per se evidence of incompetency. The trial court was not required to make specific findings on willful intent regarding whether respondent's deficient behavior constituted a manifestation of severe mental illness or otherwise make further inquiry into respondent's competency, since there was no evidence or argument that respondent suffered from mental illness. In fact, respondent's counsel argued that respondent's prior mental health report was not relevant; further, respondent admitted that her failure to seek visitation for seven months was due to problems with her phone and social media account.

Judge TYSON dissenting.

Appeal by respondent-mother from judgment entered 5 March 2024 by Judge Curtis Stackhouse in Lenoir County District Court. Heard in the Court of Appeals 15 January 2025.

White & Allen, P.A., by Delaina Davis Boyd and Christopher J. Waivers, for the petitioners-appellees.

Edward Eldred, for the respondent-appellant mother.

FLOOD, Judge.

Respondent-Mother appeals from the trial court's order terminating her parental rights. On appeal, Respondent-Mother argues the trial court could not terminate her parental rights under N.C.G.S. § 7B-1111(a)(7) for any "willful" action where it granted a Rule 17 guardian for her, and thus, she was incompetent to do anything "willfully." Respondent-Mother additionally argues the trial court could not terminate her parental rights under N.C.G.S. § 7B-1111(a)(3) for failing to pay for the care of the minor child where the minor child was not in foster care but was living with legal guardians. Upon review, we conclude the trial court properly found Respondent-Mother acted "willfully," supporting grounds to terminate her parental rights under N.C.G.S. § 7B-1111(a)(7), despite having a Rule 17 guardian appointment, and we do not reach her additional argument.

I. Factual and Procedural Background

Respondent-Mother is the biological mother of the minor child, Koda.[1] On 30 August 2019, the Lenoir County Department of Social Services ("DSS") petitioned for non-secure custody of Koda when he was ten days old, after Koda's maternal grandmother reported to DSS the conditions of Respondent-Mother's home, identifying the conditions as being extremely cluttered, lacking in any baby formula supplies, and having cockroaches crawling around. Koda was placed in the care of Petitioners that same day.

Additionally, on that same day, Petitioners filed a petition of neglect, and Koda was adjudicated to be a neglected juvenile. Respondent-Mother

1. The parties stipulated to use a pseudonym for the minor child to protect his identity, pursuant to N.C. R. App. P. 42.

was granted visitation and ordered to follow DSS' recommendations, including having a mental health assessment done, taking parental responsibility classes, participating in anger management classes, and obtaining and maintaining stable housing.[2] The case was removed from the active docket on 15 June 2021, after guardianship was awarded to Petitioners, and reunification was eliminated as part of the case plan.

On 18 April 2023, Petitioners filed a petition to terminate Respondent-Mother's parental rights in Koda. Petitioners alleged, in relevant part, that Respondent-Mother has: "had no contact with the minor child since August 2022"; "[w]illfully failed, without justification, to pay for the care, and support of the minor child since the birth of the minor child for a period of more than one year"; and "[f]ailed to have consistent contact with the minor child, also constituting abandonment[,]" despite the fact "[t]hat at all relevant times, Respondent[-]Mother has had the ability to maintain communication with the minor child and to pay child support."

On 23 June 2023, Respondent-Mother's counsel filed a motion to appoint a Rule 17 guardian to assist Respondent-Mother in the proceedings, and the trial court granted the motion without further inquiry. Respondent-Mother thereafter appealed to this Court based on the trial court's lack of additional inquiry when granting her a Rule 17 guardian, and in an unpublished opinion, this Court held the trial court did not abuse its discretion when it did not conduct an additional inquiry into Respondent-Mother's competency. *See In re K.W.*, 282 N.C. App. 734 (2022) (unpublished) (hereinafter "*In re K.W.*"). On 5 March 2024, the trial court held a termination of parental rights hearing, and that same day, entered an order terminating Respondent-Mother's parental rights. The trial court found that Respondent-Mother: "had one visit [with Koda] during a 14-month period"; was not "incompetent[,] neither suffers any legal disability"; worked "at Bojangles at various times"; failed to maintain communication with Koda even though Respondent-Mother had "the ability to"; "increased the frequency of her visits [with Koda]" after Petitioners filed their petition to terminate her parental rights; and "failed to provide any gifts, cards, or anything for [Koda,] even for holidays and birthdays." Additionally, the trial court noted that Respondent-Mother claimed in an email written on 15 June 2022 to Petitioners that she could not visit Koda because her other child was sick in the hospital, but ultimately found that "even after Respondent-Mother's other child was no

2. Although the Record before us does not include a copy of the order, Respondent-Mother testified she was ordered to take several types of classes after DSS determined her house was "nasty."

longer in the hospital, Respondent-Mother failed to consistently visit with [Koda]."

The trial court concluded that Respondent-Mother willfully abandoned Koda under N.C.G.S. § 7B-1111(a)(7) "for at least six consecutive months immediately preceding the filing" of Petitioner's petition to terminate Respondent-Mother's parental rights, and that Respondent-Mother "willfully failed, without justification, to pay for the care, and support of [Koda] since the birth of [Koda] for a period of more than one year and such lack of support constitutes abandonment" under N.C.G.S. § 7B-1111(a)(3). The trial court entered its order terminating Respondent-Mother's parental rights, and Respondent-Mother timely appealed.

II. Jurisdiction

This Court has jurisdiction over an appeal by a non-prevailing parent from an order terminating her parental rights, pursuant to N.C.G.S. §§ 7A-27(b)(2) and 7B-1001(a)(7) (2023).

III. Standard of Review

This Court reviews a termination of parental rights to determine "whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re M.J.S.M.*, 257 N.C. App. 633, 636 (2018) (citation omitted). This Court reviews de novo a trial court's conclusions of law. *See In re K.J.M.*, 288 N.C. App. 332, 339 (2023). "Under a de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 339 (citation omitted) (cleaned up). "If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." *In re M.J.S.M.*, 257 N.C. App. at 636 (citation omitted).

IV. Analysis

On appeal, Respondent-Mother argues the trial court could not terminate her parental rights for any "willful" action where the trial court granted a Rule 17 guardian for her, and thus she was incompetent to do anything "willfully." Respondent-Mother additionally argues the trial court could not terminate her parental rights under N.C.G.S. § 7B-1111(a)(3) (2023) for failing to pay for the care of Koda because Koda was not in foster care, as is required by the statutory language in mandating payment for the care of a child, but rather was staying with legal guardians. Because we conclude the trial court correctly terminated Respondent-Mother's parental rights for willful abandonment

under N.C.G.S. § 7B-1111(a)(7), we do not reach Respondent-Mother's second argument.

A trial court may terminate parental rights under N.C.G.S. § 7B-1111(a)(7) if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition [to terminate parental rights.]" N.C.G.S. § 7B-1111(a)(7). "In the context of abandonment, willfulness is more than an intention to do a thing; there must also be purpose and deliberation." *In re D.M.O.*, 250 N.C. App. 570, 572–73 (2016) (citation omitted) (cleaned up).

An appointment of a Rule 17 guardian is not based on a person's legal incompetence. *See In re Q.B.*, 375 N.C. 826, 836 (2020). Our Supreme Court has explained that "neither mental health limitations nor a low IQ constitute per se evidence of a lack of competency for purposes of Rule 17[,]" but rather, a Rule 17 guardian is to be appointed only after determining "whether the parent is able to comprehend the nature of the proceedings and aid her attorney in the presentation of her case." *Id.* at 836. The Court contrasted a Rule 17 guardian from that of a Chapter 35A guardian:

> Adjudications of adult incompetency are governed by Chapter 35A[.] An adult guardian appointed under Chapter 35A generally has a broad range of powers with respect to the ward's person and property . . . whereas the duties of a [guardian] under Rule 17 appointed solely for purposes of assisting a parent during a particular juvenile proceeding are much more limited.

Id. at 836.

As to the Rule 17 appointment, Respondent-Mother argues that "the trial court's finding that [Respondent-Mother] was *not* incompetent and did *not* suffer any legal disability is plainly unsupported by the evidence" because "[t]he trial court *necessarily* found [Respondent-Mother] was incompetent—that is, she lacked sufficient capacity to manage her own affairs and to communicate important decisions concerning her family—because the trial court may only appoint a Rule 17 guardian if the parent is 'incompetent.' " This argument is without merit, as a Rule 17 guardian appointment does not establish that Respondent-Mother is legally incompetent, as explained above. *See id.* at 836.

Respondent-Mother does not challenge any of the trial court's findings of fact that support willful abandonment, and thus, these findings are binding on appeal. *See In re M.J.S.M.*, 257 N.C. App. at 636. The trial court found, in relevant part, that Respondent-Mother failed

to maintain communication with Koda even though she "had the ability to[,]" and that Respondent-Mother "had one visit [with Koda] during a 14-month period[,]" including a finding that Respondent-Mother "had no visits with [Koda] in September 2022, October 2022, November 2022, December 2022, January 2023, February 2023, March 2023, [and] April 2023[.]" These facts, deemed binding on appeal, *see id.* at 636, in turn support the trial court's conclusion of law that Respondent-Mother willfully abandoned Koda "for at least six consecutive months immediately preceding the filing" of Petitioner's petition, pursuant to N.C.G.S. § 7B-1111(a)(7). *See* N.C.G.S. § 7B-1111(a)(7); *see also In re M.J.S.M.*, 257 N.C. App. at 636. Thus, under our de novo review, the trial court properly terminated Respondent-Mother's parental rights under N.C.G.S. § 7B-1111(a)(7). *See In re K.J.M.*, 288 N.C. App. at 339.

We distinguish this case from *In re A.L.L.* 376 N.C. 99 (2020). In *In re A.L.L.*, the respondent's parental rights were terminated after the trial court found she willfully abandoned her child. *See id.* at 110. During the determinative six-month window required for abandonment, the respondent suffered "from delusions and struggles with reality, persisted in her refusal to take prescribed medications, and became easily agitated, delusional, and incoherent during a visit with [the minor child.]" *Id.* at 110 (internal quotation marks omitted). On appeal, our Supreme Court reversed the trial court's termination of the respondent's parental rights, explaining: "the evidence show[ed] that [the] respondent's deficient conduct as a parent was largely, if not entirely, a manifestation of her severe mental illnesses[,]" and therefore, the respondent did not act *willfully* in abandoning her child. *Id.* at 111. This was the only evidence the trial court found regarding the respondent's willful intent to abandon her child. *See id.* at 111-12. The Court held: "at a minimum, a trial court presented with evidence indicating that a mentally ill parent has willfully abandoned his or her child must make specific findings of fact to support a conclusion that such behavior illustrated the parent's willful intent rather than symptoms of a parent's diagnosed mental illness." *Id.* at 111-12. In making this holding, the Court reasoned:

> [J]ust as incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision, . . . behavior emanating from a parent's mental health conditions may supply grounds for terminating parental rights only upon an analysis of the relevant facts and circumstances, such as the severity of the parent's condition and the extent to which the parent's behavior is consistent with recognizable symptoms of an illness.

Id. at 112 (citation omitted) (cleaned up).

Unlike the respondent in *In re A.L.L.* who could not be found to have willfully abandoned her child without specific findings as to willful intent, due to the evidence showing only "that [the] respondent's deficient conduct as a parent was largely, if not entirely, a manifestation of her severe mental illnesses[,]" *see id.* at 111, the trial court here was not required to make any specific findings as to Respondent-Mother's deficient conduct, as her conduct was not evidenced nor argued to be a manifestation of any severe mental illness.

During the hearing on termination of Respondent-Mother's parental rights, Respondent-Mother's counsel stated twice that the only mental health report in the record was "not relevant" to the hearing:[3]

> MS. DURANT: Objection as to any reference to [the mental health] report. That's been like three or four years. It's not relevant.
>
> . . . .
>
> MS. DURANT: It is not relevant to this trial, to this termination of parental rights. I think her report was admitted in abuse and neglect, but we have different parties. We now have a Guardian Ad Litem. That report was done like in 2020. It's old. It pre-dates the conclusion of the abuse and neglect case, so I'm strenuously objecting to anything regarding [her mental health report].

The trial court overruled the objection, clarifying that Petitioners' counsel was not seeking to discuss anything of *substance* in the mental health report, but was instead asking Respondent-Mother what she was ordered to do for reunification after the trial court adjudicated Koda neglected, which included being given a mental health assessment, among other things, such as taking parenting classes and maintaining stable housing. There was no discussion in the hearing regarding any content of Respondent-Mother's mental health report.

Respondent-Mother testified that, along with her income from working at Bojangles, she was receiving Supplemental Security Income ("SSI") because she had "some issues[,]" but when asked what issues, she responded: "[I] don't know." Respondent-Mother's mother testified that she was Respondent-Mother's payee for SSI because Respondent-Mother was "delayed," but that she gave Respondent-Mother the funds

3. The Record before us does not contain a copy of Respondent-Mother's mental health assessment report.

because "[Respondent-Mother] does what she needs to do with it." Respondent-Mother's mother also testified as to the changes she had seen in Respondent-Mother in the past four years:

> Q. Describe to the [c]ourt, in detail, what changes you have seen.
>
> A. She's been keeping her house up like she's supposed to. She's been going to her appointments like she's supposed to. She's found her a job. Go to work.

Additionally, the following conversation took place between Respondent-Mother and Petitioner's counsel, with Respondent-Mother agreeing she did not visit Koda for seven months:

> Q. So, can you explain to the Court why you missed the seven months of visits at the end of 2022 to 2023?
>
> A. Don't remember.
>
> Q. Do you agree you did?
>
> A. Yes.

Respondent-Mother later explained that she did not reach out for visitation with Koda for seven months due to Facebook and phone problems:

> Q. Okay. And so after that e-mail in August 2022, you didn't reach out again; correct, until April of 2023? Is that right?
>
> A. That's correct.
>
> Q. So, why is that?
>
> A. Well one, my Facebook got hacked. That's why I couldn't reach out. The other one, I have phone problems.
>
> Q. Do you think that's a good reason not to see your child for seven months 'cause your Facebook got hacked or you had phone problems?
>
> A. I mean, I was going to reach out.

Her mother also testified regarding Respondent-Mother missing visitation with Koda during a previous five-month period, prior to the seven-month period described above, stating that Respondent-Mother takes care of her other "two year old" child, who during that five-month period was "back and forth in the hospital."

In their petition to terminate Respondent-Mother's parental rights, Petitioners made no reference to any mental illness or concerns for

Respondent-Mother, but merely alleged she failed to visit or pay support to Koda. Further, as discussed above, a Rule 17 guardian appointment does not invoke evidence of mental health illness, *see In re Q.B.*, 375 N.C. at 836, and this Court previously held the trial court did not err in granting the motion to appoint a Rule 17 guardian without holding a further inquiry for Respondent-Mother. *See In re K.W.* at 739.

Accordingly, the trial court was not required to make specific findings of fact as to Respondent-Mother's deficient conduct being due to any severe mental illness, as her conduct was not argued nor evidenced to be a manifestation of any severe mental illness. Moreover, Respondent-Mother admitted her failure to reach out for visitation was due to experiencing Facebook and phone problems for seven months.

Because a trial court may terminate parental rights as long as one ground is met under N.C.G.S. § 7B-1111(a), and we conclude under our de novo review that the trial court properly determined that Respondent-Mother willfully abandoned Koda under N.C.G.S. § 7B-1111(a)(7), we need not address Respondent-Mother's additional argument. *See In re P.L.P.*, 173 N.C. App. 1, 8 (2005) (determining that "where 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 internal quotation marks omitted)). Accordingly, we affirm the trial court's termination of Respondent-Mother's parental rights under N.C.G.S. § 7B-1111(a)(7).

V. Conclusion

Upon review, we conclude the trial court properly found Respondent-Mother acted willfully, notwithstanding her Rule 17 guardian appointment, and thus the trial court properly terminated Respondent-Mother's parental rights under N.C.G.S. § 7B-1111(a)(7). Because we hold the trial court met one ground for termination under N.C.G.S. § 7B-1111(a), we do not address Respondent-Mother's additional argument.

AFFIRMED.

Judge WOOD concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The trial court's findings of fact are not supported by clear, cogent, and convincing evidence. These unsupported findings do not support the trial court's conclusion to terminate Respondent's parental rights based upon willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) (2023) or willful failure to pay a reasonable portion of the cost of childcare under § 7B-1111(a)(3) (2023). The trial court erred when it terminated Respondent's parental rights without supported findings and conclusions. I respectfully dissent.

I. Standard of Review

This Court reviews a trial court's order terminating 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 Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citation omitted). 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) (citation omitted).

Petitioner bears the burden of proving "by clear, cogent, and convincing evidence the existence of one or more grounds for termination under [N.C. Gen. Stat. § 7B-1111(a)]" at the adjudicatory stage. *In re J.A.E.W.*, 375 N.C. 112, 116, 846 S.E.2d 268, 271 (2020) (citation omitted). Petitioner failed to carry or meet its burden under the statute and our case law. *Id.*

II. Termination for Willful Failure to Pay a Reasonable Portion of the Cost of Childcare and Willful Abandonment

A. Willful Abandonment

The district court and the majority's opinion wrongfully terminate Petitioner's parental rights for willful abandonment.

Our statutes provide a trial court may terminate parental rights upon a supported finding and conclusion "[t]he parent has *willfully abandoned* the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7) (emphasis supplied). Our Supreme Court held: "abandonment requires a purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to the child." *In re L.M.M.*, 375 N.C. 346, 349, 847 S.E.2d 770, 773 (2020) (citation and quotation marks omitted). "The word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275,

346 S.E.2d 511, 514 (1986). Petitioners carry and maintain the burden of proving Respondent had "acted willfully in abandoning [her] child." *In re L.M.N.*, 375 N.C. 346, 353, 847 S.E.2d 770, 776 (2020).

"To find that a parent has willfully abandoned his or her child, the trial court must find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety." *In re A.L.L.*, 376 N.C. 99, 110, 852 S.E.2d 1, 9 (2020) (citation and quotation marks omitted). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the determinative period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re B.R.L.*, 379 N.C. 15, 18, 863 S.E.2d 763, 767 (2021); *see* N.C. Gen. Stat. § 7B-1111(a)(7).

B. Willful Failure to Provide Material Support

The statutes also provide a district court may terminate parental rights where "[t]he juvenile has been placed in the custody of a county department of social services . . . , and the parent for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C. Gen. Stat. § 7B-1111(a)(3). To support this ground, a district court is required to make a supported finding the "parent has [the] ability to pay support[.]" *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984). "Although what is within a parent's ability to pay or what is within the means of a parent to pay is a difficult standard which requires great flexibility in its application, the requirement of N.C. Gen. Stat. § 7B-1111(a)(3) applies irrespective of the parent's wealth or poverty." *In re T.D.P.*, 164 N.C. App. 287, 290, 595 S.E.2d 735, 738 (2004) (citation and quotation marks omitted).

C. *In re A.L.L.*

Our Supreme Court examined a parent's mental health conditions in *In re A.L.L.*, 376 N.C. at 101-02, 852 S.E.2d at 4, wherein a parent's medical records showed she "had previously been diagnosed with schizophrenia, obsessive compulsive disorder, bipolar disorder, and an eating disorder, a doctor from the hospital conducted a mental health assessment and confirmed a primary diagnosis of schizophrenia."

1. Willful Abandonment

Respondent's parental rights were terminated for willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). The Supreme Court held: "Evidence that respondent acted in a manner consistent with the

symptoms of her severe mental illness is not, standing alone, evidence that she willfully intended to abandon her child." *Id.* at 111, 852 S.E.2d at 10. Our Supreme Court further held: "Thus, at a minimum, a trial court presented with evidence tending to show that a mentally ill parent has willfully abandoned his or her child must make specific findings of fact to support a conclusion that such behavior illustrated the parent's willful intent rather than symptoms of a parent's diagnosed mental illness." *Id.* at 111-12, 852 S.E.2d at 10.

Respondent was diagnosed with a moderate intellectual disability, mild persistent depressive disorder, and low intellectual functioning and adaptive skills. The district court failed to make any findings as is required by *In re A.L.L.* The district court only found: "That neither Petitioners nor Respondent Father nor Respondent Mother is an infant or incompetent and neither suffers any legal disability." While Respondent has not been adjudicated as incompetent, she has been diagnosed with mental illness. The evidence and record do not show, and the district court failed to make, specific findings of fact to support a conclusion such behaviors proved Respondent's willful intent, rather than symptoms of a parent's diagnosed mental illness. *Id.*

2. Failure to Provide Support

In the case of *In re A.L.L.*, the Court addressed abandonment, but also contains other specific language, which is applicable here and has been applied to other putative grounds. *See In re E.G.R.*, 288 N.C. App. 191, 844 S.E.2d 181 (2023) (unpublished). While this Court's opinion in *In re E.G.R.* is unpublished, the opinion persuasively addresses the issue of a parent's mental illness in a termination proceeding asserting her willful failure to make reasonable progress. The opinion in *In re A.L.L.* provides:

> [J]ust as incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision, behavior emanating from a parent's mental health conditions may supply grounds for terminating parental rights *only upon an analysis* of the relevant facts and circumstances, *such as the severity of the parent's condition and the extent to which the parent's behavior is consistent with recognizable symptoms of an illness*.

In re A.L.L., 376 N.C. at 112, 852 S.E.2d at 10-11 (citations and quotation marks omitted) (emphasis supplied). These required findings were not made. Contrary to Respondent's assertions, her alleged mental illness and incompetence is not an outright bar on termination under either

ground found below. However, despite the majority's purported distinction, the appointment of a Rule 17 guardian for Respondent does not invoke evidence of her mental illness or establish willfulness. The district court failed to make required fundings and must comply with *In re A.L.L. Id.*

In their petition to terminate Respondent's parental rights, Petitioner made no reference to any mental illness or concerns for Respondent, despite her own counsel previously requesting an evaluation after Respondent was diagnosed with a moderate intellectual disability, mild persistent depressive disorder, and low intellectual functioning and adaptive skills. *Id.*

D. Disposition

Our Supreme Court set forth the procedure to be used "when an appellate court determines that the trial court's findings of fact are insufficient" and held:

> the court must examine whether there is sufficient evidence in the record that could support the necessary findings. If so, the appropriate disposition is to vacate the trial court's order and remand for entry of a new order. This permits the trial court, as finder of fact, to decide whether to enter a new order with sufficient findings based on the record or to change its conclusions of law because the court cannot make the necessary findings.

In re A.J., 386 N.C. 409, 417, 904 S.E.2d 707, 715 (2024) (internal citations omitted).

The trial court's order terminating parental rights is properly vacated and remanded for further findings on Respondent's capacity and competence for willful conduct and for further proceedings. *Id.*

III. Conclusion

The trial court's unsupported findings and conclusions terminating Respondent's parental rights for willful failure to provide material support and for willful abandonment are unsupported and affected by errors on essential elements. The order is properly vacated and remanded for further evidence, findings and proceedings. *Id.* I respectfully dissent.

IN RE X.I.F.

[297 N.C. App. 799 (2025)]

IN THE MATTER OF X.I.F., J.R.F., C.D.F. MINOR CHILDREN

No. COA24-675

Filed 19 February 2025

1. **Termination of Parental Rights—grounds for termination—neglect—evidence of willful abandonment at time of hearing—unsupported by findings**

In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court erred in determining that the statutory ground of neglect (N.C.G.S. § 7B-1111(a)(1)) by means of willful abandonment existed where the court's findings of fact did not address evidence showing neglect at the time of the termination hearing, as required by precedent.

2. **Termination of Parental Rights—grounds for termination—dependency—juveniles in legal and physical custody of other parent—unsupported by findings**

In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court erred in determining that the statutory ground of dependency (N.C.G.S. § 7B-1111(a)(6)) existed where the juvenile petitions alleged, and the court found as fact, that the juveniles were in the legal and physical custody of their mother at the time the petitions were filed and, thus, were not in need of assistance or placement as required under the pertinent definition of "dependent" (N.C.G.S. § 7B-101(9)).

3. **Termination of Parental Rights—grounds for termination—willful abandonment—findings of fact supported by evidence—conclusions of law supported by findings**

In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court's determination that the statutory ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) existed was upheld where: (1) the court's findings of fact pertaining to the six months immediately preceding the filing of the petitions—the relevant period under subsection 7B-1111(a)(7) and during which respondent-father was incarcerated—were supported by uncontradicted evidence that the juveniles received no visits, letters or other communications, or financial contributions from respondent-father, even though he

knew the address where the juveniles resided with their mother and had been able to send money and two letters during an earlier period of incarceration; and (2) those findings of fact in turn supported the court's conclusions of law that respondent-father willfully abandoned the juveniles by voluntarily withholding his care and affection from them.

Appeal by respondent-father from orders entered 25 April 2024 by Judge Lora T. Baker in Henderson County District Court. Heard in the Court of Appeals 16 January 2025.

Rebekah W. Davis, for respondent-appellant father.

Krista S. Peace, for petitioner-appellee mother.

FREEMAN, Judge.

Respondent-father appeals from orders terminating his parental rights as to X.I.F. ("Xia"), J.R.F. ("Janet"), and C.D.F. ("Cody").[1] On appeal, respondent-father contends the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. §§ 7B-1111(a)(1), (6), and (7). After careful review, we agree the trial court's findings do not support its conclusions that grounds existed under subsections (a)(1) and (a)(6). However, because we conclude the trial court did not err in concluding grounds existed to terminate respondent-father's parental rights under subsection (a)(7), and because only one ground is necessary to support termination of parental rights, we vacate in part and affirm in part.

I. Factual and Procedural Background

Petitioner-mother and respondent-father are the biological parents of Xia, Janet, and Cody. The parties lived together from 2007 until their "on-again, off-again" relationship ended in either 2012 or 2013. After the parties separated, the children have continuously resided with petitioner-mother.

Respondent-father was incarcerated for "a good bit of" the period from 2013 to 2018. During respondent-father's incarceration, petitioner-mother "tr[ied] to make it to where he could communicate with the kids" by depositing funds into his prison account to

1. Pursuant to N.C. R. App. P. 42(b), pseudonyms are used to protect the juveniles' identities.

facilitate phone calls that occurred "once, maybe twice a week." Upon respondent-father's release, petitioner-mother "told him if he ever went to jail again, [she] would no longer put money on his books to contact his children and [she] would be done."

Respondent-father "didn't have much of a relationship with the children" when he was not incarcerated. Petitioner-mother made multiple arrangements for the children to see respondent-father, but apart from one visit in 2018 when he brought petitioner-mother money to purchase shoes for the children, respondent-father did not see them. About three weeks after that visit, respondent-father began serving a sentence of incarceration for drug trafficking with an expected release date of 2027.

As petitioner-mother had previously indicated, she stopped "trying to encourage or arrange [a] relationship or visitation" between the children and respondent-father upon his 2018 incarceration. Specifically, petitioner-mother stopped depositing funds into respondent-father's prison account to fund phone calls. Respondent-father attempted to use a third party to facilitate communication prior to 2022, but eventually "the third party said that [petitioner-mother] was no longer responding or sending my letters back." However, petitioner-mother did not change her phone number or address, and even though respondent-father knew her address, the only communication between respondent-father and his children since 2018 consisted of two letters he sent in 2022.

When asked whether she had tried to prevent respondent-father from seeing the children, petitioner-mother stated:

> Yes, I have. . . . That was when he first got incarcerated and I told him that I wasn't doing this no more because I felt like the only time he contacted his children and wanted anything to do with these children is when he was incarcerated.

According to petitioner-mother, she "never stopped him from writing" and "never stopped the children from writing," but she felt "[i]t's not up to me to make a relationship."

In 2016, petitioner-mother began a relationship with David Maynor. Mr. Maynor and petitioner-mother began living together in 2018 and were married in 2019. At some point, petitioner-mother's oldest child suggested that Mr. Maynor adopt the children.

On 14 November 2023, petitioner-mother filed petitions to terminate respondent-father's parental rights as to Xia, Janet, and Cody. The petitions alleged, as is relevant here, that:

7. The facts warranting the determination that grounds exist for termination of the parental rights of the Respondent pursuant to N.C. Gen. Stat. § 7B-1111 are as follows:

a. The Respondent has not seen the minor child since 2016 . . . .

b. The actions of the Respondent constitute a willful abandonment of the minor child for a period in excess of six (6) months next preceding the filing of this Petition as described in N.C. Gen. Stat. § 7B-1111(a)(7), in that Respondent has had, at his own election, has had no contact of any nature whatsoever, with the minor child since 2016 when he briefly saw the minor child, and three years ago when he sent a letter to the minor child. The Respondent has had no in person contact with the minor child since 2016. . . . The Respondent has made no other efforts to contact the minor child.

c. The Respondent has not provided any direct or formal support for the minor child since the separation of the parents in 2012.

d. The Respondent is a convicted felon and is currently serving time in prison for trafficking schedule II with a potential release date of October 28, 2027.

f. The Respondent has had zero communication with the minor child in three years.

g. The Respondent has sent no birthday presents nor birthday cards to the minor child since the separation of the parents.

h. The Respondent has sent no Christmas presents nor Christmas cards to the minor child since the separation of the parents.

i. The Respondent has sent no cards, no clothing, no toys and no gifts to the minor child.

j. The Respondent has had a complete lack of involvement with the child for more than three years establishing a pattern of abandonment and neglect.

k. The Respondent has neglected and abandoned the minor child for the six-month period immediately preceding the filing of the petition.

> l. The Respondent has willfully failed to pay a reasonable portion of the cost of the child's care since the separation of the parents and for the six-month period immediately preceding the filing of this petition.
>
> m. The Respondent lacks the ability to care for the minor child since he is incarcerated and lacked the ability to care for the minor child prior to his incarceration.
>
> n. The conduct of the father has been such as to demonstrate that he will not promote the child's healthy and orderly physical and emotional well-being.[2]

The termination hearing took place before Judge Lora T. Baker in Henderson County District Court on 28 March 2024. After reviewing the petitions and hearing testimony from respondent-father, petitioner-mother, and Mr. Maynor, the trial court orally announced its dispositional ruling:

> Petition filed by petitioner alleges or requests termination of parental rights for respondent father based off of 7B-1111(a)(7) which shows that the parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or the parent has voluntarily abandoned an infant. We're clearly not in the infant situation. So by my math the time period we're talking about is—the petition was filed November 14, 2023. So that time period would be May 14, 2023 to November 14 2023.
>
> I find by clear and convincing evidence that father has willfully abandoned the juvenile for those six consecutive months preceding the filing of the petition. I find no communication, no letters, no phone calls, no visitation, no financial support, nothing that would evidence an intent to maintain a relationship with the minor children during that relevant six-month period.
>
> Looking outside that six-month period, just in relation to father's intent, I will find that he sent two letters, the last being 2022. That he sent money in the amount of $90 for the children in 2018. That was accompanied by a five-minute visit with the minor children. That clearly

2. The petitions contained no subpart 7(e).

> incarceration has been an impediment to the father trying to reach out to the children and to establish and maintain a relationship, and I am taking that into consideration that that clearly does impose issues with father's attempt to maintain the relationship. But just due to the fact that he had sent letters in the past, he had the ability and wherewithal to do so. The mother hadn't changed her address during that relevant time period, hadn't changed her phone number during that relevant time period. So he had the means and opportunity to at least sent letters and make phone calls even though physical visitation was not possible.

The trial court further orally concluded that it would be in the children's best interest to terminate respondent-father's parental rights. On 25 April 2024, the trial court entered three orders terminating respondent-father's parental rights to each of the three children. As is relevant here, the orders stated:

> 7. That facts warranting the determination that grounds exist for the termination of the parental rights of the Respondent pursuant to N.C. Gen. Stat. § 7B-1111 are as follows:
>
> a. The Respondent has not seen the minor child since 2016
>
> . . . .
>
> b. The actions of Respondent constitute a willful abandonment of the minor child for a period in excess of six (6) months next preceding the filing of this Petition as described in N.C. Gen. Stat. § 7B-1111(a)(7), in that Respondent has had no contact of any nature whatsoever, with the minor child during the relevant period from November 14, 2023 through May 14, 2024.
>
> c. Clear and convincing evidence exists that the father willfully abandoned the minor child for six consecutive months prior to the filing of the petition.
>
> d. The court finds that there was no communication between the father and the minor child, no letters, no visits, no financial support nor anything that would indicate an intent to maintain a relationship with the minor child during the relevant period.
>
> e. Looking outside the relevant time period in relation to the father's intent, the court finds that the father sent

> $30.00 to pay for the minor's shoes in 2018 and that he sent two letters in 2022.
>
> f. The mother had the same address where the father dropped off the $30.00 and sent the two letters and the mother had the same phone number since the father has been incarcerated.
>
> g. The father's incarceration may have been an impediment to the father's ability to reach out and maintain a relationship, however, the father clearly had the ability and knowledge to communicate with the minor child. The father testified that he maintained phone contact with another minor child and he has previously sent this minor child letters so he had the ability to maintain contact despite his incarceration.
>
> h. Previous to this most recent incarceration, the father made little attempt to maintain a relationship with the minor child.
>
> i. The father has displayed a pattern of conduct indicating his lack of intent to maintain a relationship with the minor child.

The orders concluded that "Respondent's parental rights with the minor child[ren] should be permanently terminated on the grounds stated in N.C. Gen. Stat. §§ 7B-1111[(a)](1)(6) and (7), and taking into account the best interest of the child[ren]." Respondent-father timely appealed to this Court, arguing that the trial court erred by terminating his parental rights under N.C.G.S. §§ 7B-1111(a)(1), (6), and (7).

II. Jurisdiction

This Court has jurisdiction to review "[a]ny order that terminates parental rights or denies a petition or motion to terminate parental rights." N.C.G.S. § 7B-1001(a)(7) (2023).

III. Standard of Review

A termination of parental rights proceeding involves two different stages that trigger two distinct standards of review on appeal. At the first stage, the adjudicatory stage, "the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247 (1997). "If a trial court's finding of fact is supported by clear, cogent, and convincing evidence, it will be deemed conclusive even if the record contains evidence that would support a contrary

finding." *In re S.R.*, 384 N.C. 516, 520 (2023) (cleaned up). "A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding of fact." *In re G.C.*, 384 N.C. 62, 65 (2023) (cleaned up). We review de novo whether the trial court's properly supported findings of fact in turn support its conclusions of law. *Id.* at 66.

At the second stage of a termination of parental rights proceeding, the dispositional stage, the trial court considers whether termination of the respondent's parental rights would be in the child's best interest. "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion," and we "review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." *In re C.B.*, 375 N.C. 556, 560 (2020) (citations omitted).

Respondent-father's arguments in this matter focus solely on the adjudicatory stage of the proceeding. Accordingly, we review whether the trial court's factual findings are supported by clear, cogent, and convincing evidence and whether the supported factual findings in turn support the trial court's conclusions of law.

IV. Analysis

[1] On appeal, respondent-father argues: (1) the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1); (2) the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(6); and (3) the evidence and findings did not support the trial court's conclusion that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(7). We address each argument in turn.

A. N.C.G.S. § 7B-1111(a)(1)

Section 7B-1111 of our General Statutes provides that a court may terminate an individual's parental rights "upon a finding of one or more" of eleven statutory grounds. N.C.G.S. § 7B-1111(a) (2023). The first statutory ground contemplates termination where the parent "has abused or neglected the juvenile" within the meaning of those terms provided in section 7B-101. N.C.G.S. § 7B-1111(a)(1) (2023).

Respondent-father argues that the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1) because the petitions failed to provide notice of this ground for termination and because the trial court's conclusion "was not supported by the findings or the evidence." As we agree with

respondent-father's substantive argument regarding the trial court's conclusion, we decline to reach his notice argument.

Though willful abandonment of a child may support termination of parental rights under either N.C.G.S. § 7B-1111(a)(1) or (7), the analytical framework for reaching such conclusion differs meaningfully between each ground. Under N.C.G.S. § 7B-1111(a)(7), the court must make proper factual findings supporting a conclusion that the respondent "has willfully abandoned the juvenile for *at least six consecutive months* immediately preceding the filing of the petition[.]" N.C.G.S. § 7B-1111(a)(7) (2023) (emphasis added). In contrast, "[a] finding of neglect sufficient to terminate parental rights" under N.C.G.S. § 7B-1111(a)(1) "must be based on evidence showing neglect *at the time of the termination proceeding*." *In re Young*, 346 N.C. at 248 (emphasis added).

> Thus, in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child as of the time of the termination hearing.

In re C.K.C., 263 N.C. App. 158, 164 (2018) (cleaned up).

Here, the trial court's factual findings refer to respondent-father's conduct in 2018, 2022, and in the six-month period prior to the filing of the petition. Because the trial court failed to make any findings regarding respondent-father's conduct demonstrating neglect by abandonment "at the time of the termination hearing," *In re Young*, 346 N.C. at 248, its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(1) is unsupported. Accordingly, we vacate that portion of the trial court's orders.

B. N.C.G.S. § 7B-1111(a)(6)

[2] Respondent-father next argues that the trial court erred in concluding that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(6). That subsection permits termination of parental rights when the petitioner demonstrates that the respondent "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 reasonably probability that the incapability will continue for the foreseeable future." N.C.G.S. § 7B-1111(a)(6) (2023).

A "dependent juvenile within the meaning of G.S. 7B-101" is a juvenile "in need of assistance or placement" because either "(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.G.S. § 7B-101(9) (2023). Our Supreme Court has reasoned that a juvenile is "not 'in need of assistance or placement' at the time [a] petition [is] filed" if the juvenile is "in the legal and physical custody of her mother." *In re K.R.C.*, 374 N.C. 849, 860 (2020) (quoting N.C.G.S. § 7B-101(9) (2019)).

Here, respondent-father argues the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(6) because the petitions failed to provide notice of this ground and because the findings and evidence did not support such a conclusion. As we agree with respondent-father's substantive argument regarding the trial court's conclusion, we decline to reach his notice argument.

It is undisputed that the juveniles were in the custody of petitioner-mother at the time the petitions were filed. The petitions specifically alleged—and the trial court specifically found—that "[p]etitioner . . . is the biological mother of the minor child[ren] and resides with the minor child[ren]" at petitioner-mother's home. Because the juveniles were "in the legal and physical custody of [their] mother" at the time the petitions were filed, they were not " 'dependent juvenile[s] within the meaning of G.S. 7B-101' as required to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-111(a)(6)." *In re K.R.C.*, 374 N.C. at 860 (quoting N.C.G.S. § 7B-101(9) (2019)). Accordingly, we vacate that portion of the trial court's orders.

C. N.C.G.S. § 7B-1111(a)(7)

[3] Finally, respondent-father argues that the evidence and factual findings did not support the trial court's conclusion that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(7). That subsection permits a trial court to terminate an individual's parental rights when the petitioner demonstrates the respondent has "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition[.]" N.C.G.S. § 7B-1111(a)(7).

1. Factual Findings

Here, respondent-father argues that "[t]he findings and evidence did not show a willful intent to abandon Cody, Janet, and Xia." Specifically, respondent-father challenges the trial court's findings of fact 7(b), (c), (d), (g), (h), and (i).

Respondent-father first contends that the trial court misidentified the relevant time period in finding (b). We agree. Because the petitions were filed on 14 November 2023, the relevant six-month period was 14 May 2023 to 14 November 2023, not 14 November 2023 to 14 May 2024. However, a review of the record and transcripts in this case demonstrates that the trial court's characterization of the relevant time period was a scrivener's error which had no substantive impact on its reasoning or conclusions. Respondent-father does not contend, and we do not believe, that this error is ground for reversal of the orders.

Next, relying on *In re N.D.A.*, 373 N.C. 71 (2019), respondent-father argues that "[m]any of the findings" in (b), (c), (g), (h), and (i) "were ultimate findings and conclusions of law" and that the "ultimate findings were not explained by evidentiary findings of fact, which is a requirement of Rule 52(a)(1)." While we agree that findings (b) and (c) are properly classified as conclusions of law, respondent-father's argument misapprehends the current state of the law and the fact-finding duties imposed on trial courts.

Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2023). Contrary to respondent-father's contention that trial courts are required to expressly explain ultimate findings with evidentiary findings, our Supreme Court has stated that:

> Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick v. Quick, 305 N.C. 446, 452 (1982), *superseded in part by statute on other grounds as stated in State v. Brice*, 370 N.C. 244, 251 (2017).

Respondent-father's reliance on *In re N.D.A.* is similarly misplaced. Although *In re N.D.A.*'s statement that "an ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact," *In re N.D.A.*, 373 N.C. at 76 (cleaned up), would require that ultimate findings be expressly explained by evidentiary findings, our Supreme Court has clarified that *In re N.D.A.* "misused the term 'ultimate fact[.]' " *In re G.C.*, 384 N.C. at 65 n.3. That is why our Supreme Court "overturn[ed] [its] prior caselaw to the extent it misuses the term

'ultimate fact,' " and clarified that "an ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning." *Id.*

In contrast, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510 (1997) (citations omitted). Where a trial court mislabels "conclusions of law as findings of fact, findings of fact which are essentially conclusions of law will be treated as such on appeal." *In re J.O.D.*, 374 N.C. 797, 807 (2020) (cleaned up).

Here, findings (b) and (c) state in relevant part that "[t]he actions of Respondent constitute a willful abandonment of the minor child[ren]" and that "[c]lear and convincing evidence exists that the father willfully abandoned the minor child[ren.]" The determination of whether a parent has willfully abandoned their child under N.C.G.S. § 7B-1111(a)(7) requires "the exercise of judgment" and "the application of legal principles" and is therefore a conclusion of law, not a finding of fact. As "findings" (b) and (c) are both essentially the trial court's legal conclusion that grounds existed to terminate respondent-father's parental rights for willful abandonment under N.C.G.S. § 7B-1111(a)(7), we review that conclusion in the subsequent section.

Our review of the properly classified findings of fact examines "whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *In re J.N.J.*, 286 N.C. App. 599, 605 (2022) (quoting *In re J.W.*, 241 N.C. App. 44, 48–49 (2015)). "If a trial court's finding of fact is supported by clear, cogent, and convincing evidence, it will be deemed conclusive even if the record contains evidence that would support a contrary finding." *In re S.R.*, 384 N.C. at 520 (cleaned up). "Unchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re S.C.L.R.*, 378 N.C. 484, 487 (2021).

Here, our review of the record demonstrates that the following portions of the trial court's findings are either properly supported or unchallenged on appeal:

> d. The court finds that there was no communication between the father and the minor child, no letters, no visits, no financial support nor anything that would indicate an intent to maintain a relationship with the minor child during the relevant period.
>
> e. Looking outside the relevant period in relation to the father's intent, the court finds that the father sent $30.00

> to pay for the minor's shoes in 2018 and that he sent two letters in 2022.
>
> f. The mother had the same address where the father dropped off the $30.00 and sent the two letters and the mother had the same phone number since the father has been incarcerated.
>
> g. The father's incarceration may have been an impediment to the father's ability to reach out and maintain a relationship, however, the father clearly had the ability and knowledge to communicate with the minor child. . . . .
>
> h. Previous to this most recent incarceration, the father made little attempt to maintain a relationship with the minor child.
>
> i. The father has displayed a pattern of conduct indicating his lack of intent to maintain a relationship with the minor child.

Finding (d), that there was no communication, letters, visits, or financial support during the relevant time period, is supported by uncontroverted evidence. All the evidence, including respondent-father's testimony, demonstrated that there was no communication, letters, visits, or financial support in the relevant six-month period. Findings (e) and (f) are unchallenged and are therefore binding. *See In re S.C.L.R.*, 378 N.C. at 487 ("Unchallenged findings are deemed to be supported by the evidence and are binding on appeal.").

The portion of finding (g) discussing respondent-father's "ability and knowledge to communicate with the minor child[ren]" is supported by clear, cogent, and convincing evidence. Both petitioner-mother and respondent-father testified that he had previously sent letters to the children at petitioner-mother's address and respondent-father testified he still knew where to send letters to communicate with the children. Based on this evidence, and considering the unchallenged finding (f) that petitioner-mother "had the same address where the father . . . sent the two letters," the ultimate finding that respondent-father had the ability and knowledge to communicate with the children is naturally reached through the process of logical reasoning. *See In re J.N.J.*, 286 N.C. App. at 605.

Respondent-father specifically challenges the second portion of finding (g): "*The father testified that he maintained phone contact with another minor child* and he has previously sent this minor child

letters so he had the ability to maintain contact despite his incarceration." We agree with respondent-father that the italicized portion of finding (g) does not qualify as a factual finding because it merely recites respondent-father's testimony absent any indication that the trial court deemed such testimony credible. *See In re A.E.*, 379 N.C. 177, 185 (2021) ("[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge absent an indication concerning whether the trial court deemed the relevant portion of the testimony credible." (cleaned up)). However, as described above, the unitalicized portion of this finding is supported by clear, cogent, and convincing evidence.

Finally, findings (h) and (i) are supported by petitioner-mother's testimony regarding respondent-father's conduct prior to and during his most recent incarceration. To the extent that finding (i) constitutes an ultimate finding, it is a finding naturally reached by the process of logical reasoning based upon the evidentiary facts before the trial court. Accordingly, we conclude that findings (d), (h), (i), and all but the recitation of testimony portion of finding (g) are properly supported and conclusive on appeal.

2. Conclusions of Law

Based on these factual findings, the trial court concluded that "[t]here are grounds to terminate the parental rights of Respondent father, including willful abandonment for six months" and that petitioner-mother "has proved by clear and convincing evidence the facts stated above, and Respondent's parental rights with the minor child[ren] should be permanently terminated on the grounds stated in N.C. Gen. Stat. §§ 7B-1111[a](1)(6) and (7)." As we have concluded that the trial court's conclusions as to N.C.G.S. § 7B-1111(a)(1) and (6) must be vacated, we address only the trial court's conclusion under N.C.G.S. § 7B-1111(a)(7). We review this conclusion of law de novo. *See In re K.N.*, 381 N.C. 823, 827 (2022).

Respondent-father argues that the trial court's conclusion that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(7) is unsupported because: (1) "the factual findings do not explain or provide the basis for terminating Father's parental rights"; (2) "the findings did not reflect the evidence that Mother did not want Father to maintain a relationship with the children"; (3) "[c]ontrary to the court's findings about Father's abilities and intentions, if the ability to communicate and retain some type of relationship had existed during the present incarceration, Father would gladly work on parental duties and claims"; and (4) "[i]n this case, just as in *In re D.E.M.*, the findings

which were supported by evidence failed to show that Father willfully abandoned Cody, Janet, and Xia." We address each argument in turn.

Respondent-father's first contention—that the supported factual findings do not provide a basis for terminating his parental rights—is without merit. Willful abandonment is a ground for terminating parental rights, *see* N.C.G.S. § 7B-1111(a)(7), and "[d]espite incarceration, a parent *failing to have any contact* [during the determinative six-month period] can be found to have willfully abandoned the child[.]" *In re D.J.D.*, 171 N.C. App. 230, 241 (2005) (cleaned up) (emphasis added).

> Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. If a parent withholds that parent's presence, love, care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

In re S.R., 384 N.C. at 526 (cleaned up).

A parent's withholding of love and care must be voluntary and willful to support a conclusion of abandonment. Because the respondent-parent's willfulness is the touchstone of this analysis, our relevant case law distills into two questions: (1) what options did the respondent-parent have to display parental affection during the six-month period, and (2) did the respondent-parent exercise those options. If the absence of such parental affection is caused by "one parent actively thwart[ing] the other parent's ability to have a relationship with their child," either by eliminating the other parent's options or by frustrating their ability to exercise them, then a trial court does not err in concluding no grounds exist to terminate parental rights under N.C.G.S. § 7B-1111(a)(7). *Id.* at 527.

Where the respondent-parent is incarcerated during the determinative six-month period prior to the filing of the petition, "the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited." *In re D.M.O.*, 250 N.C. App. 570, 575 (2016). "Our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision."

In re D.E.M., 257 N.C. App. 618, 621 (2018) (quoting *In re M.A.W.*, 370 N.C. 149, 153 (2017)).

"Although a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in his child's welfare by whatever means available*." *Id.* (cleaned up). Under these circumstances a trial court must "address, in light of his incarceration, what other efforts [respondent-father] could have been expected to make to contact [mother] and the juvenile." *Id.*

Here, because respondent-father was incarcerated during the determinative six-month period, the trial court was required to enter factual findings that addressed "in light of his incarceration, what other efforts [he] could have been expected to make to contact" petitioner-mother and the juveniles. *Id.* The trial court's relevant unchallenged or supported findings are:

> d. The court finds that there was no communication between the father and the minor child, no letters, no visits, no financial support nor anything that would indicate an intent to maintain a relationship with the minor child during the relevant period.
>
> e. Looking outside the relevant period in relation to the father's intent, the court finds that the father sent $30.00 to pay for the minor's shoes in 2018 and that he sent two letters in 2022.
>
> f. The mother had the same address where the father dropped off the $30.00 and sent the two letters and the mother had the same phone number since the father has been incarcerated.
>
> g. The father's incarceration may have been an impediment to the father's ability to reach out and maintain a relationship, however, the father clearly had the ability and knowledge to communicate with the minor child. . . . [H]e has previously sent this minor child letters so he had the ability to maintain contact despite his incarceration.

These findings—though by no means exhaustive, comprehensive, or even thorough—adequately address: (1) in light of his incarceration, what options respondent-father had to show interest in his children's welfare, and (2) whether respondent-father exercised those options. The trial court acknowledged that respondent-father's options were limited due to his incarceration but that he could have continued to send

letters as he had previously. Because respondent-father failed to exercise that option, he failed to "*show[ ] interest in his child's welfare by whatever means available*," *In re D.E.M.*, 257 N.C. App. at 621 (cleaned up), and the trial court's factual findings support its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(7).

Respondent-father's second contention, that "the findings did not reflect the evidence that Mother did not want Father to maintain a relationship with the children," is misplaced. While petitioner-mother's statements that she had "tried to prevent him from seeing the children . . . when he first got incarcerated" and that she was "not willing to put money on [his] books to speak to the kids," could support a finding that petitioner-mother did not want respondent-father to maintain a relationship with the children, the trial court was not required to make any such finding. Whatever petitioner-mother *wanted* is largely irrelevant to resolving the issue of whether respondent-father willfully abandoned his children in the six-month period prior to the filing of the petition. *See* N.C.G.S. § 7B-1111(a)(7). Because petitioner-mother testified that she "never stopped him from writing" and "never stopped the children from writing," her admissions that she "tried to prevent him from *seeing* the children" and stopped funding his prison account do not amount to "actively thwarting the other's parent's *ability* to have a relationship with their child." *In re S.R.*, 384 N.C. at 527 (emphasis added).

Respondent-father's third argument, that "if the ability to communicate and retain some type of relationship had existed during the present incarceration, [he] would gladly work on parental duties and claims," similarly amounts to a contention that petitioner-mother actively thwarted his ability to communicate and retain a relationship with his children. The clear, cogent, and convincing evidence and the trial court's supported factual findings demonstrate that respondent-father: (1) knew the children's address, (2) was capable of sending letters to the children at that address, (3) sent at least two letters to the children since his 2018 incarceration began, and (4) did not send letters or otherwise attempt communication with the children in the determinative six-month period. "Although a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in his child's welfare by whatever means available*." *In re D.E.M.*, 257 N.C. App. at 621 (cleaned up).

Finally, respondent-father argues that "[i]n this case, just as in *In re D.E.M.*, the findings which were supported by evidence failed to show that Father willfully abandoned Cody, Janet, and Xia." We disagree.

In *In re D.E.M.*, this Court vacated an order terminating the respondent's parental rights in part because the trial court's findings did "not address, in light of his incarceration, what other efforts [respondent] could have been expected to make to contact [the mother] and the juvenile." *Id.* In doing so, this Court relied on our precedent in *In re D.M.O.* where we vacated and remanded a similar order in part because the trial court "made no findings indicating that it considered the limitations of respondent-mother's incarceration, or that respondent-mother was able but failed to provide contact, love, or affection to her child while incarcerated." *Id.* (quoting *In re D.M.O.*, 250 N.C. App. at 578).

As described in detail above, the orders here do not suffer from the same defect present in the orders in *In re D.E.M.* and *In re D.M.O.* The trial court's findings expressly addressed respondent-father's incarceration, the limitations such incarceration placed upon his ability to show interest in his children, and the options he could have—but did not—exercise to show such interest. Accordingly, we affirm the trial court's conclusion that grounds existed to terminate respondent-father's parental rights for willful abandonment under N.C.G.S. § 7B-1111(a)(7).

V. Conclusion

The trial court's findings do not support its conclusions that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(1) or (6) and we therefore vacate those portions of the three orders. However, because the trial court's supported factual findings in turn support its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(7), we affirm those portions of the three orders.

VACATED IN PART, AFFIRMED IN PART.

Judges HAMPSON and GORE concur.

STATE OF NORTH CAROLINA
v.
WALLACE BELFIELD, DEFENDANT

No. COA24-640

Filed 19 February 2025

Satellite-Based Monitoring—order imposing 25-year term—on remand—trial court's additional findings—supported by competent evidence

In defendant's second appeal from an order imposing a 25-year term of satellite-based monitoring (SBM) after his conviction for indecent liberties with a child, the order was affirmed because the trial court's additional findings of fact—made on remand from the first appeal—were supported by competent evidence. In making these additional findings, the court properly considered evidence beyond the Static-99 risk assessment scoring defendant as a "four," which placed him at an "above average" risk for recidivism and served as the court's original basis for imposing SBM, including: defendant's admission that he was living in a halfway house when he committed the charged crime; testimony from a chief probation officer expressing concerns about being able to locate defendant given his unstable living conditions and frequent use of halfway houses; the relevant recidivism rates for offenders with a score of four; and the chief probation officer's recommendation that defendant receive the highest level of supervision.

Appeal by defendant from order entered 11 October 2023 by Judge Timothy W. Wilson in Nash County Superior Court. Heard in the Court of Appeals 30 January 2025.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

FLOOD, Judge.

Defendant Wallace Belfield appeals from the trial court's order, which imposed on Defendant a twenty-five-year term of satellite-based monitoring ("SBM"). On appeal, Defendant argues the trial court's order

imposing this term of SBM was in error, where Defendant was not at high risk to reoffend, and the trial court's additional findings of fact—unsupported by the evidence—did not support its conclusion that Defendant requires the highest level of supervision and monitoring. Additionally, Defendant contends that some of the State's testimonial evidence was "speculative" and therefore incompetent. Upon review, we conclude the trial court's additional findings of fact were supported by competent evidence, such that the trial court had proper justification to impose on Defendant the highest level of supervision and monitoring. We further conclude Defendant failed to preserve for our review any argument that the State's evidence was speculative, and Defendant's argument to that effect is therefore dismissed.

I. Factual and Procedural Background

The following facts are derived in part from those set forth in the opinion of *State v. Belfield*, 289 N.C. App. 720 (2023) (unpublished) (hereinafter, "*Belfield I*"), filed following Defendant's prior appeal to this Court.

On 19 August 2020, this matter was heard in Nash County Superior Court, and that same day, Defendant pled guilty to, *inter alia*, one count of indecent liberties with a child. Defendant was sentenced as a prior record Level VI with twenty-six points, to a presumptive range of 33 to 49 months' imprisonment, and to a second presumptive range of 20 to 23 months' imprisonment.

On 27 October 2020, the State and Defendant appeared for an SBM hearing. The State provided that Defendant, while on post-release supervision for a different offense, pled guilty to another count of indecent liberties. In making this guilty plea, Defendant stipulated to the context under which he committed this offense; namely, that the underaged victim sneaked into the "halfway house" in which Defendant was staying and had sexual relations with Defendant. Additionally, the State presented Defendant's Static-99 sheet—a risk assessment tool used by the North Carolina Department of Adult Correction to assess a criminal defendant's likelihood of reoffending—where he scored a risk level of five. Defendant, however, contended the Static-99 contained irregularities regarding the name of the person being evaluated, and the trial court continued the matter to allow the State an opportunity to correct the Static-99.

On 21 July 2021, the trial court reconvened to determine whether Defendant required SBM (the "initial hearing"). Dr. Vernon Ted Jamison, the State's witness and a psychologist who conducted the new Static-99 assessment, testified that Defendant's score was actually four, which is a

"moderate-high" or "above average risk" of recidivism. Dr. Jamison noted he was unaware of any prior sexual offenses on Defendant's record, and Dr. Jamison attributed Defendant's "moderate-high" Static-99 score to Defendant's criminal record related to violent crimes.

The State next called as a witness Ron West, who is a chief probation officer and sex offender supervisor in Nash County. During his testimony, Mr. West read aloud a relevant portion of the Static-99, which stated that offenders with a score of four "have been found to sexually recidivate at 6.1 to 12.2 percent after five years." The State then asked Mr. West what his "normal recommendation" would be for an offender with a score of four, to which Mr. West replied, "[t]hat the offender definitely be placed on SBM." The State also asked Mr. West if there were any additional factors that would contribute to the higher risk level that are not factored into the Static-99 test. Mr. West replied that, upon review of Defendant's criminal history,

> [Mr. West's] major concern with [Defendant] would be locating him, based upon his frequent use of halfway houses and not having a stable place to live. The primary use of the SBM is just being able to locate an offender that has sex offenses. With a person that does not have a stable residence, it's very important to know where they're at.

After Defendant testified on his own behalf, Defendant's counsel objected to the entry of a finding that SBM is required. After allowing Defendant to make a final statement, the trial court orally ordered that Defendant submit to twenty-five years of SBM, and specifically provided that:

> The Static-99, having revealed that . . . Defendant is a Level [four] for the purposes of determination of [SBM], the Court makes the following findings to support a decision that the use of [SBM] is not cruel and unusual punishment as defined by the State of North Carolina Constitution or the United States Federal Constitution; therefore, the use of this instrument does not violate either the State or Federal Constitution.
>
> In addition, the Court finds that the use of [SBM] reduces recidivism and is a reliable instrument for the stated purpose therein.
>
> The Court orders that . . . Defendant be enrolled in a[n SBM] program for a . . . period of [twenty-five] years

> upon his release from the Department of North Carolina Public Safety.

The trial court entered its written order on the AOC-CR-615 (11/18) form (the "initial order"), concluding Defendant requires "the highest possible level of supervision and monitoring" and requiring Defendant to enroll in SBM for twenty-five years upon release from imprisonment. The initial order provided that the trial court's conclusion was based on the risk assessment contained in the Static-99. Further, a checkbox was marked in the initial order, denoting that the trial court's conclusion was also based on "additional findings [found] on the attached [form 618]."

Defendant appealed to this Court, and on 18 July 2023, a prior panel of this Court issued an opinion, where we provided that, while the State presented evidence that "would have supported a finding that Defendant required the highest level of supervision and monitoring[,]" the form 618 was not included in the record on appeal, and the record did "not evince the trial court made the requisite findings of fact." *Belfield I*, at *3. The record on appeal, however, demonstrated that the State presented "evidence at the SBM hearing that would support the highest level" of supervision and monitoring, and this Court therefore vacated and remanded the trial court's order, for the trial court to "consider the evidence and make findings of fact regarding the imposition of SBM." *Id.* at *3 (citation and internal quotation marks omitted).

On 9 October 2023, this matter came on before the trial court for remand hearing. The trial court heard no new evidence, considered the evidence presented during the 21 July 2021 hearing, and on 11 October 2023, entered the following, written "Additional Findings":

> 1. On August 9, 2020, Defendant pled guilty to taking indecent liberties with a child in exchange for the State dismissing one count of statutory rape of a person who is [fifteen] years old or younger and habitual felon.
>
> 2. Taking indecent liberties with a child is a sexually violent offense and did involve the physical, mental or sexual abuse of a minor.
>
> 3. Defendant had [twenty-six] prior record points for felony sentencing. (See attached State's Exhibit 618-A.)
>
> 4. On July 21, 2021, Dr. Ted Jamison, a psychologist who conducted a Static-99 assessment on Defendant, testified that Defendant's score was four, which is "moderate-high"

or "above average risk of recidivism." Dr. Jamison attributed Defendant's "moderate-high" Static-99 score to Defendant's criminal record related to violent crimes.

5. On July 21, 2021, Mr. Ron West, chief probation officer and sex offender supervisor in Nash County, testified that he recommended Defendant be placed on SBM.

6. Per the Static-99R risk reporting statements[,] . . . offenders with a Static-99 score of four have been found to sexually recidivate at 6.1 to 12.2 percent after five years. Mr. West testified to this portion of the Static-99 risk reporting statements at said hearing.

7. Mr. West also testified at said hearing that he recommend[s] SBM . . . due to Defendant's Static-99 score and Mr. West's concern about being able to locate Defendant [upon release from prison] based on Defendant's frequent use of halfway houses and Defendant not having a stable place to live. When a person does not have a stable residence, it is very important to know where they are. The primary use of SBM is being able to locate an offender, who has been convicted of sex offenses.

8. When Defendant committed said offense in the above captioned file number, Defendant was residing in a halfway house and was on post-release supervision for a different offense.

9. Based on Mr. West's testimony regarding his recommendation, recidivism rates from the Static-99R risk reporting statements, his concerns about locating . . . Defendant upon release from prison and additional factors that would contribute to a higher risk level, which are not factored into the Static-99, this court finds that Defendant requires the highest level of supervision and monitoring.

Therefore, the court's order for [SBM] . . . post-assessment entered herein on July 21, 2021, is re-adopted by the undersigned and is, along with the judicial finding set forth on form AOC-CR-615, incorporated herein by reference as though again fully set forth with these additional findings.

Defendant timely appealed.

II. Jurisdiction

"[T]his [C]ourt has jurisdiction to consider appeals from SBM monitoring determinations under N.C.[G.S.] § 14-208.40B [(2023)] pursuant to N.C.[G.S.] § 7A-27 [(2023)]." *State v. Singleton*, 201 N.C. App. 620, 626 (2010).

III. Analysis

Defendant argues on appeal that the trial court's order imposing the twenty-five-year term of SBM was in error, where Defendant was not at high risk to reoffend, and the trial court's Additional Findings were insufficient to support its conclusion that Defendant requires the highest level of supervision and monitoring. We disagree.

On appeal from an order imposing SBM, "we review 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. Kilby*, 198 N.C. App. 363, 367 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391 (2004)). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Blankenship*, 270 N.C. App. 731, 735 (2020) (citation and internal quotation marks omitted).

The purpose of SBM "is to supervise certain offenders whom the legislature has identified as posing a particular risk to society[,]" *State v. Morrow*, 200 N.C. App. 123, 131 (2009) (citation and internal quotation marks omitted), and the procedure for SBM hearings is found in N.C.G.S. §§ 14-208.40A and 14-208.40B (2023). When a defendant has been convicted of an applicable offense, and the trial court has not previously determined during the sentencing phase whether SBM is required, N.C.G.S. § 14-208.40B applies. *See* N.C.G.S. § 14-208.40B(a). Here, Defendant had been convicted of indecent liberties with a child, an applicable offense, and the trial court did not make an SBM determination when Defendant was sentenced; N.C.G.S. § 14-208.40B therefore governs. *See* N.C.G.S. § 14-208.40B; *see also Morrow*, 200 N.C. App. at 131.

In making an SBM determination, based on the results of a defendant's risk assessment and any other evidence presented by the State or the defendant, the trial court must decide whether the defendant requires "the highest possible level of supervision and monitoring." *See* N.C.G.S. § 14-208.40B; *see also Kilby*, 198 N.C. App. at 367 n.2 ("The highest level of supervision and monitoring simply refers to SBM." (internal

quotation marks omitted)). If the trial court determines that the defendant is eligible for SBM, "the State shall bear the burden of proving that the [SBM] program is reasonable." S*tate v. Greene*, 255 N.C. App. 780, 783 (2017) (citation and internal quotation marks omitted). Moreover, "the State must present additional evidence to support a determination that the offender requires the highest possible level of supervision and monitoring[,]" and such additional evidence cannot be as to matters already addressed in the defendant's Static-99 risk assessment, such as the defendant's underlying offense. *State v. Thomas*, 225 N.C. App. 631, 633–34 (2013).

Absent a "high risk" Static-99 score, in addition to the State offering additional evidence, the trial court must "make additional findings[] in order to justify a maximum SBM sentence." *Id.* at 634; *see also Kilby*, 198 N.C. App. at 369. While such additional findings cannot be based solely on matters already addressed in a defendant's Static-99 risk assessment, *see Thomas*, 225 N.C. App. at 634, "the trial court may consider the context under which the crimes occurred, revealed in the factual basis for [a d]efendant's guilty plea, when making additional findings as to the level of supervision required of a defendant[.]" *Blankenship*, 270 N.C. App. at 737 (citation and internal quotation marks omitted).

Regarding the trial court's additional findings of facts, in *State v. Green*, this Court considered the defendant's appeal from the trial court's SBM order imposing the highest level of supervision and monitoring. 211 N.C. App. 599, 600 (2017). Upon review, this Court upheld the trial court's order, and provided that, although the defendant had been assessed in the "moderate-low" risk range, "based on the facts that the victims were very young and that [the defendant] did not receive any sex offender treatment[,]" the trial court properly determined that the defendant required the highest level of supervision. *Id.* at 604–05. Likewise, in *State v. Smith*, this Court upheld an SBM order where the bases of the trial court's additional findings were "the age of the alleged victims, the temporal proximity of the events, and [the] defendant's increasing sexual aggressiveness." 240 N.C. App. 73, 76 (2015). By contrast, in *State v. Jones*, this Court reversed the trial court's SBM order where the State failed to present any evidence, other than the defendant's Static-99 risk assessment score, to support a finding that he required the highest level of supervision and monitoring. 234 N.C. App. 239, 246–47 (2024).

Here, the Record demonstrates that, in making its Additional Findings and in accordance with our opinion in *Belfield I*, the trial court considered the following, additional evidence presented by the State: (1) that, per Defendant's stipulation to the factual basis of the underlying

offense, Defendant was residing in a halfway house at the time he committed indecent liberties with a child; (2) Mr. West's testimony, where he expressed concern about being able to locate Defendant, due to "Defendant's frequent use of halfway houses and Defendant not having a stable place to live[,]" and explained that "[t]he primary use of SBM is being able to locate an offender, who has been convicted of sex offenses"; (3) the relevant recidivism rates; and (4) Mr. West's recommendation that Defendant receive the highest level of supervision. This is competent evidence—beyond evidence of matters already addressed in Defendant's Static-99 risk assessment—in support of the trial court's Additional Findings 5, 6, 7, and 8. *See Green*, 211 N.C. App. at 604–05; *see also Smith*, 240 N.C. App. at 76; *Jones*, 234 N.C. App. at 246–47; *Blankenship*, 270 N.C. App. at 735, 737; *Kilby*, 198 N.C. App. at 369. As these Additional Findings are supported by competent evidence, they are binding on appeal. *See Blankenship*, 270 N.C. App. at 735.

Defendant, however, contends the trial court's Additional Findings do not legally justify its imposition of the highest level of supervision and monitoring, as these findings were based on the trial court's consideration of improperly duplicative evidence of matters already addressed in Defendant's Static-99 risk assessment. We find Defendant's contention unpersuasive. As explained above, while the trial court's additional findings cannot be based solely on matters already addressed in the Static-99 risk assessment, because Additional Findings 5, 6, 7, and 8 are supported by competent evidence other than that of a defendant's risk assessment, they are binding on appeal. *See Blankenship*, 270 N.C. App. at 735; *see also Jones*, 234 N.C. App. at 246–47. Assuming, *arguendo*, Additional Findings 1 through 4 are based on evidence duplicative of matters addressed in Defendant's Static-99 risk assessment, the State—as in *Green* and *Smith*, and unlike in *Jones*—met its evidentiary burden of additional evidence in support of Additional Findings 5 through 8. *See Green*, 211 N.C. App. at 604–05; *see also Smith*, 240 N.C. App. at 76; *Jones*, 234 N.C. App. at 246–47. Moreover, Additional Finding 9—where the court articulates its conclusion that Defendant requires the highest level of supervision and monitoring—is based expressly on the evidentiary considerations indicated in Additional Findings 5 through 8. *See* N.C.G.S. § 14-208.40B; *see also Kilby*, 198 N.C. App. at 367 n.2; *Greene*, 255 N.C. App. at 783.

Accordingly, upon our review, we conclude that: the context of Defendant committing a sexual offense in the halfway house; the concern of not being able to locate Defendant, who still makes "frequent use" of halfway houses and does not have "a stable place to live"; the

primary purpose of the SBM program being "to locate an offender that has sex offenses"; the relevant recidivism rates; and the recommendation of Mr. West—a chief probation officer tasked with implementing the SBM program—that Defendant receive the highest level of supervision and monitoring, collectively justify the trial court's conclusion that such level of supervision and monitoring is required for Defendant. *See Kilby*, 198 N.C. App. at 367; *see also Thomas*, 225 N.C. App. at 634. We therefore affirm the trial court's SBM order.

Defendant also contends Mr. West's testimony regarding Defendant's frequent use of halfway houses was "speculative," and as such, Additional Finding 7 is not supported by competent evidence. Defendant, however, failed to object at the initial hearing to the introduction of this allegedly speculative evidence. As such, per Rule 10 of the North Carolina Rules of Appellate Procedure, Defendant failed to preserve for our review his argument regarding Mr. West's testimony, and we decline to invoke Rule 2 to consider this contention. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection, . . . stating the specific grounds for the ruling the part desired the court to make[.]"); *see also* N.C. R. App. P. 2. This argument is therefore dismissed.

IV. Conclusion

Upon review, we conclude the trial court's additional findings of fact were supported by competent evidence, such that the trial court had proper justification to impose on Defendant the highest level of supervision and monitoring. We further conclude Defendant failed to preserve for our review any argument concerning competency of the State's testimonial evidence, and Defendant's argument to that effect is therefore dismissed.

AFFIRMED In Part, and DISMISSED In Part.

Judges HAMPSON and STADING concur.

STATE OF NORTH CAROLINA
v.
GRIFFIN ALEXANDER CURTIS

No. COA24-204

Filed 19 February 2025

1. Appeal and Error—petition for certiorari—criminal sentencing error—conceded by State—extraordinary circumstances—plea agreement containing waiver of right to appeal

In an appeal from judgments entered upon defendant's guilty plea to criminal charges arising from a fatal car accident, where defendant's plea agreement included a waiver of "all right to appeal," defendant's petition for a writ of certiorari was allowed in the event that the waiver was in fact enforceable—an issue that the appellate court declined to address. The State did not oppose defendant's petition, even conceding that a sentencing error was committed in the trial court. Further, extraordinary circumstances justified issuing a writ of certiorari where, because of the trial court's error, defendant was serving four aggravated consecutive sentences that were not supported by the evidence at sentencing.

2. Sentencing—failure to find mitigating factor—stipulated in plea agreement—reversible error—request for different judge on remand denied

After defendant pleaded guilty to felony death by vehicle and other charges arising from a fatal car accident, the trial court committed reversible error at sentencing by failing to find a statutory mitigating factor that the State had stipulated to in defendant's plea agreement. Consequently, defendant's criminal judgments were vacated and the case was remanded for resentencing. However, defendant's request for a different judge to conduct his resentencing hearing was denied, since defendant failed to show that, absent a different judge, he would not be guaranteed the opportunity to receive the benefit of his plea agreement on remand.

Appeal by defendant by writ of certiorari from judgments entered 25 August 2023 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorneys General Christopher W. Brooks and Kathryne E. Hathcock, for the State.

Ellis & Winters LLP, by Kelly Margolis Dagger, Michelle A. Liguori, and Chelsea A. Pieroni, for defendant-appellant.

ZACHARY, Judge.

Defendant Griffin Alexander Curtis appeals from judgments entered upon his guilty plea to two counts of felony death by vehicle, three counts of felony serious injury by vehicle, and one count of driving while impaired. Defendant does not challenge his convictions; he only challenges the trial court's sentencing upon those convictions. After careful review, we vacate and remand for resentencing.

I. Background

This case arises from a fatal automobile collision on 9 January 2022, in which Defendant drove his vehicle head-on into an oncoming vehicle. The collision resulted in the deaths of two passengers in the oncoming vehicle, as well as serious injuries to three additional passengers between both vehicles. Inside the wreckage of Defendant's vehicle, law enforcement officers discovered dozens of used containers of nitrous oxide, along with hundreds of unused containers. Defendant also admitted that he had consumed alcohol and marijuana that evening.

Defendant was arrested and charged with two counts of felony death by vehicle, and one count each of felony serious injury by vehicle, driving while impaired, driving left of center, possession of marijuana up to one-half ounce, and driving with an open container after consuming alcohol. On 24 January 2022, a Wake County grand jury returned indictments formally charging Defendant with the same offenses; three months later, the grand jury returned another indictment charging Defendant with two additional counts of felony serious injury by vehicle.

On 25 August 2023, Defendant entered a guilty plea pursuant to a plea agreement. Defendant agreed to plead guilty to two counts of felony death by vehicle, three counts of felony serious injury by vehicle, and one count of driving while impaired, with the judgment to be arrested on the latter conviction. Defendant also agreed to waive his right of appeal and stipulated to the aggravating factor for sentencing that he "knowingly created great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." In exchange, the State agreed not to seek further indictments for second-degree murder or felony assault with a deadly weapon inflicting serious injury, and to dismiss the three remaining misdemeanor charges. The State also stipulated to the mitigating factor for

sentencing that Defendant "has accepted responsibility for [his] criminal conduct."

The trial court accepted Defendant's guilty plea and entered a series of judgments upon the plea. For the two felony death by vehicle convictions, the trial court sentenced Defendant in the aggravated range for a prior record level I offender to consecutive terms of 80 to 108 months' imprisonment in the custody of the North Carolina Department of Adult Correction. For one of the felony serious injury by vehicle convictions, the court sentenced Defendant in the aggravated range to a term of 20 to 33 months' imprisonment, which the court again set to run consecutively. The court consolidated Defendant's remaining two convictions for felony serious injury by vehicle and sentenced Defendant to another consecutive prison term of 20 to 33 months. Consistent with the plea agreement, the trial court arrested judgment on Defendant's conviction for driving while impaired and dismissed the remaining misdemeanor convictions.

On 1 September 2023, Defendant timely filed notice of appeal.

II. Appellate Jurisdiction

[1] With limited statutory exceptions, a "defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2023). Because Defendant received sentences in the aggravated range, Defendant is entitled by statute to a limited right of appeal:

> A defendant who has . . . entered a plea of guilty . . . to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense.

Id. § 15A-1444(a1).

Additionally, this case presents the threshold issue of an appeal waiver. Defendant filed notice of appeal from the judgments entered in this case despite his waiver of "all right to appeal" pursuant to his plea agreement. Defendant now contends that "this appeal waiver is unenforceable."

We need not address that issue, however, because Defendant filed a petition for writ of certiorari contemporaneous with his appellate brief

in the event that this Court should determine that the waiver "may be enforceable in whole or in part to take away his right to appeal."

"Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (italics omitted), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). Allowing a petition for writ of certiorari "is an extraordinary measure. Accordingly, a petitioner must satisfy a two-part test before we will issue the writ." *State v. Barton*, 295 N.C. App. 182, 186, 905 S.E.2d 230, 234 (2024) (citation omitted). "First, a writ of certiorari should issue only if the petitioner can show merit or that error was probably committed below. Second, a writ of certiorari should issue only if there are extraordinary circumstances to justify it." *Id.* (cleaned up). "An extraordinary circumstance generally requires a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice." *Id.* (cleaned up).

The State concedes that error was committed below and does not oppose Defendant's petition. As for showing extraordinary circumstances, Defendant observes that he "is serving four consecutive aggravated sentences that are not supported by the evidence presented at sentencing (including a stipulated mitigating factor)." In our discretion, we allow Defendant's petition for writ of certiorari and proceed to the merits of his appeal.

III. Discussion

[2] On appeal, Defendant raises a series of arguments concerning his sentencing; however, the dispositive issue is whether the trial court failed to find the mitigating factor to which he and the State stipulated in the plea agreement. The State concedes that this constitutes reversible error, and we agree. Therefore, we vacate and remand for resentencing.

A. Standard of Review

"This Court reviews alleged sentencing errors for whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Bacon*, 228 N.C. App. 432, 434, 745 S.E.2d 905, 907 (2013) (cleaned up). "A trial court's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion." *State v. Morston*, 221 N.C. App. 464, 473, 728 S.E.2d 400, 408 (2012) (citation omitted). "The balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not

have been the result of a reasoned decision." *Id.* at 473–74, 728 S.E.2d at 408 (citation omitted).

B. Analysis

Defendant argues that "[t]he trial court's failure to find mitigating factor 15 in the face of the parties' stipulation and supporting evidence was reversible error." The State concedes error, and we agree.

Under the Structured Sentencing Act, the trial "court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a). "The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." *Id.* Additionally, it is "clearly established that the sentencing judge has a duty to find a statutory mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible." *State v. Spears*, 314 N.C. 319, 321, 333 S.E.2d 242, 244 (1985) (original emphasis omitted).[1]

"[E]vidence is credible as a matter of law when the non-movant establishes [the] proponent's case by admitting the truth of the basic facts upon which the claim of the proponent rests." *State v. Albert*, 312 N.C. 567, 579, 324 S.E.2d 233, 241 (1985) (cleaned up). Thus, when the State stipulates to the facts supporting the finding of a mitigating factor, "the trial court err[s] in failing to find this fact in mitigation." *Id.* at 580, 324 S.E.2d at 241.

In the present case, it is undisputed that *Albert* is the controlling precedent. As part of the plea agreement, the State stipulated to the statutory mitigating factor that Defendant "has accepted responsibility for [his] criminal conduct." N.C. Gen. Stat. § 15A-1340.16(e)(15). By stipulating to this mitigating factor, the State "admitt[ed] the truth of the basic facts upon which the [factor] rest[ed]." *Albert*, 312 N.C. at 579, 324 S.E.2d at 241. Accordingly, it was error for the trial court to fail to find this mitigating factor. *See id.* at 580, 324 S.E.2d at 241; *see also Spears*, 314 N.C. at 321, 333 S.E.2d at 244.

---

1. Although *Spears* and other cases cited in this opinion were decided prior to the enactment of the Structured Sentencing Act, "this Court has repeatedly applied the logic of cases decided under the Fair Sentencing Act to cases arising under the Structured Sentencing Act." *State v. Vaughters*, 219 N.C. App. 356, 360, 725 S.E.2d 17, 21, *cert. denied*, 366 N.C. 402, 735 S.E.2d 321 (2012).

"[W]henever there is error in a sentencing judge's failure to find a statutory mitigating circumstance and a sentence in excess of the presumptive term is imposed, the matter must be remanded for a new sentencing hearing." *State v. Daniel*, 319 N.C. 308, 315, 354 S.E.2d 216, 220 (1987). This principle holds "true in proceedings involving guilty pleas and plea agreements." *State v. Braswell*, 269 N.C. App. 309, 317, 837 S.E.2d 580, 586 (2020). Consequently, we must remand for a resentencing hearing.

Although the parties agree that this matter must be remanded for resentencing, they disagree regarding one aspect of the disposition: whether Defendant is entitled to a resentencing hearing before a different trial judge.

Defendant principally relies upon *State v. Rodriguez*, in which this Court remanded for resentencing because the State "breached the provision of the plea agreement promising that the prosecution would 'take no position on sentencing on the assault charge.' " 111 N.C. App. 141, 143–44, 431 S.E.2d 788, 789 (1993). The State's breach of the plea agreement resulted in the trial court receiving information about several nonstatutory aggravating factors regarding one of the offenses to which the defendant pleaded guilty. *Id.* at 143, 431 S.E.2d at 789. The court then referenced one of these nonstatutory aggravating factors when entering the statutory maximum sentence for the affected conviction. *Id.* We remanded for resentencing due to this error, and instructed that a different judge was to conduct the hearing upon remand. *Id.* at 148, 431 S.E.2d at 792 ("While we have every confidence in the distinguished trial judge's ability to afford [the] defendant a fair and impartial hearing on remand, . . . we also direct that [the] defendant's new sentencing hearing be conducted before a different trial judge." (citing *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427 (1971))).

In the instant case, Defendant asserts that, pursuant to *Rodriguez*, we must also direct that a different trial judge conduct his resentencing hearing on remand. We disagree.

Defendant's reliance on *Rodriguez* is misplaced. The trial court in *Rodriguez* improperly received information regarding nonstatutory aggravating factors that it otherwise would not have received pursuant to the terms of the plea agreement between the defendant and the State. *Id.* at 143, 431 S.E.2d at 789. That bell could not be unrung. Moreover, due to the egregious nature of the State's breach of the agreement, the *Rodriguez* Court determined that it was immaterial whether the defendant's sentence was impacted to his detriment. *Id.* at 147, 431 S.E.2d at

791. As this Court emphasized, the defendant could not be guaranteed the opportunity to receive the benefit of his plea agreement unless a different trial judge—one unaffected by the State's breach—conducted the resentencing hearing on remand. *Id.* at 148, 431 S.E.2d at 792.

Unlike *Rodriguez*, no additional prejudicial information—beyond that already provided in the plea agreement—was disclosed to the trial court here. Accordingly, Defendant is unable to demonstrate any similar risk to his opportunity to receive the benefit of his bargained-for plea agreement on remand. *Rodriguez* is thus inapplicable, and Defendant's request for a different trial judge on remand is denied.

IV. Conclusion

For the foregoing reasons, we vacate and remand to the trial court for resentencing pursuant to the plea agreement. In light of our disposition, we need not address Defendant's remaining arguments.

VACATED AND REMANDED FOR RESENTENCING.

Judges TYSON and FLOOD concur.

STATE OF NORTH CAROLINA
v.
TYLER DEION GREENFIELD, DEFENDANT

No. COA23-597

Filed 19 February 2025

1. Homicide—first-degree murder—jury instructions—felony murder—transferred intent—no error

In a first-degree felony murder prosecution arising from defendant having shot and killed a man from whom he was attempting to buy marijuana, with the man's female companion also having been shot but surviving—where the assault with intent to kill inflicting serious injury on the female victim served as the underlying felony for the murder charge—the trial court did not err by denying defendant's request, made after the jury had retired but before it began deliberations, for a special instruction on the application of the doctrine of transferred intent to felony murder. While defendant's request was timely, the instructions as given regarding both felony murder and transferred intent were legally correct; namely, that the

jury was told it could only find defendant guilty of felony murder if it found that: defendant intentionally committed one of the enumerated assaults on the female victim, the male victim was killed as a result, and defendant's assault was the proximate cause of death.

2. Criminal Law—prosecutor's closing argument—mention of charge for which defendant was acquitted—not grossly improper

In a first-degree murder prosecution arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, the trial court did not abuse its discretion in failing to intervene ex mero motu when the prosecutor referred to defendant's intent to rob the victim, despite defendant having been acquitted of attempted robbery in his first trial on charges related to the incident. Defendant's rights against double jeopardy were not violated because robbery was mentioned to explain the chain of events that led to the shooting, and, moreover, the challenged comments were made during the State's rebuttal—after defendant's counsel argued in his closing that defendant had no plan to commit any crime. Defendant's related argument that the trial court erred in allowing a State's witness to testify about the attempted robbery was not preserved; defendant had more than one occasion to object to the testimony, including when it was offered at trial, but failed to do so.

3. Evidence—character of homicide victim—peaceable nature—conformity with habit or routine practice—no abuse of discretion

In a first-degree murder prosecution arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, the trial court did not abuse its discretion in excluding evidence about the victim's prior convictions, gang affiliation, tattoo, and gun habits—which defendant argued were admissible to show the victim was the aggressor and to rebut evidence of the victim's peaceable nature—where: (1) as to the victim being the aggressor, the gang, tattoo, and firearm evidence did not involve "specific instances of conduct" as required for admission under Evidence Rule 405(b), and the prior convictions were excluded pursuant to Evidence Rule 403; and (2) none of the evidence defendant sought to rebut—that the victim was in the military, had a family, cared for his children, was hardworking, and sounded scared during his encounter with defendant—concerned whether the victim had a peaceable character or was generally nonviolent. Defendant's related constitutional argument was not preserved for appellate

review because he did not argue that he was being denied his right to present a complete defense when the evidence was excluded.

4. Evidence—witness testimony—prosecutor opinions—credibility and guilt—plain error not shown

In a first-degree murder prosecution arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, defendant failed to establish plain error by the trial court in allowing certain testimony from a law enforcement witness and certain remarks by the prosecutors during closing arguments—which defendant characterized as impermissible opinions on credibility and guilt. The officer's testimony did not concern any ultimate issue before the jury or the credibility of defendant or any other witness, but rather served to explain the officer's investigation and his line of questioning of defendant; accordingly, its admission was not error. The prosecutors' references to robbery (a charge for which defendant was acquitted in an earlier trial) were made to explain the context of the shooting, and thus were not improper. The prosecutors' insinuations that defendant was lying and that the victim's partner was telling the truth about how the shooting occurred, even if considered to be improper opinions regarding credibility, were not prejudicial as defendant admitted to changing his story about the incident eight times.

Appeal by defendant from judgment entered 17 June 2022 by Judge Thomas R. Wilson in Superior Court, New Hanover County. Heard in the Court of Appeals 2 April 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Teresa M. Postell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

STROUD, Judge.

Defendant appeals the judgment convicting him of first-degree murder. Defendant contends he is entitled to a new trial since the trial court's jury instructions allowed the jury to convict him of first-degree murder under the felony murder rule without finding the required intent. Defendant also argues the trial court improperly allowed the State to contend a robbery had occurred when he was acquitted of robbery in a previous trial; the trial court improperly excluded evidence of the

victim's "prior convictions, gang affiliation, 'Thug' tattoo, and possession of assault rifles[;]" and the trial court committed plain error in not intervening during the State's allegedly improper closing arguments. For the following reasons, our review discerns, and we conclude there was no error.

I. Background

The State and Defendant each presented evidence at trial depicting different versions of events. However, it is undisputed that Defendant and a friend went to Jon and Beth's[1] apartment ("the Apartment") on 2 February 2015 to buy marijuana from Jon. After Defendant and his friend arrived at the Apartment, an altercation began involving at least three handguns. The State and Defendant differ as to what had occurred in the Apartment once Defendant and his friend arrived.

Beth testified on behalf of the State that she knew Jon sold marijuana and Defendant contacted Jon on the night of 2 February 2015 to buy marijuana from him, but she had told Jon she did not want Defendant coming to the Apartment to buy it, so if Jon was going to sell the marijuana to Defendant, it needed to be somewhere other than at the Apartment. But after Beth went to sleep, she was awakened by voices in the living room. Beth testified she heard Defendant and Jon speaking, and "it sounded like [Defendant] was getting aggressive, and [Jon's] . . . voice started to become very . . . high-pitched and scared." Beth stated she had a hard time making out what exactly was being said, but she heard Defendant "say something to the effect of, [w]here's the money? Where's the guns?" and Jon responded "[w]hat money? I don't have any money."

At this point, Beth got out of bed to see what was happening in the living room, and she saw Jon "with his hands up . . . at his waist, and . . . [Defendant] had him at gunpoint." Beth saw a gun in the bedroom and grabbed the gun; Defendant's friend came into the bedroom with a bag asking for the money, but was "caught off guard" when he realized Beth had a gun so he "turned around and walked back out of the doorway[.]" Beth then heard Defendant say "something to the effect of, [b]ring the gun out here, or I'm going to shoot him right in the head." Beth put the gun down on a table in the living room and Defendant's friend picked it up. After putting the gun down, Beth moved and was standing in front of Jon until Jon started "trying to slide [Beth] from in front of him[.]" Beth "started hearing . . . gunfire . . . closed [her] eyes," and "could feel pain on

1. We use pseudonyms to identify the victims in this case.

the side of [her] face and [she] could smell gunpowder . . . and burning flesh," at which point she "blacked out."

Beth testified Defendant was the person who had pulled the trigger. Beth then woke back up and saw "blood everywhere[;]" Beth saw Jon swaying and fall to the floor with blood pooling underneath him. Beth started screaming, tried to go to a neighbor's apartment for help, and called 911. Jon died as a result of the gunshots. Beth was shot through her left arm, under her ear, and on top of her head. Beth's injuries took about a year to heal since her gunshot wounds got infected and is permanently scarred.

On the other hand, Defendant testified in his defense and gave a much different version of events than Beth. Defendant stated while he, his friend, and Jon were in Jon's living room, he "made a decision, a dumb decision, to pick up the gun that was laying on the table." After picking up the gun, Defendant testified Jon "recognized this, and [stood] up, and [Jon] had a problem with it" but before Defendant could give the gun back to Jon or put it down, he heard his friend say "[s]he got a gun" at which point he "point[ed] the gun." Defendant stated he thought he was "about to die" since Beth was pointing a gun at him. Defendant pointed the gun at Beth and then pointed the gun at Jon "like, [p]ut the gun down, or I'm going to shoot him. . . . I'm going to shoot him in the head." Then, Defendant stated Jon pulled a gun out, shot Defendant, and "[o]nce [he] felt [him]self get hit, [he] pulled the trigger on that gun as many times as [he] could[.]"

Defendant essentially testified he did not bring a gun when he went to the Apartment to buy marijuana and he had used a gun he found "laying on the table" there to shoot Jon and Beth in self-defense after they had pointed guns at him. At least, this was the version of events Defendant testified to at trial. The evidence also showed Defendant changed his story at least eight times in his interviews with law enforcement before giving his final version of events. He testified at trial that he had lied in the interviews. After being asked on cross-examination "[e]very time [law enforcement] pokes holes in your story, you change it, correct[,]" Defendant answered "yes[.]"

An audio recording of the altercation was captured after Defendant accidentally called Jon's cellphone and left a voicemail recording of the events. Again, Defendant and the State's witnesses gave different interpretations of this voicemail. The State's witnesses argued Defendant said "where's the money" while Defendant argues Jon was the one saying "where's the money" as part of the drug transaction. In response, a voice is heard saying "I ain't got no money" which Defendant contends

was his friend speaking and Beth states it was Jon speaking. There is no dispute the voicemail captured Defendant saying he was going to shoot Jon in the head if Beth did not put the gun down.

On 26 May 2015, Defendant was indicted for first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). The State filed superseding indictments for the same charges on 31 October 2016. The case was tried in February 2017 and Defendant was convicted of all charges except attempted robbery and attempted first-degree murder; he appealed and was granted a new trial by our Supreme Court on 25 September 2020 as "the trial court erred by failing to give [D]efendant's proposed instructions on self-defense and transferred intent for the assault charge[.]" *State v. Greenfield*, 375 N.C. 434, 447, 847 S.E.2d 749, 758-59 (2020).

Defendant's retrial was initially set to begin in August 2021 before Judge Tiffany Powers. Before the retrial, the State filed a motion on 30 July 2021 "to prevent the [d]efense from making reference to victim [Jon's] prior criminal convictions, gang ties, and 'Thug' tattoo located across the victim's upper abdomen[,]" and "to preclude the [d]efense from making reference to or admitting into evidence any of the firearms found at [Jon's] residence . . . not capable of firing the casings or projectiles recovered [from] the residence." On 16 August 2021, Judge Powers entered orders excluding evidence of Jon's past criminal convictions, evidence of Jon's gang affiliation and membership, evidence of the "Thug" tattoo on Jon's abdomen, and evidence of the firearms not capable of being used in the shooting.

Defendant also filed a motion *in limine* on 2 August 2021 "to preclude the Prosecutor or any witnesses from making reference to or admitting into evidence any statements concerning an armed robbery" since Defendant was acquitted of attempted robbery in his first trial. Judge Powers denied Defendant's motion on 16 August 2021. Defendant's retrial before Judge Powers ended in mistrial due to the COVID-19 pandemic. The trial court in Defendant's June 2022 trial adopted the "previous orders from [Judge] Powers from August 16th of 2021" which included the ruling on Defendant's motion.

The trial court, in accord with our Supreme Court's holding in *Greenfield*, 375 N.C. 434, 847 S.E.2d 749, instructed the jury on self-defense. The trial court also instructed the jury on first-degree felony murder with the underlying felony being AWDWIKISI. Because Defendant was acquitted of attempted robbery in his first trial, robbery was not used as the underlying felony for the first-degree felony murder

charge. While the defense did not request a jury instruction on transferred intent for purposes of the felony murder charge during the charge conference, after the jury charge was given, the defense requested the trial judge give the following instruction on transferred intent:

> In order for you to find . . . [D]efendant guilty of first degree felony murder, you would need to find that the decedent, [Jon], was killed as a result of . . . [D]efendant's felonious assault on [Beth]. If you so find that the - - that [Jon] died as a result of . . . [D]efendant's intentional killing of [Jon], you would be required to find him not guilty of first degree felony murder.

The State objected to this proposed instruction as untimely since it was not first requested at the charge conference and was inaccurate. The trial judge denied the request to use the proposed instruction.

On or about 17 June 2022, the jury returned a verdict of guilty of first-degree murder of Jon under the felony murder rule with the underlying felony being AWDWIKISI of Beth and guilty of AWDWIKISI of Beth. The trial court entered judgment on or about 17 June 2022 arresting judgment on the AWDWIKISI charge of Beth and sentencing Defendant to life imprisonment without the possibility of parole. Defendant entered oral notice of appeal in open court.

II. Jury Instructions

[1] Defendant first argues "a new trial is required because the court's instructions permitted the jury to find [Defendant] guilty of felony murder without the requisite intent." (Capitalization altered). Specifically, Defendant argues "[t]he instructions that were given improperly allowed the jury to find felony murder even if it concluded that [Defendant] was aiming for [Jon] and only accidentally shot [Beth]."

A. Standard of Review

Defendant argues this Court should review this issue *de novo* since he made a request to the trial court for the proposed jury instructions. The instruction was not requested during the charge conference but was requested after the trial court read the instructions to the jury and before the jury started deliberations. While the State concedes " '[*d*]*e novo*' " review is the correct standard when the request was timely[,]" the State contends Defendant "concedes it was not." The State argues "Defendant is not entitled to either *de novo* or plain error review of any instructional issue because he failed to timely object to the instructions and failed to allege and argue plain error in his principal brief." In his reply

brief, Defendant contends he did not concede the request was untimely, and states "[t]he correct standard of review is de novo because trial courts must instruct on substantial and essential features of a case, even absent any specific request by" Defendant. Both sides agree that since Defendant submitted the proposed instruction after the trial judge had read the other instructions to the jury, our standard of review would be abuse of discretion if we determine the standard should not be *de novo*.

"Trial courts have a duty to instruct the jury on all substantial features of the case arising from the evidence and must properly instruct the jury as to all essential elements of the offense charged." *State v. Harper*, 285 N.C. App. 507, 518, 877 S.E.2d 771, 781 (2022) (citation and quotation marks omitted).

> Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states the general rule that "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" and must "obtain a ruling upon the party's request, objection, or motion." Rule 10(a)(2) specifically addresses challenges to jury instructions and provides that:
>
> > A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects *thereto before the jury retires to consider its verdict*, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.
>
> . . . .
>
> Rule 21 [of the General Rules of Practice] also requires that:
>
> > At the conclusion of the charge and *before the jury begins its deliberations*, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

Geoscience Grp., Inc. v. Waters Const. Co., Inc., 234 N.C. App. 680, 686-87, 759 S.E.2d 696, 700-01 (2014) (emphasis added).

Here, while Defendant did not request this jury instruction at the charge conference, once the trial judge read the instructions to the jury, and before the jury started deliberations, Defendant requested an instruction on intent. The transcript shows counsel for Defendant and the State approached the bench in an off-the-record bench conference after the instructions were read, then the trial judge instructed the jury to select its foreperson, stating:

> After reaching the jury room, your first order of business is to select your foreperson. You may begin your deliberations when the bailiff delivers the verdict forms to you. Your foreperson should lead the deliberations. When you have unanimously agreed upon a verdict as to each charge and are ready to announce them, your foreperson should record your verdicts, sign and date the verdict forms, and notify the bailiff by knocking on the jury room door. You will be returned to the courtroom and your verdict will be announced.

Then, after further discussing courtroom procedure with the remaining alternate jurors, the trial judge released the alternates and stated "[o]ur 12 jurors have left to elect their foreperson. Anything regarding - - before we address [Defendant's counsel], as to additional instructions, anything on the instructions as issued?" The State then asked for a brief clarification before Defendant's counsel requested the proposed instruction. Thus, the record shows the jury had retired to the jury room but had not yet selected the foreperson, so they had not yet begun deliberations. The trial court instructed the jury and followed the procedure as laid out in North Carolina Pattern Jury Instruction 101.35. *See* N.C.P.I. – Crim. 101.35.

Defendant timely requested the additional jury instruction before the jury began deliberations, in accord with our Rules of Appellate Procedure and Rules of General Practice. *Geoscience Grp., Inc.*, 234 N.C. App. at 686-87, 759 S.E.2d at 700-01. Thus, we conclude Defendant made a timely objection to the jury instructions and we review his challenge *de novo*. *See id.* ("When a challenge to the trial court's instructions to the jury raises a legal question, it is subject to review *de novo*." (citation omitted)).

B. Proposed Jury Instruction

Defendant argues the trial court's denial to give the proposed instruction was error since "[u]nder the merger doctrine, where a

defendant assaults and kills a single victim, that assault cannot be the underlying felony to support first degree felony murder." Defendant recognizes "[o]rdinarily, if there are two assault victims, the intentional assault of one victim may be used to support a felony murder charge of the second victim" but contends "evidence supported the conclusion that [Defendant] intended to shoot [Jon] and only hit [Beth] by mistake" and thus "[u]nder the merger doctrine, assault of [Beth], by transferred intent, was not a permissible basis for felony murder of [Jon]."

> This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. It is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Clagon, 279 N.C. App. 425, 433, 865 S.E.2d 343, 348 (2021) (citation omitted). Felony murder is "a murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" N.C. Gen. Stat. § 14-17(a) (2023). Our Supreme Court has noted that

> [a]lthough this Court has expressly disavowed the so-called "merger doctrine" in felony murder cases involving a felonious assault on one victim that results in the death of another victim, cases involving a single assault victim who dies of his injuries have never been similarly constrained. In such cases, the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule.

State v. Carroll, 356 N.C. 526, 535, 573 S.E.2d 899, 906 (2002) (citation omitted).

Here, the trial court gave an instruction as to transferred intent, stating "[i]f . . . [D]efendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if . . . [D]efendant had harmed the intended victim." Then, as to felony murder, the trial court instructed:

> [D]efendant has been charged with the first degree murder of [Jon] in perpetration of a felony. Under the law and the evidence in this case, it is your duty to return one of

the following verdicts: Guilty of first-degree murder in perpetration of one of the described felonies against [Beth] if perpetration of one of those felonies proximately caused the death of [Jon]; guilty of second degree murder of [Jon]; guilty of voluntary manslaughter of [Jon]; or not guilty.

First degree murder under the first degree felony murder rule is the killing of a human being in the perpetration of the assault with a deadly weapon with intent to kill inflicting serious injury of an individual other than the deceased, or assault with a deadly weapon inflicting serious injury of an individual other than the deceased, or assault with a deadly weapon with intent to kill with a deadly weapon of a victim other than the deceased. . . .

For you to find . . . [D]efendant guilty of first degree murder in perpetration of a felony, the State must prove four things beyond a reasonable doubt. First: That . . . [D]efendant, either acting by himself or acting together with other persons, committed the crime of assault with a deadly weapon with intent to kill inflicting serious injury of [Beth], or assault with a deadly weapon inflicting serious injury of [Beth], or assault with a deadly weapon with intent to kill [Beth], and . . . [D]efendant had intent to commit the crime of assault with a deadly weapon with intent to kill inflicting serious injury of [Beth], or assault with a deadly weapon inflicting serious injury of [Beth], or assault with a deadly weapon with intent to kill [Beth]. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

Second: That while committing, either by himself or acting together with other persons, the crime of assault with a deadly weapon with intent to kill inflicting serious injury of [Beth], or assault with a deadly weapon inflicting serious injury of [Beth], or assault with a deadly weapon with intent to kill [Beth], . . . [D]efendant, either acting by himself or acting together with other persons, killed [Jon] with a deadly weapon.

> Third: That . . . [D]efendant, either acting by himself or acting together with other persons, committed an act that was a approximate (sic) cause of [Jon's] death. A approximate (sic) cause is a real cause, a cause without which [Jon's] death would not have occurred.
>
> And fourth: That the assault with a deadly weapon with intent to kill inflicting serious injury of [Beth], or assault with a deadly weapon inflicting serious injury of [Beth], or assault with a deadly weapon with intent to kill [Beth] was committed with the use of a deadly weapon. A firearm is a deadly weapon.

Thus, the trial court gave correct instructions on transferred intent and felony murder, and Defendant does not contend these instructions are erroneous. Defendant instead argues that under this "convoluted theory" that Defendant "had some independent reason to shoot and harm [Beth], and in the course of committing that felony, . . . shot [Jon] too[,]" "the instructions that were given improperly allowed the jury to find felony murder even if it concluded that [Defendant] was aiming for [Jon] and only accidentally shot [Beth]."

However, this is not a case where the assault of a single victim resulted in the death of the same single victim; instead, Beth and Jon were both shot and Jon died as a result of his wounds. As stated in *Carroll*, the assault with a deadly weapon of one victim can be a basis for felony murder of a separate victim. *See id.* As the State notes, "[h]ere, there are . . . multiple assaults, multiple victims, multiple injuries and multiple crimes." The trial judge gave an instruction on transferred intent and then gave specific instructions as to felony murder. These instructions stated that to find Defendant guilty of felony murder, the jury would have to find Defendant intentionally committed one of the enumerated types of assault on Beth; that while committing the assault on Beth, Jon was shot and killed as a result; and that the act was a proximate cause of Jon's death. While Defendant may disagree with the jury's interpretation of the evidence, after reviewing the instructions "contextually and in [their] entirety[,]" the instructions "present [ ] the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Clagon*, 279 N.C. App. at 433, 865 S.E.2d at 348 (citation omitted).

III. The State's Contention Regarding Robbery

[2] Defendant next contends "because [Defendant] was acquitted of robbery at his prior jury trial, the trial court erred by allowing the State

to contend that a robbery occurred." (Capitalization altered.) Defendant argues "the trial court's ruling that allowed evidence and argument about the robbery charge violated double jeopardy and rendered the trial fundamentally unfair."

The State argues this argument was not properly preserved for appeal since "[w]hen this trial began before the Honorable Thomas R. Wilson, [D]efendant did not object, despite two opportunities, when the trial court stated it was adopting" the "previous orders from [Judge] Powers from August 16th of 2021" which addressed Defendant's motion and "Defendant also did not object during evidence or argument in this trial." Defendant responds in his reply brief that

> [t]he State is correct that defense counsel did not object during trial to the law enforcement witnesses' statements that this was a robbery, nor to the State's closing arguments. However, the trial court's ruling at issue was not a specific ruling on a piece of evidence, but a global ruling based on principles of double jeopardy and collateral estoppel regarding the State's ability to argue that a robbery occurred.

Defendant further states in his reply brief that his

> argument focuses mainly on the State's contentions during its closing argument that a robbery occurred. Even if the double-jeopardy/estoppel objection was not preserved by the pretrial motion, the trial court nevertheless had an independent duty to intervene in grossly improper argument by the State, and it did not do so.

This Court has consistently determined

> [u]nder our Rules of Appellate Procedure, "in order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). The objection must be made in the presence of the jury. *See State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) ("An objection made only during a hearing out of the jury's presence prior to the actual introduction of the testimony is insufficient." (citation and quotation marks omitted)). But if the party made a specific objection

> outside the presence of the jury, a general objection in the presence of the jury can be sufficient when it is clear from context the party was renewing the same objection made outside the presence of the jury. *See State v. Rayfield*, 231 N.C. App. 632, 637-38, 752 S.E.2d 745, 751 (2014) (holding an issue was preserved for appellate review when the defendant made an objection at trial that did not state the grounds for the objection because it was "clear from the context" the defendant was renewing an earlier objection made in a pretrial motion to suppress).

State v. Jones, 288 N.C. App. 175, 180, 884 S.E.2d 782, 788-89 (2023) (brackets omitted). Although Defendant originally filed a pretrial motion *in limine* as to the State's reference to robbery before the 2021 mistrial, when the trial court in this trial stated it would be adopting the ruling, Defendant did not object. Further, Defendant's initial pretrial objection did not preserve for appeal the State's witness's testimony as to whether a robbery had occurred since Defendant did not object to this testimony at trial. And as Defendant did not argue plain error in his initial brief, we are likewise unable to review his argument under the plain error standard. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." (citations omitted)). Still, we review Defendant's argument the trial court should have intervened in the State's closing arguments when the State argued a robbery occurred. *See State v. Parker*, 377 N.C. 466, 471, 858 S.E.2d 595, 599 (2021) ("When [the] defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." (citation, quotation marks, and ellipses omitted)). But since the State's references to the alleged robbery were not improper, this argument is without merit.

Under the Fifth Amendment to the United States Constitution, "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. Citing *Dowling v. United States*, 493 U.S. 342, 107 L. Ed. 2d 708 (1990), this Court stated

> evidence is inadmissible under the Double Jeopardy Clause only when it falls within the scope of the collateral estoppel doctrine. That doctrine provides that "when an

> issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

State v. Bell, 164 N.C. App. 83, 89, 594 S.E.2d 824, 828 (2004) (citation and quotation marks omitted).

In *Dowling*, "a man wearing a ski mask and armed with a small pistol robbed the First Pennsylvania Bank[.]" 493 U.S. at 344, 107 L. Ed. 2d at 715. The defendant was later charged with "federal crimes of bank robbery . . . and armed robbery . . . and with various crimes under Virgin Islands law." *Id.*

> During [the defendant's] third trial [for robbing the bank], the Government, over [the defendant's] objection, called a woman named Vena Henry to the stand. Ms. Henry testified that a man wearing a knitted mask with cutout eyes and carrying a small handgun had, together with a man named Delroy Christian, entered her home in Frederiksted approximately two weeks after the First Pennsylvania Bank robbery. Ms. Henry testified that a struggle ensued and that she unmasked the intruder, whom she identified as [the defendant]. Based on this incident, [the defendant] had been charged under Virgin Islands law with burglary, attempted robbery, assault, and weapons offenses, but had been acquitted after a trial held before his third trial in the bank robbery case.

Id. at 344-45, 107 L. Ed. 2d at 715.

> After a hearing, the District Court characterized the testimony as highly probative circumstantial evidence and ruled that it was admissible under Rule 404(b). When Henry left the stand, the District Court instructed the jury that [the defendant] had been acquitted of robbing Henry, and emphasized the limited purpose for which Henry's testimony was being offered. The court reiterated that admonition in its final charge to the jury.

Id. at 345-46, 107 L. Ed. 2d at 716. On appeal, the defendant contended the government should not have been allowed to use evidence of the robbery of Ms. Henry in the defendant's third trial for the bank robbery since he was previously acquitted of robbing Ms. Henry. *Id.* at 348, 107 L. Ed. 2d at 716-17. The Supreme Court determined "the prior acquittal did not determine an ultimate issue in the present case." *Id.* This was "[b]ecause a jury might reasonably conclude that [the defendant] was

the masked man who entered Henry's home, even if it did not believe beyond a reasonable doubt that [the defendant] committed the crimes charged at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite." *Id.* at 348-49, 107 L. Ed. 2d at 718.

In *State v. Agee*, the defendant was acquitted of misdemeanor possession of marijuana, but the trial court allowed admission of evidence of possession of marijuana in the defendant's subsequent trial for possession of LSD despite the defendant's previous acquittal. *See* 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990). Our Supreme Court upheld the trial court's decision allowing the evidence of marijuana possession, stating

> [e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or if it forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

Id. (brackets omitted).

The holding in *Agee* is similar to this case since both cases involve a continuous series of events that resulted in an acquittal for one charge at a prior trial, but in the later trial evidence was presented about the same series of events addressed in the earlier trial. *See id.* The State's theory here was that Defendant had intentionally shot at Beth and that assault with a deadly weapon resulted in the death of Jon. The State's discussion of robbery was only used to explain the chain of events that led to the intentional shooting of Beth and Jon. As the State notes, the portion of the argument cited by Defendant as improper is in the State's rebuttal after Defendant argued in his closing argument that "[t]here's no evidence that there was any plan or purpose to commit any crime when" Defendant and his friend were in the Apartment. Therefore, in accord with our Supreme Court and the Supreme Court of the United States, whether or not a robbery occurred, the evidence was without objection and tended to explain the chain of events leading to the shooting. The trial court did not abuse its discretion by not intervening in the State's closing argument. *See Dowling*, 493 U.S. at 348-49, 107 L. Ed. 2d at 718; *see also Agee*, 326 N.C. at 548, 391 S.E.2d at 174.

IV. The Victim's Prior Convictions, Gang Affiliation, Tattoo, and Firearms

[3] Defendant argues "the trial court's exclusion of evidence of [Jon's] prior convictions, gang affiliation, 'Thug' tattoo, and possession of assault rifles, particularly after the State opened the door to the

evidence, was reversible error." (Capitalization altered.) Defendant's arguments address North Carolina Rules of Evidence 404, 405(b), and 406. Defendant breaks this argument into two sections: (1) "[e]vidence of [Jon's] violent character was relevant to determining whether he was the aggressor" and (2) "[t]he same evidence was admissible to rebut the State's evidence of [Jon's] peaceable character and [Beth's] testimony about their gun habits." We will address each argument in turn.

"The standard of review for assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *See State v. Combs*, 182 N.C. App. 365, 375, 642 S.E.2d 491, 499 (2007) (citations and quotation marks omitted).

North Carolina Rule of Evidence 404 states

> (a) Character evidence generally. - 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, except:
>
> . . . .
>
> (2) Character of victim. - 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[.]

N.C. Gen. Stat. § 8C-1, Rule 404(a)(2) (2023). North Carolina Rule of Evidence 405(b) provides "Specific instances of conduct. – In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." N.C. Gen. Stat. § 8C-1, Rule 405(b) (2023). North Carolina Rule of Evidence 406 states

> [e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

N.C. Gen. Stat. § 8C-1, Rule 406 (2023).

A. Admissibility of the Evidence to show Jon was the Aggressor

We first address Defendant's argument asserting the evidence should have been admitted to show Jon was the aggressor. Defendant contends "evidence of the victim's character may be admissible for two reasons: 'to show [the] defendant's fear or apprehension was reasonable or to show the victim was the aggressor' " but recognizes "[h]ere, [Defendant] was not aware of [Jon's] violent reputation, so the first prong is inapplicable. However, the proffered evidence was admissible because it tended to show [Jon] was an aggressor."

> Well-settled exceptions to the general rule are recognized in cases where there is a plea of self-defense. In such a case, evidence of a deceased's violent or dangerous character is admissible where (1) such character was known to the accused, or (2) the evidence of the crime is all circumstantial or the nature of the transaction is in doubt.

State v. Winfrey, 298 N.C. 260, 262, 258 S.E.2d 346, 347 (1979) (citation omitted). Defendant only argues here that "the nature of the transaction is in doubt." Further, Defendant only contends the evidence could be used as specific instances of conduct under Rule 405(b), not general reputation evidence of Jon's violent character under Rule 405(a). However, this Court previously addressed this exact argument in Defendant's prior appeal:

> We conclude that the evidence concerning Jon's gang membership, his possession of firearms, and his tattoo do not involve "specific instances of conduct" admissible under Rule 405(b). Therefore, we conclude that the trial court did not err by excluding this evidence. Further, we note that there was evidence presented to the jury that Jon was a drug dealer and possessed multiple guns in his residence at the time of the shooting.

State v. Greenfield, 262 N.C. App. 631, 637, 822 S.E.2d 477, 482 (2018), *rev'd on other grounds*, 375 N.C. 434, 847 S.E.2d 749 (2020). And while Defendant notes "prior evidentiary rulings are not binding" and the testimony as a whole was different in Defendant's second trial, this contention mostly goes to Defendant's next argument, that Defendant should have been allowed to rebut the State's evidence of Jon's peaceable character. And Defendant again argues here that this evidence was admissible only as specific instances of conduct, not as reputation evidence, so the same reasoning applies.

As to Jon's "prior conviction for armed robbery[,]" this Court also addressed this issue in Defendant's prior appeal:

> Regarding the victim's prior conviction for armed robbery, the trial court specifically ruled that the evidence was inadmissible under Rule 403, based on its conclusion that unfair prejudice outweighed the probative value of the evidence. . . . Whether otherwise admissible evidence should be excluded under Rule 403 is left to the sound discretion of the court. Here, Defendant has made no argument that the trial court erred in excluding Jon's prior conviction under Rule 403. Therefore, we conclude that Defendant failed to meet his burden on appeal as to this issue.

Id. (citation omitted). Again, despite this being a separate trial, the same reasoning applies here. First, the trial court again based its ruling regarding Jon's prior convictions on "the balancing test established by Rule 403 of the North Carolina Rules of Evidence." And on appeal Defendant briefly mentions Rule 403 in his discussion about the standard of review, but Defendant does not further argue the convictions should be allowed under Rule 403. Therefore, this Court's previous rationale about evidence of Jon's prior convictions applies here since the trial court again excluded the convictions under Rule 403, and Defendant does not argue in this section of his brief that the convictions should be admissible to show Jon was the aggressor.

Defendant's argument that the evidence of Jon's prior convictions, gang affiliation, tattoo, and possession of firearms should have been admitted to show Jon was the aggressor is overruled. However, we must still address whether the same pieces of evidence should have been admitted to "rebut the State's evidence of [Jon's] peaceable character and [Beth's] testimony about their gun habits."

B. Admissibility of the Evidence to Rebut the State's Evidence

Defendant argues the evidence should have been allowed "as rebuttal because the State opened the door by offering evidence of [Jon] and [Beth's] good and peaceable character and their gun habits."

1. Jon's Firearms

We first address whether the trial court erred in excluding evidence of Jon's firearms. We note here that Defendant's brief does not distinguish that evidence of some of Jon's firearms was excluded but the trial court allowed evidence of others; specifically, the trial court's order was an "order excluding evidence of [Jon's] firearms *not of [the] type used*

in [the] alleged offense." (Emphasis added.) The trial court made findings regarding Jon's firearms:

> 1. During a search of [Jon's] residence . . . six firearms were located and seized by investigators of the Wilmington Police Department.
>
> 2. Four of those firearms . . . were capable of firing casings and projectiles recovered from the crime scene.
>
> . . . .
>
> 6. The two firearms not tested by the state crime lab, a Diomandback model DB-15 rifle and the Sporter caliber 7.62 x 39 rifle are incapable of firing the projectiles and cartridges found at the scene[.]

The trial court ruled that allowing the two rifles into evidence "would be both irrelevant and unfairly prejudicial" and allowed the four handguns to be introduced at trial while excluding evidence of the two rifles recovered at the scene.

Defendant cites *State v. Johnston*, 344 N.C. 596, 476 S.E.2d 289 (1996), to contend he should have been allowed to introduce evidence of the rifles to show Jon and Beth's gun habits. However, *Johnston* involved a witness's testimony that "she had never known the victim to carry any type of weapon and that to her knowledge, the victim was not carrying a weapon on the night of his murder." *Id.* at 605, 476 S.E.2d at 294. Our Supreme Court concluded the "testimony was relevant and admissible to show that the victim was unarmed when he was murdered" and "[e]vidence that a victim was peaceful and unarmed at the time of his murder is relevant to prove that the victim did not provoke the defendant and that the murder was committed with premeditation and deliberation." *Id.*

Here, Beth did not testify at any point that Jon did not own weapons, but she testified he typically did not have weapons out in the open. The evidence showed Beth grabbed a handgun in the bedroom before she went out to the living room and she put the gun on the table in the living room, where Jon was. There is a dispute as to which person fired the first shot, but the testimony for the State and Defendant tended to show Defendant had a gun, although Defendant testified the gun was Jon's, and there was a gun near Beth and Jon. While the facts in *Johnston* involved testimony that the victim never carried a gun and did not have a gun on the night of his murder, this case presents a very different situation. *See id.* Instead, there was evidence presented that Jon owned guns

and that there was a gun on the table near Jon. At trial, Defendant testified that the handgun he used to shoot Jon was Jon's handgun, while Beth disputed this point in her testimony. And as the trial court noted, the two rifles excluded from evidence could not have been involved in the shooting since the projectiles and casings came from handguns. Thus, *Johnston* is inapposite to this case. *See id.*

Further, Defendant did not argue in his response to the State's motion to exclude evidence of the rifles nor at trial that evidence should be admitted regarding the rifles as habit evidence under Rule 406. We will thus not address Defendant's argument as to Rule 406 as habit evidence. *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This 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 Supreme Court." (citations and quotation marks omitted)). And as Defendant was allowed to testify about handguns Jon had, Beth testified about handguns belonging to either her or Jon in the Apartment, and the rifles that were excluded were not used in the commission of a crime, we conclude this argument has no merit. *See State v. Patterson*, 284 N.C. 190, 194, 200 S.E.2d 16, 19 (1973) ("The general rule is that weapons may be admitted in evidence where there is evidence tending to show that they were used in the commission of a crime." (citation and quotation marks omitted)).

2. Jon's Prior Convictions, Tattoo, and Gang Affiliation

Defendant argues that since the State "presented favorable character evidence for [Jon] and [Beth] starting with its first witness, [Jon's] sister[,]" including "a photograph of [Jon] in his military uniform and . . . a photograph of [Jon] with family[;]" testimony from "neighbors who testified that [Jon] and [Beth] were 'pleasant and nice' 'very busy' and 'hardworking[;]' " and Beth's testimony that "I genuinely know from [Jon's] character that in that situation, he did not only not want any conflict for himself or want to get shot, but, as well, he would not want this conflict for [Defendant]." We conclude there was no error.

We reiterate

> [character] evidence may be admitted, however, when testimony regarding a *pertinent character* trait of the victim (here, the decedent) is offered by the defendant in a criminal case. N.C. Gen.Stat. § 8C-1, Rule 404(a)(2). In cases where self-defense is at issue, evidence of a victim's violent or dangerous character may be admitted under Rule 404(a)(2) when (1) such character was known to

> the accused, or (2) the other evidence of the crime is *all circumstantial* or the nature of the transaction is in doubt.

State v. McGrady, 232 N.C. App. 95, 108, 753 S.E.2d 361, 371 (2014) (emphasis in original) (citations, quotation marks, and brackets omitted).

Again, as Defendant did not know of Jon's past convictions, gang affiliations, or tattoo and does not argue the evidence was circumstantial, character evidence regarding Jon must be based on "the nature of the transaction [being] in doubt." *Id.* Defendant argues that since there were different accounts of the incident by Defendant and the State's witnesses, the nature of the transaction was in doubt.

In *McGrady*, the defendant attempted to present evidence from a doctor who had interviewed the victim:

> Dr. Brittain testified that the [victim] was angry and frustrated with many "areas" of his life. By his second meeting with the [victim], Dr. Brittain had begun "to surmise" that the decedent was dealing with "aggression," "thoughts of violence," and "conflict that he had with the people that were around him." In that meeting, Dr. Brittain and the [victim] discussed "the violence," and Dr. Brittain stressed the need for the [victim] to avoid being either the victim or the perpetrator in a confrontation. Dr. Brittain also referred to the [victim] as "a very angry man," but noted that he was taking his medication, "had not perpetrated violence," and, in the [victim's] words, was "trying to not become angry and harm someone." When asked about the source of the [victim's] anger, Dr. Brittain testified that it "permeated all of his life," but noted that the source was not specifically related to [the d]efendant, who was not discussed during the meetings.

Id. at 107, 753 S.E.2d at 370-71 (brackets omitted). The trial court excluded this evidence under Rule 404(a) as improper character evidence. *See id.* at 107, 753 S.E.2d at 371. This Court concluded the trial court's exclusion of the evidence was not error since

> Dr. Brittain's testimony—as the trial court noted in excluding it under Rule 404(a)—does not constitute evidence of the [victim's] character for violence. When asked about his meetings with the [victim], Dr. Brittain testified to the fact that the [victim] was an angry person who had thoughts of violence. He did not, however, testify to his opinion that

> the decedent was, inherently, a man of violent character or even a violent person as distinguished from others.

Id. at 109, 753 S.E.2d at 372.

Here, the testimony Defendant contends opened the door to the evidence about Jon's tattoo, gang affiliation, and past convictions was: (1) a photograph of Jon in his military uniform; (2) a photograph of Jon with his family; (3) testimony from Jon's sister that "he maintained contact with his children and supported them financially[;]" (4) testimony from Jon's neighbor that he was "pleasant and nice," "very busy," and "hardworking[;]" (5) testimony from Beth that "knowing [Jon] . . . hearing him that night, you know '[y]ou don't have to do this man' . . . and '[p]lease don't' it sounded like he was begging" which Defendant contends portrayed Jon as a scared victim; and (6) testimony from Beth which stated

> I genuinely know from [Jon's] character that in that situation, he did not only not want any conflict for himself or want to get shot, but, as well, he would not want this conflict for [Defendant]. [Jon] would not want something like this, this situation right now, to happen to [Defendant].

However, under *McGrady*, none of this evidence concerns any of Jon's "pertinent character trait[s]" or character of his peacefulness. *Id.* at 108, 753 S.E.2d at 371. Testimony tending to show Jon was in the military, had a family, maintained contact with his children and supported them financially, and was "very busy" and "hardworking" does not go to Jon's character for peacefulness and are not pertinent character traits as to whether Jon was violent. *See id.* Further, testimony from Beth that it sounded like Jon was begging for his life in that moment likewise does not go to Jon's character for peacefulness. Even assuming Defendant's assertion that this testimony made Jon out to be a scared victim is correct, this evidence does not indicate whether Jon was generally peaceful or non-violent.

Testimony from Jon's neighbor that Jon and Beth were "pleasant and nice" is perhaps a closer call than the testimony referenced above; however, it does not explicitly or implicitly contend Jon was peaceful, considering this Court's discussion in *McGrady* where we concluded a witness's testimony that the victim was "an angry person who had thoughts of violence" but the witness "did not, however, testify to his opinion that the [victim] was, inherently, a man of violent character or even a violent person as distinguished from others." *Id.* at 109, 753 S.E.2d at 372.

As we previously decided testimony that a victim was an angry person was not the same as testifying the victim was violent, we do not consider testimony that Jon was "pleasant and nice" as being the same as testifying Jon was peaceful. *See id.* Finally, Beth's testimony that "from [Jon's] character that *in that situation*, he did not only not want any conflict for himself or want to get shot, but . . . he would not want this conflict for [Defendant]" does not discuss Jon's character for being peaceful in general. Beth was specifically discussing the situation at hand, and simply using the word "character" does not mean Beth was testifying about Jon's general character for being peaceful. We conclude the trial court did not err by excluding evidence of Jon's gang affiliation, prior convictions, and tattoo as the testimony cited by Defendant does not open the door to rebuttal evidence of Jon's character for violence. This argument is overruled.

C. Constitutional Argument

Defendant also briefly argues that he had a constitutional right to present a complete defense and the evidence should have been admitted for that reason. "This Court reviews constitutional issues *de novo*." *State v. Williams*, 261 N.C. App. 516, 518, 820 S.E.2d 521, 523 (2018) (citation omitted). However, while Defendant raised his constitutional right to a complete defense in his written pretrial motion, he did not raise this issue again during trial. Defendant properly preserved his objections to this evidence under the Rules of Evidence since he made an offer of proof at trial, but his objections and offer of proof were based only on the Rules of Evidence. Defendant did not argue his constitutional right to a complete defense in his objections or offer of proof. Therefore, this constitutional issue is not properly preserved and we will not address it further. *See Jones*, 288 N.C. App. at 180, 884 S.E.2d at 788-89; *see also State v. Mills*, 232 N.C. App. 460, 466, 754 S.E.2d 674, 678 (2014) ("Our appellate courts will only review constitutional questions raised and passed upon at trial." (citations omitted)).

V. Opinions Regarding Credibility and Guilt

[4] Finally, Defendant argues "the trial court committed plain error by allowing Detective Odham and the Prosecutors to give improper and prejudicial opinions on credibility and guilt." (Capitalization altered.) As Defendant did not object to the officer's testimony during trial, we review only for plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("Because [the] defendant did not object at trial, we review for plain error. To establish plain error, [the] defendant must show that the erroneous jury instruction was a fundamental error—that the error had a

probable impact on the jury verdict."). Further, as to closing arguments, Defendant again did not object, therefore

> [t]he 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*. In other words, the reviewing court must determine whether the argument in question 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 and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Parker, 377 N.C. at 471, 858 S.E.2d at 599 (citation omitted).

A. Officer's Testimony

Defendant contends Detective Odham gave improper opinion testimony when he "testified he never believed [Defendant] was using self-defense" and when he "said the voicemail answered an ultimate issue in the case, that Jon and Beth 'were being robbed by [Defendant]' " and his friend.

Rule 701 of the North Carolina Rules of Evidence states

> [i]f the witness is not testifying as an expert, his 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 (2023). Rule 704 of the North Carolina Rules of Evidence provides, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704 (2023). In interpreting these two rules, this Court has stated

> Rule 704 does allow admission of lay opinion evidence on ultimate issues, but to qualify for admission the opinion must be helpful to the jury. Meaningless assertions which amount to little more than choosing up sides' are properly excludable as lacking helpfulness under the Rules.

> Furthermore, while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness.

State v. Elkins, 210 N.C. App. 110, 124, 707 S.E.2d 744, 754 (2011) (emphasis in original) (citations, quotation marks, and brackets omitted).

Here, the full context of Detective Odham's testimony is as follows:

> Q. And it does indicate in the records that [Defendant] did sleep in the night that evening, correct?
>
> A. It does.
>
> Q. And you said it's your philosophy to trust and verify a witness until you have reason not to, or until it could be -- to see if it can be corroborated; is that fair to say?
>
> A. Yes, sir.
>
> Q. And did, in fact, your later investigation corroborate [Beth's] story?
>
> A. Yes.
>
> Q. And how did it do so?
>
> A. Well, the investigation itself, the ballistics, right up until we received the voicemail, that painted a clear picture of what had transpired in that house on February 2nd, 2015. That detailed through that voicemail that [Jon] and [Beth] were being robbed by [Defendant] and [Defendant's friend].
>
> Q. And you brought up self-defense to . . . [D]efendant in the first interview; is that correct?
>
> A. I did.
>
> Q. He never mentioned that prior to that?
>
> A. No.
>
> Q. Again, what was the purpose of you bringing that up?
>
> A. To get him to continue to talk.
>
> Q. Did you believe at any point in time that [Defendant] was utilizing self-defense inside that residence?
>
> A. No.

We first note since Defendant was previously acquitted of robbery, he was not facing a robbery charge in this case either independently or as a basis for first-degree murder under the felony murder rule. As whether Defendant was, in fact, committing a robbery here is not an element of any of the crimes submitted to the jury, it is not an ultimate issue in this case. *See State v. Daye*, 83 N.C. App. 444, 445-46, 350 S.E.2d 514, 515-16 (1986) (discussing whether a witness's use of the term "concealing" when "willful concealment of merchandise" was "an essential element of the offense" was error).

Further, Detective Odham was not testifying as to the credibility of Beth as Defendant contends; he was testifying that his investigation corroborated Beth's version of events based on his own perception of the evidence, especially since Detective Odham interviewed Defendant before discovery of the audio recording and would have been familiar enough with Defendant's voice to form an opinion as to whose voice was on the audio recording. *See State v. Crabtree*, 249 N.C. App. 395, 402-03, 790 S.E.2d 709, 715 (2016) (concluding a witness's statement that " 'we have sort of five categories all the way from, you know, we're really sure sexual abuse didn't happen to yes, we're really sure that sexual abuse happened' and her reference to the latter category as 'clear disclosure' or 'clear indication' of abuse, in conjunction with her identification of that category as the one assigned to L.R.'s 23 December 2013 interview, crosses the line from a general description of the abuse investigation process into impermissible vouching" (brackets omitted)); *see also State v. Hill*, 247 N.C. App. 342, 347, 785 S.E.2d 178, 182 (2016) (determining the trial court did not abuse its discretion in allowing officer testimony that two officer's identified the defendant from surveillance video since they had previous interactions with the defendant and thus "the officers' testimony was rationally based on their special knowledge of [the defendant's] appearance and was helpful to the jury's determination of whether [the defendant] was the person seen in the video").

As to Detective Odham's testimony regarding self-defense, Detective Odham first testified that he brought up self-defense during the questioning to get Defendant to keep talking to law enforcement. The first statements made by Detective Odham explaining why he brought up self-defense were not error since he was not testifying whether he believed Defendant was acting in self-defense; Detective Odham was testifying as to why he first brought up the issue of self-defense. Earlier in his testimony, Detective Odham similarly explained after being asked "[w]as there any mention of self-defense at all prior to you bringing it up in this interview" that there was not and he brought it up "[t]o

literally, like I told him, to give him an out, to give him a reason for being there and a reason for what happened, to keep him talking. Several reasons." Thus, in context, when Detective Odham was asked whether he believed at any point Defendant was acting in self-defense and Detective Odham replied no, Detective Odham was not necessarily commenting on whether Defendant acted in self-defense but was explaining why he brought that up in his interviews with Defendant. Detective Odham's testimony regarding self-defense was not error.

B. Closing Arguments

As to the State's closing arguments, Defendant contends the State improperly argued that Beth "was truthful, that [Defendant] was lying, that this was a robbery, that [Jon] would 'never' have behaved in certain ways." As we addressed the State's closing arguments as to robbery above, we will not address that issue again.

Our Supreme Court has explained "[a] lawyer's function during closing argument is to provide the jury with a summation of the evidence[.]" *State v. Tart*, 372 N.C. 73, 80, 824 S.E.2d 837, 842 (2019) (citation omitted).

> Regarding closing arguments made to the jury during criminal trials, the North Carolina General Statutes provide that an attorney may not: (1) become abusive, (2) express his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or (4) make arguments premised on matters outside the record. Through our precedent, this Court has elaborated on the statutory provisions governing closing arguments and emphasized that closing arguments must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passions or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.

Id. (citations and quotation marks omitted).

Here, much of the argument cited by Defendant is the State reviewing each of the nine versions of events Defendant told to law enforcement, which Defendant admitted were lies in his testimony. The State does repeatedly refer to these many statements as lies, and then states

> [h]e's lying about the number of times he's lied.

> Members of the jury: I submit to you, you cannot believe anything that comes out of that man's mouth. He gets caught in a lie, and what does he do? He changes his story. He changes his story to fit what he knows the officer's already know.

As to Beth, the State argued

> [j]ust like Detective Odham told you, [Beth's] story has not changed since day one. She has maintained this entire time that two men came to her apartment, tried to rob her and her boyfriend, and that they shot her and they shot and killed her boyfriend, and they did so after they disarmed her.
>
> . . . .
>
> [Beth] gave an account completely consistent with an audio recording of what happened. . . . That's corroboration. That proves [Beth] isn't lying.

Our Supreme Court recently addressed the issue of calling a defendant a "liar" or insinuating a defendant was lying during closing arguments:

> [The] defendant argues the prosecutor's repeated statements insinuating that [the] defendant lied were improper. Over the course of his argument, the prosecutor used some variation of "lie" at least thirteen times, though never directly calling [the] defendant a liar. "Innocent men don't lie" appeared to be the State's theme: the prosecutor used it at the beginning of his closing argument and again when beginning his rebuttal. The prosecutor also referred to [the] defendant's claim of self-defense as "just not a true statement." The prosecutor commented that the unidentified man involved in the shooting scenario was "imaginary" and "simply made up." The prosecutor also asserted [the] defendant engaged in "the act of lying" and "tried to hide the truth from you all." Relying on *Hembree*, [the] defendant argues that even though the prosecutor did not directly call [the] defendant a liar, the effect and intimations of his statements are also improper. 368 N.C. at 19-20, 770 S.E.2d at 89.
>
> A prosecutor is not permitted to insult a defendant or assert the defendant is a liar. *See Jones*, 355 N.C. at 133-34,

> 558 S.E.2d at 107; *Miller*, 271 N.C. at 659, 157 S.E.2d at 345 ("A prosecutor can argue to the jury that they should not believe a witness, but he should not call him a liar."). A prosecutor is permitted to address a defendant's multiple accounts of the events at issue to suggest that the defendant had not told the truth on several occasions and the jury could find from this that he had not told the truth at his trial. In this case there is no doubt the prosecutor's statements directed at [the] defendant's credibility are improper. Statutorily, the prosecutor is not permitted to inject his opinion as to the truth or falsity of the evidence or comment on a defendant's guilt or innocence during his argument. Here the prosecutor injected his own opinion that [the] defendant was lying, stopping just short of directly calling [the] defendant a liar, and his theme, "innocent men don't lie," insinuated that because [the] defendant lied, he must be guilty. The focus of the prosecutor's argument was not on presenting multiple conflicting accounts and allowing the jury to come to its own conclusion regarding [the] defendant's credibility. Rather, the State's argument appeared to overwhelmingly focus on attacking [the] defendant's credibility through the prosecutor's personal opinion.

State v. Huey, 370 N.C. 174, 181-82, 804 S.E.2d 464, 470-71 (2017) (citations, quotation marks, and brackets omitted). Despite concluding the prosecutor's statements in *Huey* were improper, the Court determined the defendant had failed to show prejudice. *See id.*

In *State v. Solomon*, our Supreme Court also addressed a situation where the defendant had given differing accounts of the events, and the prosecutor argued he was "*lying his head off* about what happened[;]" the defendant "*c[a]me up with a cock and bull story*[;]" the defendant "expect[s] you to brush away everything that's been said and every untruth he's ever told like you're suppose to say, we'll [sic] *let's give him best one out of four*[;]" and "[t]he thing about [the defendant] is he has not dealt with the truth in so long that he's forgot what it is. . . . He wants to boldly come in here *after giving what he says are three untruthful statements* and pull the wool over your eyes." 340 N.C. 212, 218, 456 S.E.2d 778, 783 (1995) (emphasis in original) (ellipsis omitted). The Court concluded "[c]learly, in light of the defendant's own testimony, the prosecutor did not inject his own beliefs, personal opinions or knowledge into his jury argument. Rather, the prosecutor's remarks

were consistent with the facts in evidence from the defendant himself and the reasonable inferences drawn therefrom" and "[a]ssuming *arguendo* that the statements which the defendant now complains of were improper, the impropriety was not so gross or excessive that we would conclude the trial court abused its discretion by failing to intervene *ex mero motu*." *Id.* at 220, 456 S.E.2d at 784.

Here, the State never explicitly called Defendant a liar, but stated "you cannot believe anything that comes out of that man's mouth" and other comments insinuating Defendant was lying. But Defendant admitted at trial to changing his story eight times to law enforcement before giving his ninth and final version, so even if the State's arguments were improper, they were certainly not "so gross or excessive that we would conclude the trial court abused its discretion by failing to intervene *ex mero motu*." *Solomon*, 340 N.C. at 220, 456 S.E.2d at 784; *see also Huey*, 370 N.C. at 181-82, 804 S.E.2d at 470-71. Similarly, explaining Beth's story did not change throughout the investigation and trial is not the same as claiming Beth was a truthful person. Defendant's arguments as to the State insinuating Defendant was lying and that Beth's story did not change are overruled.

Finally, as to Defendant's argument about the State discussing how Jon would behave, the State argued

> [Jon] is a former Marine. He would never keep a gun laying out on a table, especially when he is about to sell weed. He would never.
>
> In the almost two years that [Beth] was with him, she had never seen a gun laying out in the living room anywhere, and if you think back to the other handguns that were recovered in this case, where were they?

Defendant's argument in this issue focuses more on Defendant's and Beth's versions of events and the State's remarks about Defendant lying or Beth telling the truth. Defendant does not show how the State arguing Jon would or would not behave in a certain way is improper. And as the State supports the argument that Jon would not leave a gun out on the table while selling marijuana with Beth's testimony that she had "never seen a gun laying out in the living room[,]" it was a reasonable inference for the State to argue Jon would not have left a gun out on the table. *See State v. Campbell*, 359 N.C. 644, 686, 617 S.E.2d 1, 27 (2005) ("The State's argument was that [the] defendant had victimized trusting people on previous occasions and that this occasion was no different. A closing argument may include the facts in evidence, as well as

any reasonable inferences which arise therefrom. This argument is a reasonable inference, given [the] defendant's history of crime." (citation omitted)). This argument is overruled. Defendant has not demonstrated that the trial court erred by not intervening during the State's closing arguments.

VI. Conclusion

We conclude the trial court did not err in denying Defendant's requested instruction as the instructions given accurately stated the law and would not mislead the jury as to whether Defendant had the requisite intent for felony murder. Further, the trial court did not err in allowing the State to argue a robbery occurred despite Defendant's previous acquittal of robbery since Defendant was not charged with robbery in this case directly or as a basis for felony murder, and collateral estoppel does not apply. We also conclude the trial court did not err in excluding evidence of Jon's firearms, prior convictions, "Thug" tattoo, and gang affiliation. Finally, the trial court did not err, much less plainly err, in allowing Detective Odham's testimony or by not intervening in the State's closing argument *ex mero motu*.

NO ERROR.

Judges TYSON and GORE concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS DALTON NANES, DEFENDANT

No. COA24-487

Filed 19 February 2025

1. Constitutional Law—firearm regulation—possession of firearm by felon statute—facial and as-applied challenges

In defendant's first-degree murder trial, the trial court did not err by denying defendant's motion to dismiss a charge of possession of a firearm by a felon where the statute under which defendant was charged, N.C.G.S. § 14-415.1, was not unconstitutional, either on its face or as applied to defendant, under either section 30 of the North Carolina Constitution or the Second Amendment to the U.S. Constitution. The firearm regulation was within the tradition and history of disallowing individuals who posed a threat of safety to

others to possess a firearm, and defendant failed to show that there were no circumstances under which the statute would be invalid. Moreover, defendant's predicate felony, larceny of a dog and animal cruelty, constituted a felony of a violent nature sufficient to trigger the disarmament requirement; even if it did not, defendant had a demonstrated history of committing violent crimes against others.

2. Evidence—murder trial—statements made by defendant in phone call—racial animus—relevance—lack of prejudice

In defendant's first-degree murder trial, the trial court did not abuse its discretion by admitting into evidence portions of a phone call between defendant and his mother after his arrest, in which defendant indicated he had obtained a firearm because of "racist black people." The statement was relevant under Evidence Rule 401 because it shed light on the State's theory of defendant's motive for committing the two murders, where one of the two victims was black and the other was Indian with a dark complexion. Further, the trial court carefully balanced the probative value of the evidence with its potential to have a prejudicial effect pursuant to Evidence Rule 403, particularly in light of the trial court's decision to exclude more detailed statements by defendant showing racial animus, and in light of the overwhelming evidence that defendant committed both murders.

Appeal by Defendant from judgment entered 31 October 2023 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 14 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Mary Carla Babb, for the State.

Sarah Holladay for Defendant.

GRIFFIN, Judge.

Defendant Nicholas Dalton Nanes appeals from the trial court's judgment entered upon a jury verdict finding him guilty of two counts of first-degree murder and one count of possessing a firearm while a felon. Defendant raises two issues on appeal. First, whether section 14-415.1 of the North Carolina General Statutes, which prohibits convicted felons from possessing firearms, is constitutional. Second, whether the trial court erred by admitting Defendant's own statements into evidence.

We hold section 14-415.1 is constitutional and Defendant received a fair trial, free from error.

I. Factual and Procedural Background

Between 7 August 2020 and 27 August 2020, Defendant shot and killed two people whom he had never met. The evidence presented at trial tended to show the following:

In the early morning of 7 August 2020, Raleigh Police Officers responded to a report of gunshots at the Montecito West Apartment complex in north Raleigh. Officers discovered the body of Bobby Lucas lying in the parking lot with five gunshot wounds to the back of his head. Mr. Lucas was a developmentally disabled black man who required assistance to live on his own. No shell casings were found at the scene.

Three weeks later, on 27 August 2020 at approximately 4:00 p.m., the Cary Police Department received a report of gunshots at the Somerset neighborhood pool in Cary. The caller reported hearing five gunshots and observing an individual running through their backyard. Upon arriving, officers discovered the body of Selva Vellingiri, an Indian man who lived with his family in the neighborhood. Cary Police Officers recovered video footage from the Somerset pool building depicting Defendant walking through the pool parking lot at 3:15 p.m. to where Mr. Vellingiri's body would later be located. The video also showed Defendant running from the scene approximately forty-one minutes later—around 4:06 p.m. Law enforcement used a still of Defendant from the video to distribute a "be on the look out" notice, from which Defendant's probation officer recognized him.

One day later, on 28 August 2020, law enforcement contacted Defendant's mother who gave them Defendant's address. Officers executed a search warrant at Defendant's residence and seized clothing which matched what the individual in the Somerset pool footage was wearing. Defendant was arrested by the Cary Police Department for possession of a firearm by a felon. While in custody, law enforcement allowed Defendant to speak with his mother on the phone while being recorded.

A Wake County grand jury indicted Defendant for the murders of both Mr. Lucas and Mr. Vellingiri as well as possession of a firearm by a felon on 14 September 2020. Defendant's matter came on for trial in Wake County Superior Court on 23 October 2023. The jury returned verdicts finding Defendant guilty of both murders and possessing a firearm. Defendant timely appeals.

II. Analysis

Defendant raises two issues on appeal. First, Defendant contends the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon because, he alleges, North Carolina's statute criminalizing possession of a firearm by a felon is unconstitutional. Second, Defendant argues the trial court erred by admitting statements he made during the phone call to his mother into evidence. We disagree.

A. Possession of a Firearm by a Felon

[1] Defendant challenges section 14-415.1 as both facially unconstitutional and unconstitutional as applied to him under both Section 30 of the State Constitution and the Second Amendment to the United States constitution. Specifically, Defendant contends the United States Supreme Court's decisions in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), render section 14-415.1 unconstitutional. As we explain below, it is not.

We review a constitutional challenge to a criminal statute de novo. *See State v. Grady*, 372 N.C. 509, 521–22, 831 S.E.2d 542, 553 ("Whether a statute is constitutional is a question of law that this Court reviews de novo." (citation omitted)). When conducting "de novo review, we consider the matter anew and substitute our judgment for that of the trial court[,]" *Parks v. Johnson*, 282 N.C. App. 124, 127–28, 870 S.E.2d 290, 283 (2022) (citations omitted); however, "we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt," *Grady*, 372 N.C. at 521–22, 831 S.E.2d at 553 (citations omitted).

1. Second Amendment

The Second Amendment of the United States constitution provides, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The right to keep and bear arms is a fundamental right and is protected against state action through the Fourteenth Amendment's Due Process Clause. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750 (2010) (holding the Fourteenth Amendment incorporates the Second Amendment's protections against the states). This right, however, is not unlimited. *Rahimi*, 602 U.S. at 690–91 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). The federal and state governments may regulate firearms, but "when the Second Amendment's plain text covers an individual's conduct, the [c]onstitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17. When

a party challenges a firearm restriction, "the government must affirmatively prove [the] regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. Only after the government has made this showing "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' " *Id.* at 17 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).

Therefore, in determining the constitutionality of a firearm regulation, we "must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'applying faithfully the balance struck by the founding generation to modern circumstances.' " *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 29). "Why and how the regulation burdens the right are central to this inquiry." *Id.* Accordingly, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.* However, even if the regulation is passed for a permissible reason, the scope of the modern regulation may not extend "beyond what was done at the founding." *Id.*

This analysis requires the government to show the regulation "comport[s] with the principles underlying the Second Amendment, but [the regulation] need not be a 'dead ringer' or a 'historical twin.' " *Id.* (quoting *Bruen*, 597 U.S. at 30). Statutes prohibiting convicted felons and the mentally ill from possessing firearms are presumptively lawful. *Heller*, 554 U.S. at 626–27, n.26; *see also McDonald*, 561 U.S. at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill[.]' "); *Rahimi*, 602 U.S. at 699 ("[*Heller*] stated that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' " (quoting *Heller*, 554 U.S. at 626–27, n.26)).

a. Facial Challenge

A facial challenge is the most onerous challenge a party may make to the constitutionality of a statute "because it requires a defendant to establish that no set of circumstances exists under which the [statute] would be valid." *Rahimi*, 602 U.S. at 693 (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)). Thus, the State must only show that section 14-415.1 "is constitutional in some of its applications." *Id.*

At the outset, we note that section 14-415.1 undoubtedly regulates conduct that the Second Amendment's plain text covers as it revokes an

individual's right to keep and bear arms following a felony conviction. Resultingly, "the [c]onstitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17. Regardless of this presumption, section 14-415.1 is sufficiently analogous to historical laws to show that prohibiting convicted felons from possessing firearms is within the nation's history and tradition of firearm regulation.

The United States Supreme Court held in *Rahimi* that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *Rahimi*, 602 U.S. at 690. There, the defendant was subject to a domestic violence protection order, which, under 18 U.S.C. § 922(g)(8), prohibited him from possessing or using a firearm. *Id.* at 684–87. The defendant, despite this restriction, committed a series of firearm-related crimes resulting in his arrest. *Id.* at 687. Following his arrest, law enforcement discovered multiple other firearms at his residence, after which a grand jury indicted him for violating section 922(g)(8). *Id.* at 687–88. On appeal, the defendant argued section 922(g)(8) impermissibly infringed upon his Second Amendment right to keep and bear arms. *Id.* at 689.

Surveying the nation's historical legal landscape, the Court cited numerous firearm regulations as evidence that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 693–99, 702. Specifically, the Court analyzed surety laws requiring "those persons, [of] whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance . . . that such offence . . . shall not happen, by finding pledges or securities." *Id.* at 695 (quoting 4 W. Blackstone, Commentaries on the Laws of England 251 (10th ed. 1878)). These laws "could be invoked to prevent all forms of violence." *Id.* Stated differently, where there was a reasonable belief that an individual posed a danger to others, the law could require those individuals to post a bond which would be forfeited upon breaching the peace. *Id.* Alternatively, if the individual failed to post a bond, they would be imprisoned and, in consequence, disarmed. *Id.*

Additionally, the Court surveyed "going armed" and "affray" laws which prohibited individuals from using firearms to terrorize people—violation of which was punished by imprisonment and forfeiture of the arms. *Id.* at 697 (citing 4 Blackstone 149). Together, these laws represent a tradition of "what common sense suggests: [w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 687.

Defendant argues the Court's holding in *Rahimi* does not apply here because the statute at issue there included a provision requiring a court to find that an individual poses "a credible threat to the physical safety" of another individual and, even then, would eventually allow him to regain his firearms license. *Rahimi* at 693. On the other hand, section 14-415.1, Defendant contends, forecloses firearm possession for any individual convicted of a felony regardless of the violent nature of the crime and does so without limiting the duration of the prohibition.[1] This argument misstates the substance of section 14-415.1 and is without merit.

Section 14-415.1(a) states that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm. . . ." N.C. Gen. Stat. § 14-415.1(a) (2023). Contrary to Defendant's categorical assertion that "all criminal defendants in North Carolina are automatically and permanently deprived of their Second Amendment rights upon conviction of nearly any felony" is section 14-415.4. Section 14-415.4, entitled "Restoration of firearm rights" provides for a "procedure that allows a North Carolina resident who was convicted of a single nonviolent felony . . . to petition the court to remove the petitioner's disentitlement under [section] 14-415.1 and to restore the person's firearms rights in this State." N.C. Gen. Stat. § 14-415.4(b) (2023). Pursuant to this statute, an individual previously convicted of a single non-violent felony who has their civil rights restored may regain their firearm rights after twenty years, N.C. Gen. Stat. § 14-415.4(d) (2023), thus undermining Defendant's arguments regarding the duration of the prohibition and the violent nature of the underlying felony.

Accordingly, sections 14-415.1 and 14-415.4, when read *in pari materia*, provide for temporary disarmament of non-violent felons initially but allow restoration of firearm rights if the individual is not a violent felon and has been a law-abiding citizen for a period of twenty years. These regulations fit comfortably within the nation's tradition of disarming dangerous individuals and substantively reflect the Court's holding in *Rahimi*. *See U.S. v. Canada*, 123 F.4th 159, 161 (4th. Cir. 2024) ("No federal appellate court has held that [the federal felon in possession of a firearm statute] is facially unconstitutional[.]").

Moreover, the United States Supreme Court has consistently reaffirmed that statutes prohibiting possession of firearms by felons and the

1. Section 14-415.1 also excepts some white-collar felonies from its prohibition; however, that aspect of the statute is not at issue here.

mentally ill are "presumptively lawful." *Heller*, 554 U.S. at 626–27, n.26; *McDonald*, 561 U.S. at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill[.]' "); *Rahimi*, 602 U.S. at 699 ("In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' "). To this end, the Court in *Rahimi* upheld the constitutionality of section 922(g)(8) despite the fact that section 922(g)(8) "did not require a previous criminal conviction." *Canada*, 123 F.4th at 160–61 (citing *Rahimi*, 602 U.S. at 699). Here, unlike section 922(g)(8), section 14-415.1 affirmatively *requires* a felony conviction prior to revoking an individual's firearm rights. N.C. Gen. Stat. § 14-415.1(b)(1) (2023).

In sum, Defendant's facial challenge to the constitutionality of section 14-415.1 fails as the regulation is within the Nation's tradition and history of disarming individuals who pose a threat to the safety of others. Moreover, section 14-415.1 has a "plainly legitimate sweep" and can be applied constitutionally to numerous circumstances. For example, section 14-415.1's prohibition applies to individuals convicted of assault with a deadly weapon. *See* N.C. Gen. Stat. § 14-32(a)–(c) (2023) (criminalizing assault with a deadly weapon in various forms as a felony). Accordingly, Defendant's facial challenge to section 14-415.1 under the United States constitution is without merit.

b. As-Applied Challenge

An as-applied challenge requires a defendant to show the statute at issue is unconstitutional as applied to the facts of his specific case. *See Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211 (4th Cir. 2024) ("In an as-applied challenge, the court focuses on the circumstances of the particular [party] and whether, in light of those circumstances, the challenged law was unconstitutionally applied to *those* [parties]." (emphasis in original) (internal marks and citations omitted)).

Defendant argues section 14-415.1 is unconstitutional under the Second Amendment to the United States constitution as applied to him. Specifically, Defendant contends the predicate felony which triggered his violation of section 14-415.1, larceny of a dog and animal cruelty, are not violent crimes against people and therefore disarming him is not within the nation's tradition of disarming individuals who pose a violent threat to others. This argument is without merit.

Defendant was convicted of felony animal cruelty for stealing his parent's pet dog and then using a knife to decapitate the dog—certainly

a violent crime. Even if this were not a violent felony, the record reflects Defendant has previously been convicted of other violent crimes. Specifically, the record reflects Defendant has a history of victimizing others resulting in convictions for: assault on a government official or employee, simple assault, simple assault again, assault inflicting serious injury, assault on a handicapped person, and assault and battery. *See State v. Davis*, 68 N.C. App. 238, 244, 314 S.E.2d 828, 832 (1984) ("An assault is an overt act or an attempt, or the unequivocal appearance of an attempt, *with force and violence*, to do some immediate physical injury to the person of another . . . sufficient to put a reasonable person in fear of immediate bodily harm." (cleaned up)).

Simply put, as Defendant has a demonstrated history of violence towards others, applying section 14-415.1 against him and revoking his firearm rights is again well within this nation's tradition and history of disarming individuals who pose a threat of violence towards others.

2. Section 30

In addition to Defendant's challenges under the federal constitution, Defendant contends section 14-415.1 also violates section 30 of the North Carolina State Constitution, both facially and as applied to him. Again, it does not.

Section 30 of the State Constitution states, *inter alia*, that, "[a] well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed[.]" N.C. Const. art. I, § 30. Our Supreme Court has held it is within the General Assembly's police power to regulate the right to bear arms so long as the regulation is "at least reasonable and not prohibitive, and [the regulation] must be a fair relation to the preservation of the public peace and safety." *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322 (2009) (citation and internal marks omitted).

Constitutional challenges under our State Constitution mirror those made under the federal constitution. To succeed on a facial challenge, a defendant "must establish that no set of circumstances exists under which the act would be valid." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (cleaned up). "[A]ny act promulgated by the General Assembly" enjoys a presumption of constitutionality and we resolve all doubt in favor of constitutionality. *State v. Harris*, 242 N.C. App. 162, 164, 775 S.E.2d 31, 33–34 (2015) (citing *State v. Fowler*, 197 N.C. App. 1, 13, 676 S.E.2d 523, 536 (2009)). An as-applied challenge, on the other hand, "represents a party's protest against how a statute was applied in the particular context in which the party acted or proposed

to act[.]" *Lakins v. W. N.C. Conf. of United Methodist Church*, 283 N.C. App. 385, 393, 873 S.E.2d 667 (2022) (cleaned up). While the General Assembly has modified section 14-415.1 on numerous occasions, we have nonetheless upheld its constitutionality as applied to other individuals. *State v. Fernandez*, 256 N.C. App. 539, 548, 808 S.E.2d 362, 369 (2017) (holding section 14-415.1 constitutional as applied to the defendant); *State v. Bonetsky*, 246 N.C. App. 640, 648, 784 S.E.2d 637, 643 (2016) (holding the same).

We apply five factors to the specific facts of the case when a defendant challenges the application of section 14-415.1 to them:

> (1) the type of felony convictions, particularly whether they involved violence or the threat of violence, (2) the remoteness in time of the felony convictions; (3) the felon's history of law-abiding conduct since the crime, (4) the felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited, and (5) the felon's assiduous and proactive compliance with the 2004 amendment.

Bonetsky, 246 N.C. App. at 644, 784 S.E.2d at 640 (citing *State v. Whitaker*, 201 N.C. App. 190, 205, 689 S.E.2d 395, 404 (2009)); *see also Britt*, 363 N.C. at 549–50, 681 S.E.2d at 322–23 (setting forth the factor test for as-applied challenges to section 14-415.1). Pertinent to this analysis is whether the individual challenging application of section 14-415.1 voluntarily disarms themselves prior to seeking vindication of their right to bear arms or waits until they are disarmed by law enforcement and then subsequently seeks vindication. *Bonetsky*, 246 N.C. App. at 644–45, 784 S.E.2d at 640–41.

Defendant contends the *Britt* factors are inapplicable to his challenge as they were first applied in a challenge to the 2004 amendment of section 14-415.1. In 2004, the General Assembly amended a previous version of the law, which allowed convicted felons to possess firearms in their homes or businesses, to foreclose possession in all circumstances. *See Johnson v. State*, 224 N.C. App. 282, 286–88, 735 S.E.2d 859, 864–65 (2012) (discussing the history of amendments to section 14-415.1). In *Britt*, the plaintiff sought declaratory judgment that the 2004 amendment was unconstitutional as applied to him because both his civil and firearm rights had been restored prior to the amendment. *Britt*, 363 N.C. at 549–50, 681 S.E.2d at 322–23. There, the plaintiff was convicted of one felony count of possession with intent to sell and deliver a controlled substance in 1979. *Id.* The plaintiff thereafter lived a law-abiding life and

ultimately disarmed himself of the firearms he had acquired following the restoration of his rights when he learned of the 2004 amendment. *Id*. The Supreme Court, weighing the facts of the plaintiff's case, determined application of section 14-415.1 to him was "an unreasonable regulation, not fairly related to the preservation of public peace and safety." *Id*. at 550, 681 S.E.2d at 323.

While Defendant's argument is persuasive because the factual circumstances underlying the challenges are materially different, a change in the standard utilized to adjudicate these challenges must come from the General Assembly or a higher court as binding precedent requires us to apply the *Britt* factors when a defendant challenges section 14-415.1 as applied to them. *See Fernandez*, 256 N.C. App. at 547–48, 808 S.E.2d at 368–69 (utilizing the *Britt* factors to analyze an as-applied challenge to section 14-415.1 where the predicate felony was committed after 2004); *see also In re O.D.S.*, 247 N.C. App. 711, 721–22, 786 S.E.2d 410, 417 (2016) ("One panel of this Court cannot overrule a prior panel of this Court, or our Supreme Court." (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

Here, regarding Defendant's previous felony convictions, on 8 November 2017 he was convicted of animal cruelty because he stole and then used a knife to decapitate his parent's dog while on post-release supervision for another crime. Defendant was also convicted of larceny of a motor vehicle in 2019, although the record does not reflect whether Defendant used violence or the threat of violence when committing this offense. "In addition to his felony convictions, [D]efendant has demonstrated a blatant disregard for the law as he has been convicted of numerous misdemeanors:" disorderly conduct by abusive language in 2010, assault on a government employee or official in 2010, simple assault in 2010, larceny in 2010, simple assault again in 2015, assault inflicting serious injury in 2015, assault on a handicapped person in 2017, assault and battery in 2017, larceny of a dog in 2017 as mentioned previously, intoxicated and disruptive behavior in 2019, and finally first-degree trespassing in 2019. *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 404.

Both of Defendant's felonies were proximate in time to Defendant's convictions in the present case and are evidence of Defendant's continuous willingness to violate the rights of others. Furthermore, Defendant's behavior does not reflect a history of responsible gun ownership. Rather, the first known instance of Defendant possessing a gun was when he utilized a revolver to kill two people in the present case. Lastly, Defendant did not voluntarily surrender a firearm to law enforcement as part of an effort to comply with the law. Instead, Defendant was charged with

possession of a firearm by a felon after acquiring a revolver, posting pictures on social media with said revolver, and then utilizing the revolver to murder two individuals.

At bottom, the *Britt* factors undoubtedly weigh in favor of upholding the application of section 14-415.1 against Defendant as he has a demonstrated history of violence, victimizing others, and disregarding the law. Moreover, doing so is reasonable and consistent with the tradition of disarming individuals who pose a threat of violence towards others. *See Whitaker*, 201 N.C. App. at 206–07, 689 S.E.2d at 405 ("It is not unreasonable to prohibit a convicted felon who has violated the law on numerous occasions . . . from possessing firearms in order to preserve 'public peace and safety.' " (citations omitted)).

Accordingly, we hold section 14-415.1 was constitutionally applied to Defendant. Being so, we hold section 14-415.1 is facially constitutional as well because Defendant has failed to show that there are "no set of circumstances under which the act would be invalid." *Bryant*, 359 N.C. at 564, 614 S.E.2d at 486 (citations and internal marks omitted).

B. Phone Call

[2] Defendant argues the trial court abused its discretion by admitting statements Defendant made during a phone call with his mother into evidence. Specifically, Defendant contends his statements were not relevant to any fact in question and were unduly prejudicial. We disagree.

1. Rule 401

Rule 401 of the North Carolina Rules of Evidence states that "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401 (2023) (cleaned up). Irrelevant evidence is inadmissible while "[a]ll relevant evidence is admissible unless otherwise provided by the [c]onstitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly, or by the Rules of Evidence." *State v. Washington*, 386 N.C. 265, 268, 900 S.E.2d 657, 659 (2024) (cleaned up). This threshold to admissibility is "relatively lax[,]" *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988), and we review the trial court's decision de novo, *State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015). Moreover, the party challenging the evidence as improperly admitted must "show both error and that he was prejudiced by its admission." *State v. Anderson*, 200 N.C. App. 216, 220, 684 S.E.2d 450, 454 (2009) (internal marks omitted) (quoting *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987)).

Here, the trial court admitted over Defendant's objection portions of a phone call between Defendant and his mother during which Defendant states "[t]his is a hard time for our country, and you've got racist black people out here." In context, Defendant made this statement while his mother questioned his reasons for possessing and posting on social media a picture of a firearm despite his status as a felon.

The State's theory of the case was that, because both victims were peaceful individuals whom Defendant had never met that happened to be people of color, the murders were committed out of racial animus on Defendant's part. In support of its theory, the State pointed towards Defendant's statements and that one of the victims, Mr. Lucas, was black while the other victim, Mr. Vellingiri, was Indian but had a dark complexion—in fact, law enforcement thought he may have been black upon arrival at the scene.

Stated differently, the State argued, and we agree, Defendant's statements reflecting that he obtained a firearm because of "racist black people" were probative of his motive for committing the murders. *See State v. Fleming*, 350 N.C. 109, 130, 512 S.E.2d 720, 735 (1999) ("Evidence is 'relevant when it reveals a circumstance surrounding one of the parties and is necessary to understand properly their conduct or motives or if it allows the jury to draw a reasonable inference as to a disputed fact.' "). Moreover, "[i]n the context of a murder, evidence is relevant if it tends to shed light upon the circumstances surrounding the killing[.]" *State v. Garcia*, 358 N.C. 382, 416, 597 S.E.2d 724, 748 (2004) (citations and internal marks omitted). Thus, Defendant's statements shed light on the circumstances surrounding his purchase of a firearm and the subsequent murders he committed using the firearm.

Accordingly, Defendant's argument that his statements were irrelevant is without merit. Having determined so, we now review the trial court's determination that the statements probative value was not substantially outweighed by its prejudicial value. *Triplett*, 368 N.C. at 175, 775 S.E.2d at 807.

2. Rule 403

Even if evidence is admissible under Rule 401, it may still "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2019) (cleaned up). Generally, "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. Washington*, 141 N.C. App. 354, 367, 540 S.E.2d 388, 397 (2000) (citations and internal marks omitted). Rather, evidence will

be excluded under Rule 403 where it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, on an emotional one." *State v. Baldwin*, 240 N.C. App. 413, 418, 770 S.E.2d 167, 171 (2015) (cleaned up).

The decision to include or "exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court," *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (citation omitted), which we review for an abuse of discretion, *State v. Gillard*, 386 N.C. 797, 816, 909 S.E.2d 226, 248 (2024); *see also Triplett*, 368 N.C. at 175, 775 S.E.2d at 807 ("We review relevancy determinations by the trial court de novo before applying an abuse of discretion standard to any subsequent balancing done by the trial court."). An abuse of discretion occurs where the trial court's decision is " 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Richardson*, 385 N.C. 101, 133, 891 S.E.2d 132, 163 (2023)). Moreover, a defendant must show "there is a reasonable possibility that, had the error not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443 (2023).

Here, the record reflects the trial court's decision to admit Defendant's statement was not unsupported by reason or arbitrary, but rather the result of carefully balancing the statement's probative and prejudicial values. As explained above, Defendant's statements supported the State's theory of Defendant's motive for killing Mr. Lucas and Mr. Vellingiri. Additionally, the recording of Defendant's phone call with his mother contained numerous other statements, including more detailed statements showing potential racial animus, such as that there were "racist people out there killing white people all over the place[,]" which the trial court did not admit because they would have been unduly prejudicial. *See State v. Miller*, 197 N.C. App. 78, 91, 676 S.E.2d 546, 554–55 (2009) ("This Court will not intervene where the trial court properly appraises the probative and prejudicial values of evidence under Rule 403." (citations omitted)).

Even assuming it was error to admit Defendant's statements, he cannot show prejudice because the State presented substantial and overwhelming evidence that Defendant committed the two murders. Specifically, the State showed Defendant purchased a revolver which was consistent with the firearm used in both murders as no shell casings were recovered, went to the scenes of both murders when they were committed, had gun-powder residue on his belongings, and likely had one victim's blood on his hat. In the face of this evidence, we cannot say there is a reasonable possibility that the jury would have reached

a different verdict had the trial court not admitted Defendant's own statements as evidence of his motive. *See* N.C. Gen. Stat. § 15A-1443 ("A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]").

Accordingly, the trial court did not err in determining the probative value of Defendant's statements was not substantially outweighed by their prejudicial value.

III. Conclusion

For the aforementioned reasons, we hold section 14-415.1 of the North Carolina General Statutes is both facially constitutional and constitutional as applied to Defendant. Additionally, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges STROUD and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
CHARLES DOMINICK REAVES

No. COA24-663

Filed 19 February 2025

Assault—with a deadly weapon inflicting serious injury—serious injury—sufficiency of evidence

In a prosecution arising from a domestic violence incident, the trial court properly denied defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where the State presented sufficient evidence that defendant had inflicted "serious injury" upon his girlfriend, including that: defendant repeatedly hit her with his fists and his gun, then kicked her in the mouth and struck her with a curtain rod; the girlfriend escaped defendant's attack by jumping from the second-floor balcony of his apartment, since he had blocked her escape by door; she suffered bruising, swelling, bleeding, and lacerations on different parts of her body, and her fingernail was torn off; she felt a "throbbing" pain throughout her body, for which she was taken to the hospital, given

strong pain medication, and monitored for several hours; her pain and bruising took weeks to heal; and she still had scars on her body at the time of defendant's trial.

Appeal by Defendant from judgments entered 19 January 2024 by Judge L. Lamont Wiggins in Durham County Superior Court. Heard in the Court of Appeals 14 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General M. Lynne Weaver, for the State.

New Hanover County Public Defender by Assistant Public Defender Max E. Ashworth III, for Defendant.

WOOD, Judge.

Charles Reaves ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a convicted felon. Defendant argues the trial court erred in denying his motion to dismiss for insufficiency of the evidence on the charge of assault with a deadly weapon inflicting serious injury. For the reasons stated herein, we hold Defendant received a fair trial free from error.

I. Factual and Procedural Background

In 2021, Defendant met Emily Brownstein through the dating app "Tinder." Shortly thereafter, Brownstein moved into Defendant's apartment; however, in February 2022, she ended the relationship and moved out. A few months later Defendant reached out to Brownstein wanting to reconnect and resume their relationship. Ultimately, she moved back into Defendant's apartment in early August 2022. Defendant and Brownstein were twenty-three years old at the time.

During the first few days following Brownstein's move-in, their relationship was "pretty good" and "everything was fine." Not long after, they began to argue frequently, and Defendant became "verbally, physically, and mentally" abusive. Defendant insulted, degraded, criticized, and physically assaulted Brownstein with his fists, a curtain rod, and the butt of his handgun. During one argument, Defendant hit her on the head with his gun, causing her head to split open and bleed profusely. The laceration required ten staples. These altercations reportedly occurred "every single day" that she lived with Defendant.

Their final altercation occurred on 3 September 2022. That day, Brownstein awoke in the early afternoon to find Defendant was in a "bad mood" because he was upset over an argument they had the previous night. Following a brief conversation, while she remained seated on their bed, Defendant struck Brownstein on the head and face with his fists and kicked her in the mouth. Defendant hit her with his gun. Eventually, Brownstein escaped from the bed and grabbed a pillow to use in an attempt to shield herself from Defendant. Defendant then grabbed a curtain rod that lay on the floor nearby and hit her with it.

Brownstein ran toward the front door of the apartment to escape Defendant. As she opened the door, Defendant grabbed her, threw her to the ground, and shut and locked the door. Defendant pointed his gun at her and threatened to shoot her while stating that if she tried to get away or told anyone about what he had done, he would kill her.

In fear for her life, Brownstein ran towards the apartment's balcony while Defendant had his back turned. She slid open the door, climbed over the railing, and jumped from the second-floor balcony. She fell approximately ten to fifteen feet landing in bushes on the ground level. Brownstein ran to a mail carrier that was nearby and asked her to call 911, explaining to the carrier that she was "scared that he was going to kill [her]," he had a gun, and she needed help. While she spoke with the 911 dispatcher, Defendant exited the apartment and tried to convince her not to call the cops and to leave with him. Unsuccessful, Defendant left.

Two law enforcement officers responded and took a statement from Brownstein. Durham County EMS arrived shortly after and examined her injuries. She reported pain in her head, nose, lip, legs, and feet. The paramedic noted Brownstein's injuries in the report: bruising and swelling to her left arm; bruising around her cheekbones, with most bruising on the cheek where the gun hit her; bruising and swelling behind her left ear and left thigh; bleeding near her nose ring and earrings; lacerations on her scalp, upper lip, right shin; and a fingernail torn off. The paramedic additionally observed injuries from Defendant's previous attacks including, old bruising, medical staples in her scalp, bruising from strangulation attempts, and lacerations. The treatment provided to her at the scene consisted of bandages, ice packs, ibuprofen, and Tylenol.

Brownstein was transported by ambulance to the hospital for further evaluation, arriving at 3:37 p.m. Upon arrival, she reported her pain level as a "5" out of "10," increasing to a "6" after a few hours. She described it as a "ringing in [her] head," her arms and legs were "pulsating," and her body was "throbbing." The treating nurse provided Brownstein with

a "very strong pain medication," which decreased her pain level to a "0" in the span of approximately one hour. The hospital's report contained similar findings as the EMS report, documenting the bruising, swelling, and tenderness on her body. She was discharged from the hospital around 11:30 p.m. with instructions to take Tylenol and ibuprofen as needed. Following this incident, her pain lasted one to two weeks, the bruising took two to four weeks to heal, and she had scarring on her leg and head. Brownstein provided a written statement to law enforcement the day after her discharge from the hospital.

Defendant was indicted for first-degree kidnapping, assault with a deadly weapon inflicting serious injury, and possession of a firearm by a convicted felon and was subsequently arrested on 7 November 2022. Defendant's trial was conducted on 16 January 2024 through 19 January 2024. At trial, Brownstein testified about the assault that occurred on 3 September 2022, as well as the injuries she sustained in the weeks prior. Additionally, law enforcement officers, the assisting paramedic, and one of the nurses that treated Brownstein at the hospital testified. The State introduced, *inter alia*, photographs taken on 3 September 2022 of Brownstein's injuries, a recording of the 911 call, the EMS and hospital reports, and Brownstein's written statement to law enforcement. At the close of the State's evidence, Defense counsel moved to dismiss the assault with a deadly weapon inflicting serious injury charge. Defendant argued there was insufficient evidence from which the jury could find Brownstein suffered "serious injury" from the assault that occurred on 3 September 2022. The trial court denied Defendant's motion to dismiss.

The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a convicted felon. Defendant was found not guilty of first-degree kidnapping. On 19 January 2024, the trial court entered judgments sentencing Defendant to two consecutive terms of 33 to 52 months of imprisonment and 17 to 30 months of imprisonment, respectively. Defendant entered oral notice of appeal at the conclusion of sentencing.

II. Analysis

Defendant asserts one argument on appeal. Defendant contends the trial court erred when it denied Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury because Brownstein's injuries were not serious injuries pursuant to N.C. Gen. Stat. § 14-32(b).

Upon a defendant's motion to dismiss, the trial court must examine "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." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citations omitted). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013) (citation omitted). "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. Miles*, 267 N.C. App. 78, 82, 833 S.E.2d 27, 30 (2019) (citation omitted). Further, "[w]hen ruling on a motion to dismiss, the 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). It is well-established that "[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Blagg*, 377 N.C. 482, 489, 858 S.E.2d 268, 273 (2021) (citation omitted).

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. McVay*, 287 N.C. App. 293, 296, 882 S.E.2d 598, 602 (2022) (citation omitted). This Court must affirm the trial court's denial of a motion to dismiss if, when taking the evidence in the light most favorable to the State, the record "discloses substantial evidence of all material elements constituting the offense for which the accused was tried." *Id.*

When ruling on a defendant's motion to dismiss, the trial court must consider whether the State presented substantial evidence that the defendant committed "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Webster*, 291 N.C. App. 392, 397, 895 S.E.2d 898, 902 (2023) (citations omitted); *see also* N.C. Gen. Stat. § 14-32(b). On appeal, Defendant's sole argument is that the State did not present sufficient evidence of the third element, "inflicting serious injury," to allow the question to reach the jury. Specifically, Defendant argues "[b]ruising and throbbing pain that are treated with Tylenol do not amount to serious injury."

Serious injury is "physical or bodily injury, but not death, resulting from an assault with a deadly weapon." *State v. Allen*, 233 N.C. App. 507, 513, 756 S.E.2d 852, 858 (2014) (cleaned up). Apart from this definition, our courts have "declined to define serious injury" under N.C. Gen. Stat.

§ 14-32, as "further definition seems neither wise nor desirable." *State v. Walker*, 204 N.C. App. 431, 446, 694 S.E.2d 484, 495 (2010) (citation omitted). For these reasons, "[w]hether serious injury has been inflicted depends on the particular facts of each case and is a question for the jury." *Allen*, 233 N.C. App. at 513, 756 S.E.2d at 858 (citation omitted). It has been consistently held that, "as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." *State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994). Although this determination is made on a case-by-case basis and is a fact-specific inquiry, this Court has outlined the following relevant considerations: "(1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work." *State v. Morgan*, 164 N.C. App. 298, 303, 595 S.E.2d 804, 809 (2004) (citation omitted).

In arguing that the trial court erred when it denied his motion to dismiss, Defendant cites two prior decisions by this Court and our Supreme Court. First, in *State v. Brunson*, the defendant picked up the victim from work and pulled a gun out, putting it against her head as he continued to drive. *State v. Brunson*, 180 N.C. App. 188, 190, 636 S.E.2d 202, 203 (2006). Eventually, the defendant parked in a deserted area, forced the victim out of the vehicle, and beat her with his hands and feet. He then tore off the victim's clothes and raped her. The victim did not seek medical assistance for two days following the incident; however, she felt "pain . . . all over" as the defendant beat her and she suffered from "bruising, swelling, and scratches." *Id.* at 194, 636 S.E.2d at 206. Further, the nurse and law enforcement officer observed that the victim had "swollen, black eyes; bruises on her neck, arms, back and inner thighs; and redness on her vagina." *Id.* As in the present case, the defendant in *Brunson* argued the State failed to present sufficient evidence of serious injury. In light of the victim's injuries, this Court held that the question of whether the defendant inflicted serious injury was properly submitted to the jury. Moreover, the Court emphasized that "our common law does not otherwise define 'serious injury' but leaves it to the jury to decide under appropriate instructions from the trial court." *Id.*

Second, in *State v. Ramseur*, the defendant beat the victim in the head with the bottom of his gun and struck the victim in the shoulder with an air compressor. *State v. Ramseur*, 338 N.C. 502, 507–08, 450 S.E.2d 467, 471 (1994). The victim was hospitalized for several hours, received treatment on his shoulder and fifteen stitches on his head. He sustained bruising to his shoulder and could not properly move his arm for a few days. On appeal, the defendant argued that the State failed to

present sufficient evidence that the victim's shoulder injury was a serious injury because of the defendant's assault with the air compressor. The defendant contended that the injury could not be considered "serious" because the victim drove to the police station after the altercation, the skin on his shoulder was not broken by the blow, and he did not endure great pain or lingering disability. The Court in *Ramseur* held that the defendant's arguments were unpersuasive and there was substantial evidence of serious injury. Accordingly, the charge was properly submitted to the jury. *Id.* at 508, 450 S.E.2d at 471.

In the case *sub judice*, Defendant acknowledges that Brownstein was bruised, suffered pain, and went to the hospital. However, Defendant argues, unlike the victims in *Brunson* and *Ramseur*, she did not need medical treatment; rather, she went to the hospital and received Tylenol. Similarly, Defendant asserts, unlike the victim in *Brunson*, she did not have a black eye, swollen limbs, and did not need a rape kit examination. Further, in distinguishing *Ramseur*, she did not require stitches in her head and was not immobilized for any period of time. In sum, Defendant urges this Court to conclude that *Brunson* and *Ramseur* stand for the proposition that a serious injury, at a minimum, requires medical attention that goes beyond a mere cursory examination.

Contrary to Defendant's position, our courts have consistently declined to define serious injury, aside from the requirement that the victim sustain physical or bodily injury resulting from an assault by the defendant. *See State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962) ("Further definition seems neither wise nor desirable"); *see also Walker*, 204 N.C. App. at 446, 694 S.E.2d at 495 ("The courts of this [S]tate have declined to define serious injury for purposes of assault prosecutions."). Thus, to agree with Defendant's argument, would be to adopt a threshold requirement contrary to longstanding case law.

At trial, the evidence tended to show that Defendant repeatedly hit Brownstein with his fists and his gun, kicked her in the mouth, and struck her with a curtain rod. To escape his attack, Brownstein jumped from the second-floor balcony of Defendant's apartment after he barred her escape by door. She immediately felt pain in her head, nose, lip, legs, and feet. Upon examination, the EMS paramedic reported bruising and swelling to her left arm, cheekbones, left ear, left thigh; blood near her nose ring and earrings; lacerations on her scalp, upper lip, and right shin; and her fingernail was torn off. Subsequently, she was evaluated at the hospital and monitored for several hours. Brownstein classified her pain as a "5" and "6," her body as "throbbing," and she received strong pain medication for her injuries. Her pain lasted between one

to two weeks, the bruising took two to four weeks to heal, and she was scarred at the time of trial.

After careful review of the record evidence, we hold the trial court did not err by denying Defendant's motion to dismiss. The State presented sufficient evidence to allow the jury to decide whether Defendant inflicted serious injury upon Brownstein. *See Morgan*, 164 N.C. App. at 303, 595 S.E.2d at 809 ("Relevant factors in determining whether serious injury has been inflicted include, but are not limited to: (1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work.").

Further, as discussed *supra*, "as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, *it is for the jury to determine the question of whether the injury was serious*." *Alexander*, 337 N.C. at 189, 446 S.E.2d at 87 (emphasis added); *see also State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 374 (1978) (because there was evidence of "physical or bodily injury to the victim, the question of the nature of these injuries was . . . properly submitted to the jury."). It is a "factual determination within the province of the jury[.]" *State v. McLean*, 211 N.C. App. 321, 325, 712 S.E.2d 271, 275 (2011) (citation omitted). Accordingly, consistent with *Alexander* and *Joyner*, because the State presented evidence that Brownstein sustained physical injuries because of the assault by Defendant, it was within the province of the jury to determine the nature of those injuries.

III. Conclusion

The trial court did not err in denying Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. The State presented sufficient evidence from which the jury could find Brownstein suffered serious injury from the assault that occurred on 3 September 2022. Defendant received a fair trial free from error.

NO ERROR.

Chief Judge DILLON and Judge MURRY concur.

STATE v. VELASCO

[297 N.C. App. 885 (2025)]

STATE OF NORTH CAROLINA
v.
ZUAMMETT VELASCO

No. COA24-333

Filed 19 February 2025

1. Appeal and Error—preservation of issues—jury instructions — failure to object at trial—failure to argue plain error—waiver

In a trial for rape, forcible sexual offense, sexual servitude of a child victim, and incest, where defendant did not object to the trial court's instruction to the jury on flight, defendant failed to properly preserve any alleged error with the instruction as required by Appellate Rule 10. Further, defendant did not specifically and distinctly argue on appeal that the instruction amounted to plain error; therefore, the issue was waived and dismissed.

2. Criminal Law—jury instructions—aiding and abetting—parent's presence during daughter's rape—plain error analysis

In defendant's trial for multiple offenses against her daughter—first-degree forcible rape, first-degree forcible sexual offense, sexual servitude of a child victim, and incest—the trial court did not commit plain error when instructing the jury on aiding and abetting by a parent where, given the plethora of evidence of not only defendant's presence during the incidents at issue but also her verbal statements and actions indicating her consent and contribution to the commission of the crimes against her daughter, defendant failed to show that, absent any alleged error, the jury probably would have reached a different result.

Appeal by defendant from judgment entered 3 February 2023 by Judge Rebecca W. Holt in Johnston County Superior Court. Heard in the Court of Appeals 28 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Mark Montgomery, for the defendant-appellant.

TYSON, Judge.

Zuammett Velasco ("Defendant") appeals from judgment entered upon the jury's verdicts finding her guilty of first-degree forcible rape, first-degree forcible sexual offense, sexual servitude of a child victim, and incest of her daughter. We dismiss her waived first argument concerning pattern jury instructions on flight and discern no plain error in her remaining argument on appeal.

I. Background

Katy was born on 23 December 2002. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of all minors and victims). Defendant is Katy's biological mother. Defendant and Katy's father procreated five children. Defendant was married to Katy's father until 2018. When Katy's parents divorced, Defendant left the family home.

In 2020, Katy lived with her biological father, stepmother, and three of her siblings, including her younger sister, Penny. Katy's older sibling, Zoey, had reached the age of majority, moved out, and was living with her boyfriend, Roman. Defendant married Gamaliel Hernandez Velasco ("Gamaliel"), who is between ten and twenty years younger than Defendant, in 2020 or 2021.

Katy had first met Gamaliel when she was celebrating her birthday with Defendant in 2018. Defendant had picked out a dress for Katy to wear. Gamaliel touched and complimented Katy's hair and told Katy how much her appearance resembled Defendant. Defendant told Katy to dance with Gamaliel. Katy agreed, despite feeling uneasy about the situation. While dancing, Gamaliel rubbed his knee outside her clothing against the area of Katy's vagina.

Defendant drove Katy back to her father's house that evening. Katy sat in the front passenger seat, and Gamaliel rode in the backset. Gamaliel touched Katy's hair and inserted his finger inside of Katy's mouth while Defendant was driving. The next day, Defendant called and Katy told her about this incident over the phone. Defendant asked Katy why she had waited to tell her. Katy explained she was "just scared" because she knew Defendant's relationship with Gamaliel "was tough" and she did not "want to get hurt or see [Defendant] get hurt in front of [her]." Defendant told Katy she was not on good terms with Gamaliel.

On 28 August 2020, Katy and her younger sister, Penny, snuck out of their father's house to spend time with Defendant. Defendant had told Penny she wanted to see her. Katy and Penny walked through their neighbor's yard, where Defendant was waiting for them in her car with Gamaliel. Katy and Penny were confused when they saw Gamaliel sitting inside the vehicle, because they were not expecting him to be there.

Defendant planned to consume alcohol and "party" with her daughters that evening. Defendant gave Penny and Katy a marijuana gummy while in the car. When they arrived at the house, Defendant gave them shots of tequila and vodka. The two girls also left Defendant's house with Defendant to purchase more alcohol at a gas station, although Katy was outside the gas station when the alcohol was purchased.

At some point after midnight, Katy started to feel sick. Katy testified: "I felt dizzy. Not really dizzy, but the room was like spinning to me. So I felt really nauseous, and I went to the bathroom, and I had to throw up." Eventually, Penny and Defendant joined Katy in the bathroom. Defendant told Penny and Katy to clean their vaginas, and she washed her own in the bathtub.

Penny went to Defendant's room to go to sleep, but Katy was taken to Gamaliel's bedroom to lie down. Gamaliel started cuddling Katy and rubbing the clothing over her vagina with his hand. Katy tried to tell Gamaliel to stop, but he would not stop. He stopped for a moment, and Defendant entered the room. Katy grabbed Defendant's hand and asked for some water, although she did not want Defendant to leave the room. Katy testified, "I just looked at her in her eyes, and I squeezed her hand to mean[,] that was me telling her that I need her, and then she left, and she came back with more drinks. With two shot glasses. And I started crying and I told her no." Katy did not drink either of the liquor shots.

When Defendant left the room, Gamaliel inserted his hand underneath Katy's underwear and inserted his fingers inside her vagina and inside her rectum. He also started touching her breasts. At some point, Defendant returned to the room. Defendant performed oral sex on Gamaliel with Katy present.

At some point, Defendant brought scissors into the bedroom. Defendant told Gamaliel, "I know you want to. You can do it." Defendant left the bedroom. When Defendant left the room, Gamaliel used the scissors to cut off Katy's clothing. Gamaliel performed oral sex on Katy. He also "suck[ed] on [her] neck."

Defendant returned to the room with Gamaliel's cellphone. Gamaliel asked Defendant to take pictures. Katy saw the flashes, even though her eyes were closed. When Gamaliel's phone battery started to die, Defendant used her cellphone to take more pictures.

While Defendant was taking pictures, Gamaliel inserted his penis inside of Katy's vagina. He touched Katy everywhere on her body and "kissed" her. Katy testified, "And then next thing he did was put me on top of him, and controlled me that way. And then he – my mom

came back to the room, and he laid me back down and continued. He continued. I don't know how long it went for." Defendant eventually told Gamaliel to stop. Defendant brought Katy different clothes and dressed her.

Defendant and Gamaliel drove Katy and Penny to their neighbor's backyard and dropped them off. Katy realized she had lost her house keys, so she texted her brother and asked him to let them into the house. Katy decided to lie on the grass while she waited for her brother to unlock the door. After her brother let Katy and Penny inside the house, Katy slept for a couple of hours. Katy did not say anything to her brother or to Penny about what Gamaliel and Defendant had done.

When Katy awoke, she went downstairs and cried alone on the floor. After she composed herself, she went to the bathroom and saw a mark on her neck in the mirror. Katy called her older sister, Zoey. When Zoey did not answer the phone, she called Zoey's boyfriend, Roman, and told him what had happened.

Zoey and Roman met Katy at her father's house, and Katy told Zoey of the assaults by Gamaliel and Defendant. Zoey angrily called Defendant and spoke with her on the phone. During that phone conversation, Zoey threatened to notify law enforcement. Defendant denied anything had happened to Katy. Defendant contacted Katy by texting Penny's cell phone, because Katy had blocked Defendant on her cell phone and social media. Katy sent Defendant text messages using Penny's cell phone.

Zoey and Roman drove Katy and Penny to the fire department. After speaking to a sheriff's deputy for approximately thirty minutes, she was transported to WakeMed. Katy called her father, while she was on the way to the hospital, and he met her there. Katy was worried her father would be angry at her for sneaking out, but he was not angry and instead "he held [her], and said it's going to be all right." Katy was initially examined at WakeMed and then referred to a sexual assault center for further testing.

Defendant did not return to work after 28 August 2020, the night of the events and allegations. Before Defendant and Gamaliel could be arrested, they fled from Johnston County. They were located and arrested a month later in Indio, California, and returned to North Carolina.

On 16 May 2022, Defendant was indicted for first-degree forcible rape, first-degree forcible sexual offense, sexual servitude of a child victim, and incest. A trial was held on 23 January 2023. Katy, Katy's Father, Penny, Zoey, Roman, and Defendant testified at trial.

Zoey, Katy's older sister, was born in 1997 and was twenty-five years old at the time of trial. She testified as a character witness and corroborated Katy's testimony, and she also recounted the events that occurred after Katy had told Roman and her about Gamaliel's assaults and the crimes committed against her.

Zoey continued to have a good relationship with Defendant after Defendant had moved out of the family home. When Zoey was twenty-one years old, Zoey visited Defendant at her apartment in Knightdale, and she met Gamaliel for the first time. Zoey went to see Defendant because she was upset after she had failed to pass her phlebotomy examination. Defendant picked Zoey up from her biological father's house and took her back to her Knightdale apartment. Defendant gave Zoey her first alcoholic drink, which was multiple shots of Vodka. Defendant and Zoey danced to Spanish music. To Zoey's surprise, Gamaliel walked into the apartment. Gamaliel told Zoey she resembled Defendant and inquired about her age as they continued to drink Vodka shots.

Zoey and Defendant danced together until Defendant asked Zoey to dance with Gamaliel. Zoey agreed and danced with him. Zoey used her cellphone to reply to a SnapChat message with a video, which revealed she was dancing with Gamaliel. At some point, Zoey's friends told her they were coming to pick her up.

Zoey felt dizzy and decided to lie down on Defendant's bed. Defendant walked out of the room as Gamaliel walked into the room, and Gamaliel lay down on the bed with Zoey. Gamaliel cuddled Zoey and started rubbing her thighs and reaching for her breasts. Zoey pushed Gamaliel away and called for Defendant. Defendant entered the room, and Gamaliel sat up. Defendant brought Zoey some water.

Zoey's boyfriend and biological father started looking for Zoey by banging on random doors in Defendant's apartment complex. While Zoey was waiting, Gamaliel asked Zoey, "Do you want to f*ck me?" Zoey replied "no", got up, went to the door, and told Defendant she had to go. Zoey left Defendant's apartment and found her biological father and her then-boyfriend downstairs. Zoey told Defendant the next day what had happened with Gamaliel and how it had made her feel uncomfortable. Defendant was upset, but told Zoey not to worry about it because she would handle it.

A few months later, Zoey visited Defendant at her apartment because she wanted to maintain a relationship with her mother. Defendant had told Zoey that Gamaliel would not be there, but he was present. After Zoey and Defendant spent the day drinking together at the pool, Gamaliel

came to the apartment after work. While Zoey was talking to Roman on the phone, Gamaliel asked Zoey, in an angry tone, who she was talking to and why she was talking to them. Zoey told Gamaliel to leave her alone and not to touch her, because he had brushed her hair. Gamaliel grabbed Zoey's phone and hung up on Roman. After this encounter, Zoey again told Defendant she did not feel comfortable being around Gamaliel. Defendant again assured Zoey she would talk to Gamaliel and deal with it.

Other individuals outside of Katy's family also testified: the Sheriff's Sergeant with whom Katy had first reported the assault; the detective who had met with Katy at WakeMed; the nurse practitioner at WakeMed, who had examined Katy; the sexual assault nurse who had met with Katy at the sexual assault center; several other detectives, who investigated the case and collected evidence; and several expert witnesses, who collected DNA evidence and completed the requisite testing.

Beatriz Pujols ("Pujols"), a forensic scientist in the forensic biology section of the North Carolina State Crime Laboratory, testified as an expert in bodily fluid identification, DNA analysis, and DNA interpretation. Pujols conducted a DNA analysis of the sexual assault evidence collection kit containing multiple body swabs, hair samples, and underpants from Katy. The profile obtained from collections of Katy's right breast swabs and left neck swabs matched Gamaliel's DNA profile. Notably, these swabs were collected after Katy had changed her clothes, been driven back to her father's home, waited in the yard for her brother to let her into the house, had slept for several hours, spoken with Zoey and Roman, given her testimony to the Sheriff, and finally been escorted to the hospital.

Pujols opined Gamaliel Hernandez Velasco was the second contributor to the profile generated from Katy's left neck swab: "The partial DNA profile obtained from the right breast swab is approximately 199 quintillion times more likely it originated from [Katy] and Hernandez Gamaliel Velasco, than it originated from [Katy] in an unknown, unrelated individual." Pujols further opined: "[T]he statistics for this item are the DNA profile obtained from the left neck swab is approximately 1.16 nonmillion times more likely it originated from [Katy] and Hernandez Gamaliel Velasco, than it originated from [Katy] [and] an unknown, unrelated individual."

Detective C.J. House ("Det. House") searched Defendant's and Gamaliel's apartment. Det. House found "a pair of blue in color panties that obviously had been damaged or cut" and "a pair of pants that were obviously cut" in Defendant's trash can. At least ten empty bottles

of alcohol were found in Defendant's trash can, and more alcohol was found in the refrigerator.

The jury found Defendant guilty of all four crimes of which she was indicted. Defendant was sentenced as a prior record level I offender to 240 to 348 months for first-degree forcible rape, 240 to 348 months for first-degree forcible sexual offense to run consecutively to her first-degree forcible rape sentence, and to 73 to 148 months for incest and sexual servitude, which were both consolidated and set to run concurrently to Defendant's prior two sentences. Each of Defendant's sentences were within the presumptive range. Defendant entered oral notice of appeal in open court.

II. Jurisdiction

This Court possesses jurisdiction to review a final judgment entered in a criminal case pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court erred by: (1) omitting a parenthetical phrase from the pattern jury instructions for flight; and, (2) instructing the jury on aiding and abetting because she is Katy's biological mother and was present in the home when the alleged incidents occurred.

IV. Jury Instruction on Flight

[1] Defendant argues the trial court erred by omitting the parenthetical phrase from the first sentence of the pattern jury instruction on flight, which states: "The State contends (and the Defendant denies) that the defendant fled." N.C.P.I.–Crim. 104.35 (June 2021).

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure requires: "In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298-99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(a)(1)).

In criminal cases, this Court may review unobjected-to instructional and evidentiary errors for plain error. *State v. Lawrence*, 365 N.C. 506, 512-16, 723 S.E.2d 326, 330-33 (2012) (explaining "[u]npreserved error in criminal cases, on the other hand, is reviewed only for plain error" and "plain error review in North Carolina is normally limited to instructional and evidentiary error" (citations omitted)).

A defendant must "specifically and distinctly" argue "an issue that was not preserved by objection . . . amount[ed] to plain error." N.C. R. App. P. 10(a)(4). Additionally, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection[.]" N.C. R. App. P. 10(b)(2).

Failure to allege plain error regarding an unpreserved issue waives all appellate review. *State v. Benner*, 380 N.C. 621, 638, 869 S.E.2d 199, 210 (2022); *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)).

Here, Defendant failed to preserve her argument asserting the trial court should have included the parenthetical phrase "(and the defendant denies)" in the jury instruction on flight. Defendant failed to "specifically and distinctly" contend the issue she purportedly raised on appeal "amount[ed] to plain error." N.C. R. App. P. 10(a)(4). Defendant presents this argument for the first time on appeal. N.C. R. App. *id.*; *Regions Bank*, 206 N.C. App. at 298-99, 697 S.E.2d at 421; *State v. Richardson*, 328 N.C. 505, 514, 402 S.E.2d 401, 407 (1991). Defendant's argument regarding this issue is waived and dismissed. *Benner*, 380 N.C. at 638, 869 S.E.2d at 210; *Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394; N.C. R. App. P. 28(b)(6).

V. Jury Instruction on Aiding and Abetting

[2] Defendant next argues the trial court erred by instructing the jury on aiding and abetting. Defendant argues the trial court's inclusion of this instruction was based solely on her being Katy's biological mother and being present in the home when the alleged incidents occurred.

A. Standard of Review

This Court reviews unpreserved instructional errors using the plain error standard of review. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330. A defendant has failed to preserve an issue for appellate review if the argument was not raised before the trial court. *See Regions Bank*, 206 N.C. App. at 298-99, 697 S.E.2d at 421 (citing N.C. R. App. P. 10(a)(1)).

"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)).

In appeals of criminal cases, this Court may review unobjected-to instructional and evidentiary errors for plain error. *Lawrence*, 365 N.C. at 512-16, 723 S.E.2d at 330-33. As noted, Defendant must "specifically and distinctly" argue "an issue that was not preserved by objection . . . amount[ed] to plain error." N.C. R. App. P. 10(a)(4).

Plain error is defined as:

> a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial[,] or where the error is such as to seriously affect the fairness, integrity[,] or public reputation of judicial proceedings[,] or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations, quotation marks, and alterations omitted). "To show that an error was fundamental, a defendant must establish prejudice." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result[.]" *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

Here, Defendant failed to object and preserve her argument on appeal. At trial, Defendant objected to a specific portion of the jury instructions for the crime of first-degree forcible rape (multiple assailants). N.C.P.I.–Crim. 207.10A (June 2020). The second element of that crime requires the State to prove beyond a reasonable doubt "that the defendant **aided and abetted** another to use or threatened to use force sufficient to overcome any resistance the alleged victim might make." The State asked for the following jury instructions to be included:

> Constructive force can be inferred from a parent-child relationship between the defendant and the victim. State v. Etheridge, 319 N.C. 34 (1987); State v. Mueller, 184 N.C. App. 553, 567-69 (2007); Locklear, 172 N.C. App. 249; State

> v. Corbett, 154 N.C. App. 713 (2002); State v. Hardy, 104 N.C. App. 226 (1991).
>
> Constructive force may also be inferred when one engages in sex acts with a person who is unable to consent due to mental incapacity or physical helplessness. See State v. Washington, 131 N.C. App. 156 (1998); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442, 1988 N.C. App. LEXIS 529 (1988).

(citations and format original). Defendant presented arguments before the trial court challenging the inclusion of this language in the jury instruction for the second element of first-degree forcible rape.

Aside from the second element of aiding and abetting in first-degree forcible rape, the jury was also instructed on aiding and abetting concerning each of the four crimes Defendant was being tried for. After the jury was instructed on the elements for each of those crimes, a separate section was provided entitled "Aiding and Abetting – Parent." Those instructions, which were discussed during the jury charge conference and later read four times to the jury, included the following:

> The failure of a parent who is present to take all steps reasonably possible to protect his or her child from attack or sexual assault by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime[,] and thus is sufficient to support a conviction based on aiding and abetting. State v. Walden, 306 N.C. 466 (1982); State v. Ainsworth, 109 N.C. App. 136 (1993).

(citations and format original). Defendant failed to object to these instructions.

On appeal, Defendant presents arguments concerning the latter aiding and abetting jury instruction, and Defendant's brief cites the above jury instruction *verbatim*. Defendant does, however, also argue the trial court committed plain error if the Court concludes her argument was not preserved at trial. We review Defendant's argument for plain error. N.C. R. App. P. 10(a)(1)-(2), (4); *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330; *Regions Bank*, 206 N.C. App. at 298-99, 697 S.E.2d at 421 (citing N.C. R. App. P. 10(b)(1)); *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

B. Analysis

Defendant must demonstrate "that absent the error, the jury probably would have reached a different result[.]" *Jordan*, 333 N.C. at 440, 426

S.E.2d at 697 (citation omitted). The Court in *State v. Walden* addresses whether a parent has a duty to protect their child from the commission of a crime and, if so, what actions are sufficient to support a conviction for aiding and abetting. 306 N.C. 466, 293 S.E.2d 780 (1982). Our Supreme Court explained the "trial court was, of course, correct in perceiving that whether a general legal duty of parents exists in such cases is a question of law to be determined by the trial court and stated to the jury, rather than a question of fact for the jury." *Id.* at 474, 293 S.E.2d at 785 (citation omitted). Thus, instructing the jury on a parent's duty to protect their children is a legal question and not a factual one. *Id.*

The Court in *Walden* further held "to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent." *Id.* at 475, 293 S.E.2d at 786. This duty "has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute." *Id.* While parents do not have a "legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children[,]" they "do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children." *Id.*

Walden also provided a final caveat:

> It remains the law that one may not be found to be an aider and abettor, and thus guilty as a principal, solely because he is present when a crime is committed. It will still be necessary, in order to have that effect, that it be shown that the defendant said or did something showing his consent to the criminal purpose and contribution to its execution.

Id. at 476, 293 S.E.2d at 786-87 (citations omitted).

Even if the trial court's omission of the final caveat in *Walden* was error, Defendant has failed to demonstrate the trial court committed plain error. *See Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378. The State presented a plethora of evidence at trial tending to show Defendant "said or did something showing h[er] consent to the criminal purpose and contribution to its execution." *Walden*, 306 N.C. at 476, 293 S.E.2d at 786-87.

Katy testified she heard Defendant tell Gamaliel, "I know you want to. You can do it." Defendant brought scissors to Gamaliel to cut off Katy's underwear and outer clothing and allegedly took photos while Gamaliel was raping her. Defendant helped Katy sneak out of her father's

house, served her alcohol while underage, and provided her with marijuana gummies, all of which made her nauseous, dizzy, disoriented and made it easier for Gamaliel to sexually abuse Katy. Defendant has failed to show error or plain error to establish, "absent [any purported] error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

VI. Conclusion

Defendant received a fair trial, free from plain and prejudicial errors she preserved and argued on appeal. She has failed to show plain error by failing to demonstrate "the jury probably would have reached a different result[.]" *Id.* We discern no prejudicial or reversible error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and FREEMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 FEBRUARY 2025)

IN RE A.W. No. 24-371	Cumberland (22JB15)	Dismissed
IN RE C.C.B. No. 24-870	Cumberland (19JT000162) (19JT000163)	Affirmed
IN RE J.D.S. No. 24-569	Union (20JT000143)	Affirmed
IN RE L.M.H. No. 24-656	Pitt (23JT000076)	Affirmed
IN RE R.S.M-M. No. 24-851	Gaston (22JT000217)	Affirmed
OXFORD HOUS. AUTH. v. CHURCH No. 23-917	Granville (22CVD716)	Reversed and Remanded
STATE v. BARRETT No. 24-597	Pasquotank (21CRS050580)	No Error
STATE v. BELL No. 24-511	Gaston (20CRS054904) (20CRS054905) (20CRS055980) (20CRS055981)	No Plain Error
STATE v. BOLES No. 24-542	Catawba (20CRS003466) (20CRS054797)	No Error
STATE v. BREWINGTON No. 24-327	Alamance (18CRS2270) (18CRS2272)	Vacated and Remanded
STATE v. CARR No. 24-423	Yancey (23CRS232540) (23CRS59)	Vacated and Remanded
STATE v. CURL No. 24-858	Brunswick (23CRS353928)	Affirmed
STATE v. DAVIS No. 24-275	Wayne (19CRS1990-2009) (21CRS1235-36)	REVERSED IN PART AND REMANDED, NO PLAIN ERROR IN PART

STATE v. FINGER No. 24-495	Watauga (22CRS050371)	Affirmed.
STATE v. GRIER No. 24-383	Cleveland (22CRS1088) (22CRS260238)	No Error
STATE v. LOCKLEAR No. 24-741	Scotland (00CRS000022) (00CRS000023)	Affirmed
STATE v. LONG No. 24-531	Guilford (20CRS078860)	New Trial
STATE v. MOORE No. 24-585	McDowell (22CRS000306) (22CRS000307) (22CRS050792) (22CRS050793)	No Error
STATE v. NOBLITT No. 24-860	Catawba (23CRS209515)	Dismissed
STATE v. PICA No. 24-502	Surry (20CRS000297) (21CRS052538)	No Plain Error
STATE v. ROBERTSON No. 24-356	Stokes (19CRS22) (19CRS700059-60)	Affirmed In Part, and No Plain Error In Part
STATE v. SHIPMAN No. 24-167	Bladen (16CRS51564) (19CRS368-69)	No Error
STATE v. WASHINGTON No. 24-529	Cabarrus (20CRS000580) (20CRS053767)	No Error
SULLIVAN v. PENDER CNTY. No. 24-545	Pender (20CVS000752)	Affirmed

HEADNOTE INDEX

ALIENATION OF AFFECTIONS
APPEAL AND ERROR
ARBITRATION AND MEDIATION
ASSAULT
ATTORNEY FEES
ATTORNEYS

CHILD ABUSE, DEPENDENCY, AND NEGLECT
CHILD CUSTODY AND SUPPORT
CHURCHES AND RELIGION
CIVIL PROCEDURE
COLLATERAL ESTOPPEL AND RES JUDICATA
CONSTITUTIONAL LAW
CRIMINAL LAW

DAMAGES AND REMEDIES
DECLARATORY JUDGMENTS
DISCOVERY
DIVORCE
DOMESTIC VIOLENCE

EVIDENCE

FIREARMS AND OTHER WEAPONS

HOMICIDE
HUSBAND AND WIFE

IMMUNITY
INJUNCTIONS
INSURANCE

JUDGMENTS
JURISDICTION
JURY
JUVENILES

MORTGAGES AND DEEDS OF TRUST
MOTOR VEHICLES

NEGLIGENCE

POLICE OFFICERS
PROBATION AND PAROLE

SATELLITE-BASED MONITORING
SEARCH AND SEIZURE
SENTENCING
SEXUAL OFFENDERS
STATUTES OF LIMITATION AND REPOSE

TERMINATION OF PARENTAL RIGHTS
TORTS, OTHER

UNFAIR TRADE PRACTICES

ZONING

ALIENATION OF AFFECTIONS

Evidence of out-of-state conduct—where alienation of affection is not a recognized tort—admissibility—In an alienation of affection case, where defendant's alleged conduct spanned multiple states of which North Carolina was the only one that recognized the tort of alienation of affection, plaintiff's evidence of defendant's out-of-state conduct was still admissible, since it was relevant to the issue of where the tortious injury occurred. Even if the location of the injury had not been disputed by the parties or presented to the jury, the evidence was still relevant, as defendant's out-of-state conduct made it more likely to be true that defendant "produced the loss of [plaintiff and his ex-wife's] love and affection." **Fish v. Stetina, 733.**

Motion for directed verdict—malice—sufficiency of evidence—In an alienation of affection case, the trial court properly denied defendant's motion for a directed verdict where plaintiff had presented sufficient evidence that defendant acted with malice, including phone records and location data documenting numerous interactions between defendant and plaintiff's ex-wife prior to her separation from plaintiff. To be sure, the doctrine of issue preclusion prevented the jury from considering the phone and location records as proof that defendant and plaintiff's ex-wife engaged in pre-separation sexual intercourse, since that particular issue had already been determined (in the negative) in a prior lawsuit. However, a reasonable jury could still conclude that defendant's repeated phone conversations and visits with plaintiff's ex-wife amounted to "intentional conduct that would probably affect the marital relationship" between the spouses. **Fish v. Stetina, 733.**

APPEAL AND ERROR

Appeal in child neglect matter—motion to strike guardian ad litem brief—proper party—In an appeal in a child neglect matter, in which the trial court dismissed allegations of neglect and dependency, the appellate court denied respondent-parents' motion to strike the guardian ad litem's brief, since the guardian ad litem (GAL) was a proper party in the matter. Although respondents argued that the GAL had not appealed and that it was merely standing in the stead of the county department of social services, which had appealed, respondents failed to cite to any binding authority or to a violation of a specific rule in support of their argument. **In re G.B.G., 772.**

Appellate jurisdiction—child neglect matter—proper party to sign notice of appeal—authorized representative—The notice of appeal in a child neglect and dependency matter—from an order dismissing allegations of neglect and dependency—was sufficient to confer jurisdiction on the appellate court where the notice was signed by a social worker as the authorized representative of the director of the county department of social services, as allowed by statute. Therefore, the appellate court denied respondent-parents' motion to dismiss the appeal and dismissed the department's petition for writ of certiorari as moot. **In re G.B.G., 772.**

Defective notice of appeal—incorrect statutory authority—intent to appeal fairly inferred—appellee not misled—In a private termination of parental rights matter, even if respondent-parents' notices of appeal were jurisdictionally defective pursuant to Appellate Rule 3.1 for citing the wrong statutory authority, dismissal of the appeals was not required where respondents' intent to appeal could be fairly inferred from the notices—including by appealing to the correct appellate court and listing the order from which appeal was taken—and where petitioner-appellee's full participation in the appeal indicated that she had not been misled by the mistake. **In re H.R.P., 339.**

APPEAL AND ERROR—Continued

Failure to appeal—issues not raised in prior appeal—waiver—In a child abuse and neglect matter, respondent-father waived his right to appeal the trial court's decision to eliminate reunification from the permanent plan, and the issue of whether respondent received notice of the possibility that reunification efforts could cease, where he had the opportunity to raise those issues in a prior appeal but chose not to. **In re H.G., 41.**

Interlocutory order—child neglect matter—temporary dispositional order—appeal dismissed—A trial court's order dismissing an allegation that a child was a dependent juvenile was interlocutory because it was a temporary dispositional order; although the trial court also adjudicated the child as a neglected juvenile, the trial court's dismissal did not fully resolve the dependency claim because the order only contained an interim disposition and the matter had been scheduled for a disposition hearing. Therefore, the county department of social services' appeal challenging the temporary dispositional order was dismissed without prejudice. **In re G.B.G., 772.**

Motion for judgment notwithstanding the verdicts—no notice of appeal from denial—no appellate jurisdiction—Plaintiffs' purported appeal from the denial of their motion for judgment notwithstanding the verdicts (JNOV) entered against them was dismissed for lack of jurisdiction where plaintiffs' notice of appeal only designated the judgment entered upon the jury's verdicts and did not specifically designate the order denying their JNOV motion. **Warren v. Bonner, 615.**

Motion to withdraw by appellate counsel—no constitutional right implicated—denied—In an appeal from convictions for attempted first-degree murder and other felonies where defendant had the Appellate Defender appointed as new appellate counsel after his initial appellate counsel was allowed to withdraw—but then supported a motion by the Appellate Defender to withdraw—the Court of Appeals denied the motion to withdraw (as well as any alternative motion for substitution of appointed counsel), noting the lack of any constitutional right for a criminal defendant to proceed pro se on appeal, control the arguments of appointed appellate counsel, or obtain substitute appointed appellate counsel. The appellate court also dismissed without prejudice additional motions that defendant filed, pro se, after the appointment of the Appellate Defender. **State v. Womble, 547.**

Notice of appeal—Appellate Rules violations—intent to appeal fairly inferred—certiorari allowed—In a criminal defendant's appeal from judgments entered upon his convictions for voluntary manslaughter and possession of a firearm by a felon, where his notice of appeal failed to designate the judgments being appealed and the court to which the appeal was taken, his petition for a writ of certiorari was allowed because his intent to appeal the judgments could be fairly inferred from the notice, since it was timely filed on the same day as the judgments' entry, it included the case numbers associated with those judgments, and there were no other judgments from which defendant could have taken appeal. Furthermore, the State did not object to certiorari review of defendant's appeal. **State v. Williams, 512.**

Notice of appeal—jurisdictional defect—not signed by respondent—appeal dismissed—An appeal from the trial court's orders terminating respondent-mother's parental rights to her children was dismissed for lack of jurisdiction because respondent did not sign the notice of appeal as required by N.C.G.S. § 7B-1001(c); although the notice of appeal was filed on respondent's behalf and signed by her attorney and guardian ad litem (who had been appointed pursuant to Civil Procedure Rule 17),

APPEAL AND ERROR—Continued

there was no indication in the record that respondent had been adjudicated incompetent or that she wished to pursue an appeal. **In re Z.A.N.L.W.C., 698.**

Order settling record on appeal—binding on appellate court—certiorari review denied—In an ex-husband's appeal from the trial court's order confirming an arbitration award in his divorce case, the Court of Appeals denied a petition for a writ of certiorari filed by the ex-wife (as part of her cross-appeal) seeking review of the trial court's order settling the record on appeal, which included a large volume of arbitration transcripts and exhibits that were not filed, served, or considered at the hearing before the trial court. As a general matter, this type of order could not be challenged via appeal, since the trial court alone had the authority to settle the appellate record and, therefore, its decision was both final and binding. Further, although the Court of Appeals did have discretion to review the order by granting certioriari, it declined to do so where the ex-wife's argument lacked merit sufficient to justify certiorari review. **Gallagher-Masonis v. Masonis, 272.**

Petition for certiorari—criminal sentencing error—conceded by State—extraordinary circumstances—plea agreement containing waiver of right to appeal—In an appeal from judgments entered upon defendant's guilty plea to criminal charges arising from a fatal car accident, where defendant's plea agreement included a waiver of "all right to appeal," defendant's petition for a writ of certiorari was allowed in the event that the waiver was in fact enforceable—an issue that the appellate court declined to address. The State did not oppose defendant's petition, even conceding that a sentencing error was committed in the trial court. Further, extraordinary circumstances justified issuing a writ of certiorari where, because of the trial court's error, defendant was serving four aggravated consecutive sentences that were not supported by the evidence at sentencing. **State v. Curtis, 826.**

Petition for certiorari—notice of appeal—timeliness—juvenile delinquency case—In an appeal from adjudication and disposition orders in a juvenile delinquency case, the juvenile's petition for a writ of certiorari was allowed—out of an abundance of caution and in the interest of justice—after the juvenile conceded that, because he filed written notice of appeal after the rulings were orally rendered in court but one day before the orders memorializing those rulings were entered, his notice of appeal may have been untimely under N.C.G.S. § 7B-2602 (requiring notice of appeals in delinquency cases to be given in open court "at the time of the hearing" or within 10 days "after" entry of the order appealed from). **In re C.S., 317.**

Preservation of issues—admission of evidence—different objections stated at trial and on appeal—In an alienation of affection case, defendant failed to preserve for appellate review his objection to evidence (placing him and plaintiff's ex-wife at the same hotel during the same time period) on hearsay grounds where, at trial, he explicitly objected to the evidence's admission on the ground that no foundation for the evidence had been laid, and he did not specifically object to the evidence as lacking the requisite foundation for satisfying the business record exception to the hearsay rule (which was the argument he put forth on appeal). Although defendant did preserve his general foundation objection for appeal, he abandoned any argument to that effect by failing to argue it in his appellate brief. **Fish v. Stetina, 733.**

Preservation of issues—admission of exhibits at criminal trial—invited error analysis—In a murder case, defendant did not waive appellate review of his argument that the trial court committed plain error by admitting two exhibits into evidence—each consisting of numerous text or multimedia messages obtained from

APPEAL AND ERROR—Continued

defendant's cell phone—and allowing the exhibits to be published to each jury member to retain for the duration of the trial where, because defendant did not affirmatively seek admission of the exhibits or ask that the exhibits be published to the jury in a prejudicial manner, the invited error doctrine did not apply. Although defense counsel told the court that the manner of publication was "probably a pretty good idea" and that he might use the same method on cross-examination, his statement constituted mere consent and failure to object rather than an unequivocal action directly precipitating the alleged error. Further, he did not elicit testimony on cross which was challenged on appeal. Finally, defense counsel's request for an additional extraction of data from defendant's phone—in order to obtain possible audio files that defense counsel had previously not been aware of—did not trigger the invited error doctrine because it represented counsel's due diligence in seeking to uncover potentially exculpatory evidence. **State v. Hicks, 457.**

Preservation of issues—defendant's right to open closing arguments—In a prosecution that resulted in defendant being convicted on charges including first-degree forcible rape and first-degree forcible sexual offense—where defendant initially proceeded with counsel but part way through the trial was permitted to represent himself with his former attorneys acting as standby counsel—his argument that the trial court erred in failing to advise defendant at the charge conference of his right to open closing arguments (as provided by Rule 10 of the General Rules of Practice for Superior and District Courts) was not preserved for appellate review by a timely request, objection, or motion. Further, the Court of Appeals declined to invoke Appellate Rule 2 to reach the merits of defendant's argument because the authority he cited only concerned the right of criminal defendant to give the final closing argument—as defendant did—a right deemed of critical importance under existing precedent. **State v. Pressley, 495.**

Preservation of issues—jury instructions—failure to object at trial—failure to argue plain error—waiver—In a trial for rape, forcible sexual offense, sexual servitude of a child victim, and incest, where defendant did not object to the trial court's instruction to the jury on flight, defendant failed to properly preserve any alleged error with the instruction as required by Appellate Rule 10. Further, defendant did not specifically and distinctly argue on appeal that the instruction amounted to plain error; therefore, the issue was waived and dismissed. **State v. Velasco, 885.**

Specific personal jurisdiction—stream of commerce—insufficient findings of fact for meaningful appellate review—remanded—In a tort proceeding brought by plaintiff—a resident of Texas and the front-seat passenger in a car involved in a collision in Wake County, who suffered a catastrophic spinal injury after the alleged failure of a rear-seat safety belt caused another passenger to be thrown into the back of plaintiff's seat—against a number of defendants, including appellee Adient US LLC (Adient), one of several entities alleged to be involved in the design, manufacture, and other aspects of the seat belt in question, the trial court's order dismissing the complaint on personal jurisdiction grounds lacked findings of fact sufficient to permit meaningful appellate review of plaintiff's argument that the lower court erred in concluding that plaintiff failed to establish specific personal jurisdiction as to Adient. While the findings of fact concerning other defendants were affirmed because plaintiff did not challenge them, the findings did not address plaintiff's "stream of commerce" arguments pertaining to Adient. Accordingly, the order was affirmed as to other defendants and vacated as to Adient, and the matter was remanded to the trial court for the entry of findings of fact resolving evidentiary conflicts pertinent to Adient's stream of commerce arguments. **Vlassis v. Nissan N. Am., Inc., 560.**

ARBITRATION AND MEDIATION

Equitable distribution—trial court's order confirming arbitration award—standard of review on appeal—On appeal from a trial court's decision confirming an arbitration award, any findings of fact that are not clearly erroneous are accepted as true, while its conclusions of law are reviewed de novo. Therefore, in an appeal from a trial court's order affirming an arbitration award in a divorce case, where the ex-husband argued that the arbitrator abused her discretion in awarding fifty-seven percent of the marital estate to the ex-wife and in ordering the ex-husband to pay three-and-a-half years' worth of prospective alimony, the order was affirmed because the ex-husband failed to argue any error in the trial court's findings of fact or conclusions of law. **Gallagher-Masonis v. Masonis, 272.**

ASSAULT

With a deadly weapon inflicting serious injury—serious injury—sufficiency of evidence—In a prosecution arising from a domestic violence incident, the trial court properly denied defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where the State presented sufficient evidence that defendant had inflicted "serious injury" upon his girlfriend, including that: defendant repeatedly hit her with his fists and his gun, then kicked her in the mouth and struck her with a curtain rod; the girlfriend escaped defendant's attack by jumping from the second-floor balcony of his apartment, since he had blocked her escape by door; she suffered bruising, swelling, bleeding, and lacerations on different parts of her body, and her fingernail was torn off; she felt a "throbbing" pain throughout her body, for which she was taken to the hospital, given strong pain medication, and monitored for several hours; her pain and bruising took weeks to heal; and she still had scars on her body at the time of defendant's trial. **State v. Reaves, 877.**

ATTORNEY FEES

Criminal case—attorney appointment fee—duplicate fees erroneously assessed—Where the trial court erroneously assessed defendant two appointment fees for court-appointed counsel in a criminal matter—once after defendant's sentencing when he pleaded guilty and a second time after his probation was revoked—in violation of N.C.G.S. § 7A-455.1, the duplicate appointment fee was vacated and the matter was remanded to the trial court for recalculation of the judgment. **State v. McCullough, 183.**

ATTORNEYS

Rule 11 sanctions—pro se signature sufficient to certify—other bases not supported by findings of fact—remanded—The trial court's imposition of sanctions against plaintiff under Civil Procedure Rule 11(a) was reversed where one basis for the award was the failure of plaintiff, an attorney licensed in Rhode Island and Massachusetts who represented himself in this tort action, to verify his pleading because he signed the complaint and thus certified the pleading as a party for Rule 11(a) purposes. To the extent defendants' motion for sanctions was allowed because plaintiff's complaint was not well grounded in fact, not warranted by existing law, or filed to harass defendants, the trial court failed to make findings of fact that would support such an award, despite evidence in the record that would permit them; accordingly, the matter was remanded to the trial court to make additional findings. **Bossian v. Chica, 1.**

ATTORNEYS—Continued

Rule 34 sanctions—gross violation of Appellate Rules—inclusion of collateral matters in reply brief—remand for determination of sanctions—As a result of plaintiff's gross violations of the Appellate Procedure Rules—by including legal arguments and factual assertions entirely outside the issues on appeal and outside of the record (some of which plaintiff acknowledged were "collateral" to the appeal at hand)—the Court of Appeals, on its own initiative, imposed sanctions pursuant to Appellate Rule 34 by remanding the matter to the trial court for a hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of that rule; specifically, the appellate court directed the award of up to half of the additional attorney fees related to the appeal, with the option to award less left to the sole discretion of the trial court. **Bossian v. Chica, 1.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse—lack of evidentiary support—prior abuse of sibling insufficient—The trial court's order adjudicating a child as abused was reversed where the only evidence of abuse pertained to the child's older sibling—whose prior adjudication of abuse and neglect resulted from having sustained serious injuries through non-accidental means while in her parents' care—and where there was no evidence that the child subject to the current juvenile petition had ever been subjected to physical harm by the parents or that the parents had directly placed the child in a substantial risk of harm. **In re N.R.R.N., 673.**

Adjudication—sufficiency of evidence and findings—testimony verifying truth of petition allegations—The trial court's findings of fact in its order adjudicating a child neglected and abused were based on clear, cogent, and convincing evidence—including a prior adjudication and disposition of the child's older sibling—and reflected the trial court's processes of logical reasoning and independent evaluation of the ultimate facts of the case rather than a mere verbatim recitation of the allegations contained in the juvenile petition. Further, the sworn testimony of an investigator for the department of social services verifying that the allegations in the petition were true constituted competent evidence. In addition, neither mother nor father objected to the introduction of the petition, presented evidence in opposition to the petition and its allegations, or availed themselves of the opportunity to conduct a cross-examination of the investigator. **In re N.R.R.N., 673.**

Dependency allegation dismissed—at least one parent able to care for child—The trial court did not err by dismissing a county department of social services' allegation that a child was a dependent juvenile where, because there was evidence that at least one parent was able to provide care for the child, the trial court had no reason to consider whether respondent-parents had alternative childcare. **In re G.B.G., 772.**

Disposition order—elimination of reunification—not prohibited by statute—notice to parent not required—In a child abuse and neglect matter, the trial court did not abuse its discretion by eliminating reunification from a child's permanent plan in its disposition order because, contrary to respondent father's contention, N.C.G.S. § 7B-901(d) did not prohibit the court from eliminating reunification even after having previously determined that reunification efforts were not required at the initial disposition hearing. Further, there was no statutory requirement to provide respondent with notice that reunification could be eliminated from the permanent plan. **In re H.G., 41.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Effective assistance of counsel—juvenile petition—failure to advocate during adjudication—pending felony child abuse charges—In an adjudication proceeding on a juvenile petition alleging abuse and neglect, neither parent received ineffective assistance of counsel where their counsels' decisions to "stand mute" or not object to the submission of the juvenile petition constituted permissible strategic decisions in light of the pending felony child abuse charges both parents faced for the alleged child abuse of their older child and the fact that counsel for each parent actively participated in the dispositional phase of the hearing. Further, neither parent could show they were deprived of a fair hearing given the sufficiency of the evidence to conclude that the child was a neglected juvenile. **In re N.R.R.N., 673.**

Initial disposition—ceasing reunification efforts—statutory requirements—In a juvenile abuse and neglect proceeding, the trial court properly ordered the department of social services to cease reunification efforts with the parents at the initial disposition hearing pursuant to N.C.G.S. § 7B-901(c)(3)(iii) after determining, as a "court of competent jurisdiction," that the parents had committed a felony assault resulting in serious bodily injury to the child's sibling. However, the court's order ceasing reunification efforts pursuant to N.C.G.S. § 7B-901(c)(1)(f) was vacated for lack of sufficient findings of the existence of "other" aggravated circumstances, since the facts that gave rise to the adjudication could not also serve as the "other act, practice, or conduct" for purposes of disposition. **In re N.R.R.N., 673.**

Neglect allegation dismissed—lack of injurious environment—neglect of sibling differentiated—The trial court did not err by dismissing a county department of social services' allegation that respondent-parents' one-and-a-half-year-old baby was neglected, where the court's findings of fact were supported by evidence and, in turn, supported the court's conclusions. Although respondent-mother's fifteen-year-old daughter, who had recently joined the household, was adjudicated neglected (based on the teen's untreated mental health issues and attempts at self-harm, and respondent-mother's inadequate response), the teenager's situation was sufficiently different from the younger child's to warrant differing results on allegations of neglect. Similarly, there was no evidence that any arguments between respondent-father and the teenager (who was not his biological daughter) or respondent-father's prior usage of alcohol—for which respondent-father had sought treatment—had any adverse effect on the younger child or put her at substantial risk of impairment. Finally, the trial court had discretion to draw inferences from the evidence about whether conditions of the home rendered it an injurious environment for the younger child. **In re G.B.G., 772.**

Neglect—injurious environment—prior abuse of sibling from non-accidental injuries—The trial court properly adjudicated a child as neglected based on evidence that the child's older sibling had been abused and neglected from sustaining non-accidental injuries, for which the parents had not provided an explanation, and that the parents had not acknowledged the injurious environment created for the sibling or taken steps to remedy the environment to prevent future harm to the child subject to the current juvenile petition. **In re N.R.R.N., 673.**

New adjudication and disposition orders—based on prior hearing—within trial court's discretion—In a child abuse and neglect matter that had been remanded back to the trial court for additional findings of fact, the trial court did not abuse its discretion by entering new adjudication and disposition orders (in which it once again eliminated reunification from the permanent plan based on respondent's sexual abuse of the child) without holding a new evidentiary hearing and instead

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

relying on the transcript of a prior hearing—a decision which the appellate court had left to the trial court's discretion on remand. **In re H.G., 41.**

CHILD CUSTODY AND SUPPORT

Child support—modification—self-employed parent's income—depreciation expenses—sufficiency of findings—The trial court abused its discretion by modifying defendant father's child support obligation without making sufficient findings regarding depreciation expenses (claimed by defendant as deductions on his personal tax returns), which it excluded when calculating defendant's gross income from self-employment. Since the trial court did not make a finding that it was treating the depreciation as accelerated (versus straight-line), or that the depreciation was inappropriate for income determination pursuant to the North Carolina Child Support Guidelines, the trial court's findings lacked sufficient specificity to support its conclusions. Therefore, the court's modification order was reversed and the matter was remanded for additional findings. **Mecklenburg Cnty. v. Pressley, 82.**

Child support—reimbursement for extraordinary expenses—remanded for findings—A child support order in a proceeding between divorced parents was remanded where the trial court left implicit its basis for ordering that defendant reimburse plaintiff for half of prior camp expenses—a permitted expense under the North Carolina Child Support Guidelines "if the court determines the expenses are reasonable, necessary, and in the child's best interest." **Keith v. Keith, 356.**

Custody—consideration of statutory factors—sufficiency of findings—In its order granting joint legal and physical custody to a child's mother and father, the trial court entered numerous findings of fact showing that it addressed the factors in N.C.G.S. § 50-13.2, including those that detailed each parent's personal relationship with the child, financial means, housing situation, work schedule, and type of activities engaged in with the child. The trial court's findings supported its conclusions that the child's best interest would be served by having the parents share joint legal and physical custody and for her to attend schools in the school district where her mother lived. **Ludack v. Ludack, 72.**

Custody—conversion of temporary order to permanent by operation of time—delay in seeking permanent custody—remand required—In a child custody proceeding in which the father argued that the court's temporary custody order (granting a mother and father joint legal and physical custody and setting forth a detailed custody schedule) had converted to a permanent order by operation of time, where the trial court's subsequent permanent custody order (entered thirty-eight months after an evidentiary hearing, which kept joint custody but changed the custody schedule) did not indicate the effect that the mother's twenty-five-month delay in seeking permanent custody had on the temporary order, the matter was remanded for the trial court to hold a hearing to determine whether the temporary order had become permanent. **Ludack v. Ludack, 72.**

Custody—delay in entry of permanent order—remedy—petition for writ of mandamus or other action—In a child custody proceeding, although the father argued on appeal that the trial court's lengthy delay before entering a permanent written custody order was prejudicial, the Court of Appeals—following the same rule adopted by the Supreme Court in termination of parental rights cases—held that the proper remedy would have been to request expedited entry at the trial court level, such as by making a motion or petitioning for a writ of mandamus, rather

CHILD CUSTODY AND SUPPORT—Continued

than waiting to raise the issue for the first time on appeal. Here, after the trial court held an evidentiary hearing on child custody, the parties appeared in court multiple times during the thirty-eight months that passed between the hearing and entry of the order, during which either party could have requested entry of a written order. **Ludack v. Ludack, 72.**

Permanent child support order—imputed income—no abuse of discretion— In a child custody and support proceeding between divorced parents, the trial court did not abuse its discretion in imputing income to defendant for child support purposes where the court's: (1) findings of fact supported its determination that defendant had acted in bad faith to suppress his income, and defendant only challenged weight and credibility determinations made by the court (and critiqued the court's failure to make different and additional findings that he would have preferred), matters left to the discretion of the trial court; and (2) calculation of the amount of income to be imputed followed the framework provided by the North Carolina Child Support Guidelines and was based on evidence of defendant's past income, his employment potential, and earning levels in the community, as demonstrated by the income of a plumber and a plumber's assistant in defendant's employ—a reasonable response to the opacity of defendant's financial circumstances given his refusal to provide documentation thereof. **Keith v. Keith, 356.**

Permanent child support order—past-prospective child support—effective date—remanded for findings—In a child custody and support proceeding between divorced parents, where the trial court set an effective date in July 2019 for past-prospective child support, a date after plaintiff filed her complaint for child support in August 2017, deviating from the pertinent directive in the North Carolina Child Support Guidelines—that such payments should begin on the date a complaint is filed unless a trial court finds, based upon evidence in the record, that it would be unjust or inappropriate to do so—the matter was remanded because the court left implicit the rationale for its past-prospective child support award, rather than making the explicit findings and conclusions required. **Keith v. Keith, 356.**

CHURCHES AND RELIGION

Church property dispute—dismissal for failure to state a claim—sufficiency of allegations—In a dispute between plaintiff church and its parent denomination (one of several related entities listed as defendants) over the church's property—which the church had owned independently for nearly eighty years prior to affiliating with the denomination and which was seized by the denomination after the church inquired about disaffiliating pursuant to the denomination's Book of Discipline—the trial court erred by dismissing the church's claims for declaratory judgment and quiet title for failure to state a claim under Civil Procedure 12(b)(6), since the complaint alleged sufficient facts to meet the elements of both claims. However, the trial court properly dismissed the church's claim for promissory estoppel, which has not been recognized as an affirmative cause of action under North Carolina law. **Fifth Ave. United Methodist Church of Wilmington v. N.C. Conf., 246.**

Subject matter jurisdiction—church property dispute—lack of ecclesiastical entanglement—In a dispute between plaintiff church and its parent denomination (one of several related entities listed as defendants) over the church's property—which the church had owned independently for nearly eighty years prior to affiliating with the denomination and which was seized by the denomination after the church inquired about disaffiliating pursuant to the denomination's Book of Discipline—

CHURCHES AND RELIGION—Continued

where the church asserted several claims against the denomination that could be determined using neutral principles of secular law—and, thus, did not implicate the ecclesiastical entanglement doctrine under the First Amendment—the trial court erred by granting the denomination's motions to dismiss under Civil Procedure Rule 12(b)(1) (for lack of subject matter jurisdiction) the church's claims for breach of contract, fraud, constructive fraud, quiet title, and judicial modification of trust. **Fifth Ave. United Methodist Church of Wilmington v. N.C. Conf., 246.**

CIVIL PROCEDURE

Rule 60—partition order—void for lack of personal jurisdiction—abuse of discretion—In a special proceeding initiated by the filing of a petition to partition real property, where the clerk of court entered an order of default allowing the petition without requiring proof of service of the summons and petition on appellee respondents—who failed to appear in the proceeding—the trial court abused its discretion in denying the Civil Procedure Rule 60 motion for relief filed by appellee respondents because N.C.G.S. § 1-75.11 (regarding proof of service required before entering judgment against defendants who failed to timely appear in an action) rather than N.C.G.S. § 1-75.10 (regarding proof of service required before entering judgment against defendants who appear in an action but challenge service) was applicable, and no affidavit or other evidence was filed in the superior court to establish grounds for personal jurisdiction, as mandated by section 1-75.11. **Hansley v. Hansley, 764.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Issue preclusion—distinguished from law-of-the-case—alienation of affection—admission of evidence—potentially probative of previously litigated issue—In plaintiff's second lawsuit bringing the same alienation of affection claim against defendant, where defendant's motion for summary judgment in the first lawsuit was granted as to plaintiff's criminal conversation claim, the trial court did not err in admitting into evidence certain phone calls and data from a location-sharing app placing defendant and plaintiff's ex-wife at the same hotel during the same time period. Defendant's argument—that plaintiff violated the law-of-the-case doctrine where, by introducing this evidence, he improperly relitigated the issue of pre-separation sexual intercourse—lacked merit for two reasons: first, because two separate lawsuits were involved, the proper doctrine for analyzing the argument was that of issue preclusion, not law-of-the-case; second, although the court in the first lawsuit necessarily determined at summary judgment that defendant did not have pre-separation sexual intercourse with plaintiff's ex-wife, issue preclusion principles did not bar plaintiff from introducing evidence that may have been probative of pre-separation sexual intercourse. **Fish v. Stetina, 733.**

Res judicata—claim splitting—not applicable—different exclusive jurisdictions for state tort and constitutional claims—In an action asserting state constitutional claims, brought by an adult care home for disabled adults with mental illness and its owner (plaintiffs) against the division of the Department of Health and Human Services that provides regulatory oversight for such facilities (defendant) after the North Carolina Supreme Court issued an opinion in an earlier lawsuit between the parties—holding that plaintiffs' claims for negligent regulatory action could not be brought under the State Tort Claims Act (STCA)—plaintiffs were not barred from bringing their claims by the principle of res judicata or the prohibition

COLLATERAL ESTOPPEL AND RES JUDICATA—Continued

on claim splitting because the exclusive jurisdiction of the applicable fora (the Industrial Commission for the STCA claims and the superior court for the state constitutional claims) precluded all of the claims from being brought together in a single action. **Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., 23.**

CONSTITUTIONAL LAW

Effective assistance of counsel—first-degree murder trial—faulty defense— In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, there was no merit to one of the defendant's argument that he received ineffective assistance of counsel for purportedly conceding defendant's guilt during closing argument by discussing aspects of defendant's involvement in the shooting. Based on the totality of the record, defendant failed to show that his counsel's performance was so unprofessional as to be deficient and that any deficient performance prejudiced defendant. **State v. Lacure, 486.**

Effective assistance of counsel—per se error—remand for evidentiary hearing—In a prosecution on charges including two counts of second-degree murder, defendant established error pursuant to *State v. Harbison*, 315 N.C. 175 (1985)—a per se violation of the Sixth Amendment right to effective assistance of counsel occurring when a criminal defendant's counsel admits the defendant's guilt without the defendant's knowing consent—where, during closing arguments, his trial counsel admitted defendant's guilt of the lesser included offense of misdemeanor death by motor vehicle, although defendant, during an earlier *Harbison* hearing and through stipulations had only clearly consented to the admission of certain elements of that misdemeanor. Moreover, even assuming that defendant consented to admit all elements, there was no showing that defendant understood the potential consequences of such admissions. Although the admission was to a lesser-included offense of the charges for which defendant was ultimately convicted, defendant was nonetheless entitled to remand to the trial court for an evidentiary hearing determining whether he knowingly consented in advance to his counsel's admission of his guilt of misdemeanor death by vehicle. **State v. Farook, 412.**

Firearm regulation—possession of firearm by felon statute—facial and as-applied challenges—In defendant's first-degree murder trial, the trial court did not err by denying defendant's motion to dismiss a charge of possession of a firearm by a felon where the statute under which defendant was charged, N.C.G.S. § 14-415.1, was not unconstitutional, either on its face or as applied to defendant, under either section 30 of the North Carolina Constitution or the Second Amendment to the U.S. Constitution. The firearm regulation was within the tradition and history of disallowing individuals who posed a threat of safety to others to possess a firearm, and defendant failed to show that there were no circumstances under which the statute would be invalid. Moreover, defendant's predicate felony, larceny of a dog and animal cruelty, constituted a felony of a violent nature sufficient to trigger the disarmament requirement; even if it did not, defendant had a demonstrated history of committing violent crimes against others. **State v. Nanes, 863.**

Right to speedy trial—nearly seven-year delay—Barker factors—The six-and-a-half-year delay between defendant's arrest and trial for murder did not violate his constitutional right to a speedy trial, where consideration of the four factors in *Barker v. Wingo*, 407 U.S. 514 (1972), revealed that: (1) similarly long delays had been upheld in other cases; (2) although part of the delay was attributable to the

CONSTITUTIONAL LAW—Continued

State (from its late submission of evidence for testing, to the Assistant District Attorney's scheduling limitations and the district's congested court docket), part of the delay was attributable to defendant's actions, such as his changes in counsel, drawn-out trial preparation, and request for a continuance for trial, and the parties agreed that the one-year period of delay caused by shutdowns during the COVID-19 pandemic was justified; (3) the delay neither impaired defendant's ability to mount a defense nor caused him to experience abnormal anxiety or oppressive pretrial incarceration; and (4) defendant formally asserted his right to a speedy trial only one month before the trial began. **State v. Crisp, 400.**

Right to speedy trial—no order entered on defendant's motion—remand required—In a prosecution on charges including first-degree murder—arising from an October 2020 incident in which the victim died as the result of gunshot wounds received just after he was seen arguing with defendant, but which did not come on for trial until March 2023—where the trial court failed to enter an order on defendant's speedy trial motion following a hearing in November 2022, remand to the trial court was required for the entry of findings of fact and conclusions of law on the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, assertion of the right, and prejudice) because the trial delay of more than two years was sufficient to establish presumptive prejudice to defendant and the court's indeterminant oral statements following the hearing were not minimally sufficient to resolve defendant's motion. **State v. Boyd, 624.**

Right to speedy trial—six-year delay—Barker factors—no violation shown—On remand from the Supreme Court for a speedy trial hearing on the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, assertion of the right, and prejudice) where defendant was indicted on charges arising from a June 2012 incident—in which defendant walked away from the scene after his vehicle crossed the center line and collided with a motorcycle (killing a husband and wife)—but only proceeded to trial (resulting in convictions including two counts of second-degree murder) in October 2018, the trial court properly denied defendant's motion to dismiss. While the extraordinary length of the delay weighed in favor of defendant's position, it was only one of four factors to be considered: as to the reason for delay, the State and defendant both contributed, with this factor weighing slightly in favor of defendant; assertion of the right was a neutral factor with defendant timely filing a federal action and writing to the state court judge, but delaying his filing of a formal speedy trial motion; and the State rebutted the presumptive prejudice of the lengthy delay because there was no showing that it compromised defendant's trial defense. **State v. Farook, 412.**

CRIMINAL LAW

Defenses—castle doctrine—inapplicable where intruder has ceased efforts to enter a home—plain error and ineffective assistance of counsel not shown—In a prosecution that resulted in a conviction for second-degree murder—arising from an incident where the (masked) victim entered defendant's residence in the early morning hours and struck defendant with multiple objects before defendant pushed him out of the house; the two continued to fight away from the house and into a used car lot; after the victim raised his hands, defendant and two other occupants of the home each kicked and beat the victim even after he became motionless—the trial court did not plainly err by failing to instruct the jury on the castle doctrine in the absence of defendant's timely objection to the instruction's omission. The presumptive fear of imminent death or serious bodily harm essential

CRIMINAL LAW—Continued

to the defense of habitation, as codified in N.C.G.S. § 14-51.2(b), was unavailable because the victim had discontinued his efforts to forcefully and unlawfully enter—and had clearly exited—defendant's home, as shown by video surveillance footage from the used car lot and testimony from defendant and two eyewitnesses. Accordingly, defendant's related claim for ineffective assistance based on counsel's failure to raise the issue at trial was also unavailing. **State v. Carwile, 145.**

Defenses—self-defense—special instruction not given—jury instructions accurate as given—no error—In a prosecution that resulted in a conviction for second-degree murder—arising from an incident where the (masked) victim entered defendant's residence in the early morning hours and struck defendant with multiple objects before defendant pushed him out of the house; the two continued to fight away from the house and into a used car lot; after the victim raised his hands, defendant and two other occupants of the home each kicked and beat the victim even after he became motionless—the trial court did not err by failing to give a special instruction to the jury extending the holding of *State v. McLymore*, 380 N.C. 185 (2022) (which addressed the ability of a criminal defendant to assert self-defense where that defendant had been in the process of committing a felony) to the conduct of the victim, because the victim was not a criminal defendant and was not asserting self-defense. Moreover, the jury instructions as given provided an accurate statement of the law regarding self-defense as it could potentially apply to defendant. **State v. Carwile, 145.**

Guilty plea—voluntariness—extended post-release supervision added later—direct consequence of plea—Where defendant entered a plea of guilty to robbery and kidnapping charges without being made aware that he would be subjected to an extended period of post-release supervision (although defendant's initial judgment placed him on nine months of post-release supervision, that component was later amended to five years without notice to defendant or an opportunity to be heard), the trial court erred by summarily dismissing defendant's supplemental motion for appropriate relief (MAR) challenging the voluntariness of his guilty plea. First, defendant pled sufficient facts in his initial MAR to preserve this argument in his subsequent filing. Further, since post-release supervision is a direct consequence of a guilty plea—as distinguished from satellite-based monitoring and sex offender registration—because it has a definite, immediate, and essentially automatic effect on the range of punishment, the details of such supervision must be conveyed to a defendant before entry of a guilty plea. **State v. Spry, 641.**

Jury instructions—aiding and abetting—parent's presence during daughter's rape—plain error analysis—In defendant's trial for multiple offenses against her daughter—first-degree forcible rape, first-degree forcible sexual offense, sexual servitude of a child victim, and incest—the trial court did not commit plain error when instructing the jury on aiding and abetting by a parent where, given the plethora of evidence of not only defendant's presence during the incidents at issue but also her verbal statements and actions indicating her consent and contribution to the commission of the crimes against her daughter, defendant failed to show that, absent any alleged error, the jury probably would have reached a different result. **State v. Velasco, 885.**

Kidnapping—jury instructions—conviction upon theory not included in indictment—plain error shown—In a prosecution for multiple sexual offenses and one count of kidnapping, the trial court plainly erred by instructing the jury on a theory of kidnapping (based on involuntary servitude as defined in N.C.G.S. § 14-43.12)

CRIMINAL LAW—Continued

that differed from the one alleged in the indictment (based on sexual servitude as defined in N.C.G.S. § 14-43.13). The erroneous instruction rose to the level of plain error because the two theories constitute distinct crimes per the kidnapping statute (N.C.G.S. § 14-39) and, where the jury could have found defendant guilty of first-degree kidnapping based on the commission of a sexual assault but instead found defendant guilty of the lesser-included offense of second-degree kidnapping based on involuntary servitude and further found defendant not guilty of four counts of sexual servitude of a child, the jury's decisions clearly demonstrated that it considered involuntary servitude to be something entirely different from sexual servitude. Thus, the error had a probable impact on the verdict. Defendant's kidnapping conviction was vacated and the matter was remanded for a new trial on the kidnapping charge only. **State v. Wilson, 535.**

Motion for appropriate relief—summary denial—factual issues unresolved—hearing required on remand—The trial court erred by summarily denying defendant's motions for appropriate relief—in which defendant challenged the voluntariness of his guilty plea on the grounds that he was never informed that he would be subject to sex offender registration or five years of post-release supervision, conditions that were added as a correction to the original judgment without prior notice to defendant or opportunity to be heard—where there was a question of fact whether defendant entered his guilty plea under a misapprehension and where the record on appeal was devoid of any verbatim transcript of the plea proceedings. The trial court's orders were vacated and the matter was remanded for the trial court to hold an evidentiary hearing, receive and consider evidence, and make additional findings of fact. **State v. Spry, 641.**

Motion for mistrial—photograph of murder scene—showing bloodstains from unrelated incident—prejudice analysis—curative instruction—The trial court in a murder case did not abuse its discretion in denying defendant's motion for a mistrial based on the admission of a photograph taken inside defendant's home—where the murder occurred—which depicted blood-stained areas from an unrelated incident that had taken place years earlier. The photograph did not prejudice defendant where, although it may have suggested that a previous bloody incident had occurred at defendant's residence, it did not suggest that he had been arrested, tried, or convicted of committing a previous crime, or even that defendant had previously committed a violent act. Further, the trial court sufficiently cured any potential prejudice by striking the photograph and related testimony from the record, instructing the jury to disregard that evidence entirely, and asking all jurors if they could comply with the instruction, to which all jurors replied that they could. **State v. Crisp, 400.**

Motion to sever—two defendants tried for murder—no abuse of discretion—In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, the trial court did not abuse its discretion by denying one defendant's motion to sever his trial from his co-defendant's where, although defendant argued that they were antagonistic to each other and that during closing arguments each defense counsel accused the other defendant of being the perpetrator, closing arguments do not constitute evidence. **State v. Lacure, 486.**

Prosecutor's closing argument—failure to intervene ex mero motu—no gross impropriety—In a prosecution on charges including felony death by vehicle arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the prosecutor's statement during closing argument—to which defendant

CRIMINAL LAW—Continued

did not object—noting that the victim, her child, and her family had no opportunity to realize the finality of their last interactions before the deadly collision occurred, even if improper, did not require the trial court's ex mero motu intervention because it did not rise to the level of gross impropriety. **State v. Moody, 192.**

Prosecutor's closing argument—mention of charge for which defendant was acquitted—not grossly improper—In a first-degree murder prosecution arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, the trial court did not abuse its discretion in failing to intervene ex mero motu when the prosecutor referred to defendant's intent to rob the victim, despite defendant having been acquitted of attempted robbery in his first trial on charges related to the incident. Defendant's rights against double jeopardy were not violated because robbery was mentioned to explain the chain of events that led to the shooting, and, moreover, the challenged comments were made during the State's rebuttal—after defendant's counsel argued in his closing that defendant had no plan to commit any crime. Defendant's related argument that the trial court erred in allowing a State's witness to testify about the attempted robbery was not preserved; defendant had more than one occasion to object to the testimony, including when it was offered at trial, but failed to do so. **State v. Greenfield, 832.**

Prosecutor's closing argument—reference to plea of not guilty—permissible purpose—not grossly improper—In a prosecution for murder, concealing death, and possession of a firearm by a felon, where defendant admitted to hiding his dead girlfriend's remains after dismembering her but claimed that she died by committing suicide, the trial court did not err in declining to intervene ex mero motu during the State's closing argument, where the prosecutor stated "defendant didn't plead guilty to [murder] because he's going to stand up here and ask you to only find him guilty of [the other charges]. It's a distraction." The prosecutor's comments did not violate defendant's constitutional right to plead not guilty—and, therefore, were not grossly improper—because they were not an attack on defendant's failure to plead guilty; rather, they were made within the context of explaining to the jury all of the distraction tactics the prosecutor anticipated defense counsel would use during closing arguments. **State v. Stephen, 499.**

DAMAGES AND REMEDIES

Alienation of affection—punitive damages—proof of aggravating circumstances beyond malice—sufficiency—The trial court in an alienation of affection case properly submitted the issue of punitive damages to the jury, where plaintiff presented sufficient evidence of aggravating circumstances beyond the malice required to prove alienation of affection and to support an award of compensatory damages. Specifically, plaintiff introduced evidence showing that defendant intentionally deleted all of his text messages with plaintiff's ex-wife upon learning that he might be sued, which constituted spoliation of evidence and was the type of intentional conduct that went beyond the implied malice necessary for establishing alienation of affection. **Fish v. Stetina, 733.**

DECLARATORY JUDGMENTS

Standing—property interest—potentially adverse effect of statute—Plaintiff, a North Carolina company holding itself out as selling consumer merchandise through a website, had standing to bring a declaratory judgment action regarding whether its operation, use, and sale of promotional video sweepstakes was legal

DECLARATORY JUDGMENTS—Continued

under a statute that prohibits promoting or conducting sweepstakes through the use of an "entertaining display" (N.C.G.S. § 14-306.4) by virtue of having a property interest which could be adversely affected by the statute, without any need to show that the statute conferred a cause of action. **No Limit Games, LLC v. Sheriff of Robeson Cnty., 375.**

DISCOVERY

Order compelling discovery—translations of already-produced documents—Rule 26—no duty to create new documents—In a case involving the death of plaintiff's son in a traffic accident, where plaintiff (as administratrix of her son's estate) alleged that the faulty design of her son's vehicle contributed to his death, the trial court neither abused its discretion nor committed reversible error in most aspects of its order compelling discovery from defendants—the car manufacturers who designed the vehicle. However, the court did err in requiring defendants to produce English translations of documents originally written and produced in Japanese where, although the production of such translations would have been required if they had already existed in the normal course of business, Civil Procedure Rule 26 did not require defendants to create new documents. The portion of the discovery order requiring the English translations was reversed, the court's order imposing sanctions on defendants for noncompliance with the discovery order was vacated, the matter was remanded, and the portion of defendants' appeal challenging the location of certain Rule 30(b)(6) depositions the trial court had ordered was dismissed. **Sessoms v. Toyota Motor Sales, U.S.A., Inc., 395.**

DIVORCE

Alimony and child support—arbitration award—review by trial court—use of actual income—duration and amount of alimony and support—The trial court in a divorce case did not err in affirming portions of an arbitration award ordering the ex-husband to pay alimony to his ex-wife and child support for the parties' only child from the marriage. Although the ex-wife worked before and during part of the marriage before quitting her job, where she earned a six-figure salary each year, the arbitrator did not err in considering her actual income rather than her earning capacity when determining alimony and child support obligations, as there was no evidence that the ex-wife—who, with the ex-husband's consent, left work in order to be a stay-at-home mom—had acted in bad faith or had deliberately suppressed her income. Further, the amount and duration of alimony was not excessive where the arbitrator had properly considered multiple factors, including the ex-wife's accustomed standard of living, the ex-husband's "illicit sexual behavior," and the ex-wife's need for time to re-enter the workforce. Finally, the arbitrator properly calculated the child support award based on the child's reasonable monthly needs. **Gallagher-Masonis v. Masonis, 272.**

Equitable distribution—arbitration award—review by trial court—classification of marital home and mortgage debt—The trial court in a divorce case did not err in affirming and modifying portions of an arbitration award concerning the marital home, which the arbitrator distributed to the ex-wife while classifying the mortgage on the home as the ex-husband's separate debt. Although the home was originally owned by the ex-husband before the marriage, the arbitrator properly classified it as marital property in accordance with the parties' postnuptial agreement, which explicitly nullified the parties' prenuptial agreement classifying the home

DIVORCE—Continued

as the ex-husband's separate property. The arbitrator lacked the legal authority to set specific conditions for the ex-husband to pay off the mortgage early, and therefore the trial court properly vacated those conditions. However, the court properly upheld the ex-husband's general obligation to continue paying the mortgage, since he was already legally obligated to do so under the mortgage's own terms. Lastly, the trial court's decision to strike the arbitrator's statement regarding her authority to compel the sale of the marital home was not considered on appeal, as it did not impact the outcome of the case. **Gallagher-Masonis v. Masonis, 272.**

Equitable distribution—arbitration award—review by trial court—ex-wife's home—valuation—treatment of ex-husband's payments toward mortgage— The trial court in a divorce case did not err in affirming portions of an arbitration award concerning a house titled to the ex-wife and encumbered by a mortgage. Specifically, the arbitrator properly classified the home based on the parties' own stipulations, which were binding, and which classified twenty-two percent of the home's net value as the ex-wife's separate property and seventy-eight percent as marital property. Further, regarding the ex-husband's payments made toward the ex-wife's separate mortgage debt, the arbitrator did not err by reimbursing the ex-husband for any post-separation payments while declining to credit him for any pre-separation payments (which the arbitrator treated instead as support payments for the ex-wife and the parties' child), since the ex-husband failed to present any evidence or arguments at arbitration regarding his contributions to the ex-wife's separate property during the marriage. Additionally, the arbitrator did not err in failing to consider potential capital gains tax consequences from the sale of the home, since the ex-husband did not present any evidence or arguments at arbitration on this issue either. **Gallagher-Masonis v. Masonis, 272.**

DOMESTIC VIOLENCE

Protection order—grounds for issuance—harassment—findings of fact sufficient—The district court did not err in issuing a domestic violence protection order to plaintiff against her former romantic partner (defendant)—based on allegations that defendant harassed plaintiff by, among other actions, placing fraudulent liens on her property, making complaints about her to tax and other government entities, filing unsupported legal cases against her, contacting real estate professionals about her property, and reporting to law enforcement and the Insurance Commission that plaintiff had committed arson—where the evidence and the findings of fact made thereupon demonstrated harassment (as defined in N.C.G.S. § 14-277.3A(b)(2)) in that defendant's communications to third parties: (1) were made to induce action against plaintiff and thus were "directed at" her; (2) served no legitimate purpose but were intended to harass plaintiff while maintaining deniability (a credibility determination by the trial court made after defendant neither appeared before it nor presented any witness to support the truth of his allegations); and (3) placed plaintiff in fear of continued harassment rising to a level of substantial emotional distress in that his attempts to extort money from plaintiff damaged her financial and mental health. **Honacher v. Uhlhorn, 304.**

Protective order—on behalf of parties' child—good cause for renewal—child's continued, legitimate fear of father—sufficiency of evidence—In a case involving unmarried parents sharing joint custody of their thirteen-year-old daughter, the trial court erred in renewing a domestic violence protective order (DVPO) entered against the father on the child's behalf, where there was no competent evidence showing that the child had a continued, legitimate fear of her father

DOMESTIC VIOLENCE—Continued

as required to establish good cause for renewal. The court's findings of fact incorporated many allegations from the mother's original complaint seeking the DVPO, including that the father had recorded the child while she undressed, forced her to sleep in the same bed as him, and monitored her electronic devices. However, these allegations could not serve as the basis for renewing the DVPO because: (1) they were not supported by evidence presented at the renewal hearing; (2) after multiple investigations, neither the department of social services nor law enforcement found any evidence substantiating the allegations; and (3) because the DVPO was entered as a consent order without findings of fact or conclusions of law (pursuant to N.C.G.S. § 50B-3(b1)), it did not establish any facts alleged in the complaint as proven. Furthermore, the court failed to make findings about the child's actual subjective fear of the father, relying instead on the mother's unproven allegations and the child's vague and inconsistent testimony on that key issue. **Roy v. Martin, 704.**

EVIDENCE

Authentication—surveillance videos—product of automated process—reliability—In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, there was no error in the introduction into evidence of surveillance videos from multiple businesses that were used to track defendants' movements on the night of the shooting. The videos were properly authenticated by witness testimony relating the reliability of the recording processes used to produce the videos and stating that the videos at trial accurately depicted the events recorded by the surveillance systems. **State v. Lacure, 486.**

Authentication—through circumstantial evidence—murder trial—Facebook messages purportedly sent by defendant to victim—In a prosecution for first-degree murder, the trial court did not err in admitting photographs of Facebook messages purportedly sent by defendant to the victim (his brother) on the day of the murder. The State properly authenticated the messages through circumstantial evidence, including: testimony from defendant's niece, who identified the victim's phone (used to retrieve the messages) in the photographs and testified that defendant communicated exclusively via Facebook Messenger; testimony from a police deputy regarding chain of custody and his process of retrieving the messages (by opening the Facebook Messenger application on the victim's phone and clicking on defendant's name); and the content of the messages, which repeatedly referenced the sibling relationship between the sender and the victim, as well as certain details about the victim's personal life. **State v. Davenport, 605.**

Cell tower data—officer's testimony—general location of suspect—lay versus expert testimony—In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, there was no prejudicial error in the introduction of an officer's testimony regarding data from cell phone towers that tended to show defendants' locations and movements on the night of the shooting. Testimony regarding the general location of a perpetrator using cell tower data constituted lay testimony rather than expert testimony, since it did not involve the use of scientific, technical, or other specialized knowledge. To the extent that any of the officer's testimony constituted expert testimony (concerning more technical aspects of a cell tower's function), defendants were not prejudiced in light of other evidence placing each of them in front of the victim's home that night. **State v. Lacure, 486.**

Character of homicide victim—peaceable nature—conformity with habit or routine practice—no abuse of discretion—In a first-degree murder prosecution

EVIDENCE—Continued

arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, the trial court did not abuse its discretion in excluding evidence about the victim's prior convictions, gang affiliation, tattoo, and gun habits—which defendant argued were admissible to show the victim was the aggressor and to rebut evidence of the victim's peaceable nature—where: (1) as to the victim being the aggressor, the gang, tattoo, and firearm evidence did not involve "specific instances of conduct" as required for admission under Evidence Rule 405(b), and the prior convictions were excluded pursuant to Evidence Rule 403; and (2) none of the evidence defendant sought to rebut—that the victim was in the military, had a family, cared for his children, was hardworking, and sounded scared during his encounter with defendant—concerned whether the victim had a peaceable character or was generally nonviolent. Defendant's related constitutional argument was not preserved for appellate review because he did not argue that he was being denied his right to present a complete defense when the evidence was excluded. **State v. Greenfield, 832.**

Expert opinion—scope of expertise—impact of high-velocity projectile—plain error analysis—In a prosecution for murder, concealing death, and possession of a firearm by a felon, where defendant admitted to hiding his dead girlfriend's remains after dismembering her but claimed that she died by shooting herself in the head inside her bathtub, the trial court did not plainly err in allowing a forensic anthropology expert to testify that the chances of a high-velocity projectile causing no defects to a fiberglass bathtub would be "slim." Although the trial court did not require the expert to explain the rationale behind her opinion—thus failing to properly exercise its gatekeeping function under Evidence Rule 702(a)—this failure did not amount to plain error, since the expert's testimony did not prejudice defendant where: the expert explained the analyses she performed on the victim's skull and the factors that led her to conclude that the victim likely suffered a high-velocity gunshot wound; she was qualified to testify about the trajectory, velocity, and impact force of a bullet upon exiting the victim's skull; and her testimony "did not amount to baseless speculation." **State v. Stephen, 499.**

Felony death by vehicle—testimony regarding notification to be on the lookout for an impaired driver—limiting instruction—In a prosecution on charges including felony death by vehicle arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the trial court did not err by admitting testimony from a law enforcement officer that he had been notified to be on the lookout (BOLO) for a "possibly impaired driver" shortly before seeing smoke coming from the scene of the collision. Upon defendant's objection on Evidence Rule 403 grounds, the trial court gave a limiting instruction to the jury that the BOLO testimony was only to be considered to provide context to the officer's investigation, thus ensuring that any prejudice to defendant from the reference to a "possibly impaired driver" did not substantially outweigh the testimony's probative value. Further, even assuming that admission of the BOLO testimony was error on hearsay grounds (a basis not raised by defendant at trial), defendant could not show prejudice in light of the other evidence of defendant's impaired driving and thus could not establish plain error. **State v. Moody, 192.**

Hearsay—present sense impression exception—no plain error—In a prosecution that resulted in defendant being convicted of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by felon—arising from defendant shooting the victim in the neck in a convenience store parking lot following a verbal altercation between the two

EVIDENCE—Continued

men—defendant could not establish plain error in the trial court's admission of a hearsay statement identifying defendant as the shooter, which was made by the store cashier to a law enforcement officer at the scene, where, even assuming that the statement was admitted erroneously, the remaining evidence (including other eyewitness testimony, video surveillance footage, and defendant's own testimony) was sufficient to support the jury verdicts. **State v. Womble, 547.**

Hearsay—residual exceptions—statement recanted by victim—no abuse of discretion—Confrontation Clause inapplicable—In a prosecution that resulted in defendant being convicted of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by felon—arising from defendant shooting the victim in the neck in a convenience store parking lot following a verbal altercation between the two men—where the victim recanted his identification of defendant as his assailant after reporting a fear of retribution by defendant and testified on defendant's behalf at trial, the trial court did not abuse its discretion in admitting a recording of the victim's statement to a law enforcement officer pursuant to either Evidence Rule 803(24) (the residual hearsay exception that applies if the declarant is available) or Evidence Rule 804(b)(5) (the residual hearsay exception that applies if the declarant is unavailable), each of which requires the same six determinations to be made by the trial court. Despite the absence of findings by the trial court regarding the circumstantial guarantees of trustworthiness of the statements sought to be admitted, upon review of the record the appellate court was able to determine that the recording satisfied each of the six requirements and could be deemed sufficiently trustworthy. Further, defendant's challenge to the statement on Confrontation Clause grounds failed as the trial court placed no limitations upon what defendant could ask the victim during his testimony as a witness for the defense. **State v. Womble, 547.**

Murder trial—report showing 911 call—factual relevance—distinguished from prejudicial nature of the call's contents—In a prosecution for first-degree murder, the trial court did not err in admitting a Computer-Aided-Dispatch report showing that a second 911 call was made shortly after law enforcement responded to the initial call reporting the murder. Defendant argued on appeal that the report was irrelevant and should not have been admitted where the trial court subsequently excluded the content of the call from evidence. However, the report was relevant under Evidence Rule 401 because it confirmed the time when the call was made and explained why the police officer who received the call chose to leave the crime scene. Further, the actual content of the call—which the court, in its discretion, determined was substantially more prejudicial than probative under Rule 403—was a separate evidentiary matter altogether, and the court's rulings on the factual relevance of the report and the prejudicial nature of the phone call's contents were consistent with each other. **State v. Davenport, 605.**

Murder trial—statements made by defendant in phone call—racial animus—relevance—lack of prejudice—In defendant's first-degree murder trial, the trial court did not abuse its discretion by admitting into evidence portions of a phone call between defendant and his mother after his arrest, in which defendant indicated he had obtained a firearm because of "racist black people." The statement was relevant under Evidence Rule 401 because it shed light on the State's theory of defendant's motive for committing the two murders, where one of the two victims was black and the other was Indian with a dark complexion. Further, the trial court carefully balanced the probative value of the evidence with its potential to have a prejudicial effect pursuant to Evidence Rule 403, particularly in light of the trial court's decision

EVIDENCE—Continued

to exclude more detailed statements by defendant showing racial animus, and in light of the overwhelming evidence that defendant committed both murders. **State v. Nanes, 863.**

Testimony from a jailhouse witness—not inherently incredible—no plain error—constitutional arguments not preserved—In a prosecution for intentional child abuse inflicting serious bodily injury and first-degree felony murder, arising from a father's abuse of his infant twin sons—less than two weeks after the premature babies had been released from a hospital's neonatal intensive care unit—the trial court did not commit plain error in admitting evidence from a witness who had shared a jail cell with defendant and testified that defendant gave various stories about the twins' injuries before confessing to striking one of the infants with a bottle and then throwing the child to the floor. That testimony did not concern inherently incredible observations, but rather only the type of witness-credibility determinations that jurors must make in any trial. Further, since defendant did not raise any objection to this testimony at trial—on constitutional grounds or otherwise—his constitutional arguments were not preserved for appellate review. **State v. Middleton, 592.**

Text messages—relevance—manner of display—plain error shown—Defendant was entitled to a new trial on a charge of second-degree murder where the trial court committed plain error by admitting into evidence two exhibits—each consisting of numerous text or multimedia messages obtained from defendant's cell phone, some of which did not involve the victim—and allowing copies of the exhibits to be published (unredacted and without limiting instructions) to each jury member to retain for the duration of the trial, and where the erroneous admission and manner of display had a probable impact on the decision of the jury. The text messages were either irrelevant to the question of defendant's guilt, unnecessarily cumulative in light of other evidence of the tumultuous relationship between defendant and the victim, or highly prejudicial because they shifted the focus from whether defendant acted in self-defense when she fatally shot the victim to defendant's unsavory lifestyle, including drug use and multiple affairs and sexual encounters, which served only to confuse and inflame the passions of the jury. Similarly, the photographs admitted, which were published to the jury in an enlarged format and some of which depicted graphic sexual images, were inflammatory and more prejudicial than probative, particularly where sufficient evidence was presented demonstrating that defendant acted in self-defense. **State v. Hicks, 457.**

Witness testimony—prosecutor opinions—credibility and guilt—plain error not shown—In a first-degree murder prosecution arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, defendant failed to establish plain error by the trial court in allowing certain testimony from a law enforcement witness and certain remarks by the prosecutors during closing arguments—which defendant characterized as impermissible opinions on credibility and guilt. The officer's testimony did not concern any ultimate issue before the jury or the credibility of defendant or any other witness, but rather served to explain the officer's investigation and his line of questioning of defendant; accordingly, its admission was not error. The prosecutors' references to robbery (a charge for which defendant was acquitted in an earlier trial) were made to explain the context of the shooting, and thus were not improper. The prosecutors' insinuations that defendant was lying and that the victim's partner was telling the truth about how the shooting occurred, even if considered to be improper opinions regarding credibility, were not prejudicial as defendant admitted to changing his story about the incident eight times. **State v. Greenfield, 832.**

FIREARMS AND OTHER WEAPONS

Possession of a stolen firearm—knowledge that firearm was stolen—substantial evidence—In a prosecution on charges including possession of a stolen firearm (discovered in a hidden compartment in defendant's car), the trial court did not err in denying defendant's motion to dismiss the firearms change for insufficiency of the evidence that he knew or had reasonable grounds to believe the firearm was stolen where such knowledge could be reasonably inferred from incriminating circumstances, including defendant's flight from law enforcement officers—first, in a high-speed car chase, and, after defendant crashed his vehicle into trees, on foot—as well as his concealment of the gun in an open space behind a panel near the steering column and his denial of possessing any firearm when apprehended. **State v. Bracey, 136.**

HOMICIDE

First-degree murder of one infant—intentional child abuse inflicting serious bodily injury to the deceased infant's twin—evidence sufficient—In a prosecution for intentional child abuse inflicting serious bodily injury and first-degree felony murder, arising from a father's abuse of his infant twin sons—less than two weeks after the premature babies had been released from a hospital's neonatal intensive care unit—the trial court did not err in denying defendant's motion to dismiss both charges. First, the State presented evidence sufficient to send to the jury charges of intentional child abuse, including that: both children suffered multiple severe head injuries while in the sole care of defendant, defendant changed his story of how the twins were injured several times, and, eventually, defendant admitted to causing the injuries. Second, as to the twin who died as a result of injuries inflicted by defendant, the jury was permitted to infer that, when used against a helpless infant, defendant's hands were deadly weapons (an essential element when intentional child abuse is the underlying offense for felony murder). **State v. Middleton, 592.**

First-degree murder—jury instructions—felony murder—transferred intent—no error—In a first-degree felony murder prosecution arising from defendant having shot and killed a man from whom he was attempting to buy marijuana, with the man's female companion also having been shot but surviving—where the assault with intent to kill inflicting serious injury on the female victim served as the underlying felony for the murder charge—the trial court did not err by denying defendant's request, made after the jury had retired but before it began deliberations, for a special instruction on the application of the doctrine of transferred intent to felony murder. While defendant's request was timely, the instructions as given regarding both felony murder and transferred intent were legally correct; namely, that the jury was told it could only find defendant guilty of felony murder if it found that: defendant intentionally committed one of the enumerated assaults on the female victim, the male victim was killed as a result, and defendant's assault was the proximate cause of death. **State v. Greenfield, 832.**

First-degree murder—second-degree murder—distinction—jury instruction—intent to kill—no plain error—In a prosecution on charges including first-degree murder, where the trial court gave an accurate clarifying instruction distinguishing between first- and second-degree murder in response to a jury question, but omitted the "intent to kill" requirement for first-degree murder when giving the final mandate (a summary of the charge), defendant did not preserve the issue for appellate review because he failed to timely object. Nor could defendant establish plain error where precedent held, in a similar context, that there was no fundamental error where accurate instructions were, at most, "incomplete at one important part." **State v. Boyd, 624.**

HOMICIDE—Continued

Jury instruction—castle doctrine—occupant of motor vehicle—need not be physically inside—prejudicial error—After defendant was convicted of voluntary manslaughter for killing a man during an altercation—during which the man, armed with a gun, broke into defendant's car and repeatedly punched defendant; defendant disarmed the man and then exited the vehicle in an attempt to retreat; the man ran to where defendant stood so he could resume the attack; and defendant, also armed with a gun, fatally shot the man—defendant was entitled to a new trial where the trial court failed to instruct the jury on the statutory castle doctrine (N.C.G.S. § 14-51.2). At the time when defendant used deadly force, he met the statute's definition of a lawful "occupant" of a motor vehicle, which included persons who are forced to exit a vehicle due to an ongoing attack. Further, as a lawful "occupant," defendant was presumptively justified in using deadly force where the record showed that the man had unlawfully and forcibly entered the vehicle and that defendant was aware of the entry. Finally, the court's failure to give the instruction prejudiced defendant where, absent the error, there was a reasonable possibility that the jury would have reached a different verdict. **State v. Williams, 512.**

Second-degree murder—malice—sufficiency of evidence—In a prosecution resulting in defendant's conviction on charges including two counts of second-degree murder, arising from an incident in which he walked away from the scene after his vehicle crossed the center line and collided with a motorcycle (killing a husband and wife), the trial court did not err in denying defendant's motion to dismiss the homicide offenses for insufficient evidence of malice—an essential element of second-degree murder. Specifically, taken in the light most favorable to the State, the evidence was sufficient that defendant acted "so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty" where, despite the absence of evidence that he was legally impaired at the time of the crash, defendant (1) drove with a license revoked for impaired driving, (2) drove left of the center line, (3) left the scene after checking on the victims but without attempting to render aid, (4) lied to investigating officers about his identity to avoid responsibility, and (5) slurred his words and smelled of alcohol when arrested. **State v. Farook, 412.**

HUSBAND AND WIFE

Marital abandonment—intestate succession rights—burden of proof not met—order barring inheritance reversed—In an estate proceeding, the mother of the deceased, who filed a motion to bar decedent's wife from inheriting based on abandonment (pursuant to N.C.G.S. § 31A-1(a)(3)), failed to meet her burden of showing that the wife abandoned decedent while he was alive without his consent, without an intent to renew the marital relationship, or without justification. The fact that the couple had never established a marital home—because the wife lived in Florida while the deceased lived in North Carolina—would not have precluded a determination of abandonment; however, there was evidence that the lack of visitation by the wife and communication between the spouses was due to the deceased's cruel behavior and relapse of substance abuse and that he was aware of how his behavior affected his wife. Further, several of the trial court's findings were mere recitations of evidence and did not constitute true findings regarding the couple's living situation or the circumstances as they existed at the time decedent died. Therefore, the trial court's order barring the wife from inheriting was reversed and the matter was remanded for further proceedings, including reinstating the wife's eligibility to inherit from the estate. **In re Est. of Bozeman, 330.**

IMMUNITY

Public official—distinguished from public employee—negligence action—In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court erred in granting judgment on the pleadings in favor of the city's Senior Engineer Project Manager and Engineer Project Manager (defendants), whom plaintiff (the pedestrian's guardian ad litem) alleged had failed to implement safety measures at the intersection. Specifically, the court erred in finding that defendants were entitled to public official immunity when, in fact, they were merely public employees, since neither the state constitution nor any statute (including the City Code of Ordinances) created their positions or delegated statutory authority to them, and therefore they could not exercise a portion of sovereign power. **Orsbon v. Milazzo, 96.**

INJUNCTIONS

Preliminary injunction—church property dispute—likelihood of success on the merits—irreparable injury—In a dispute between plaintiff church and its parent denomination (one of several related entities listed as defendants) over the church's property—which the church had owned independently for nearly eighty years prior to affiliating with the denomination and which was seized by the denomination after the church inquired about disaffiliating pursuant to the denomination's Book of Discipline—the trial court erred by denying the church's request for a preliminary injunction because the church demonstrated a likelihood of success on the merits of its claims—including that the denomination failed to follow its own policies with regard to the disaffiliation process—and that it would suffer irreparable injury without injunctive relief—including that it had been permanently excluded from accessing the property. **Fifth Ave. United Methodist Church of Wilmington v. N.C. Conf., 246.**

Preliminary injunction—removal of sweepstakes kiosks—likelihood of success not shown—In a declaratory judgment action, the trial court erred in issuing a preliminary injunction in favor of plaintiff enjoining defendants (including several State government officials in their official capacities) from forcing or compelling the removal of plaintiff's video sweepstakes kiosks from businesses or facilities and from prosecuting persons in possession of plaintiff's video sweepstakes kiosks where plaintiff did not show a likelihood of success on the merits of its case because the determinative issue was whether chance or skill predominated in the sweepstakes game in question, and, in plaintiff's video sweepstakes, as in other games that have previously been held to violate the statute, chance could override or thwart the exercise of skill. **No Limit Games, LLC v. Sheriff of Robeson Cnty., 375.**

INSURANCE

Breach of the duty to defend—foreclosed by policy exclusions—Pleasant claim—inapplicable to merely negligent acts—Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had failed to defend plaintiff in the wrongful death suit, the trial court erred in granting

INSURANCE—Continued

partial judgment on the pleadings in favor of plaintiff. A comparison of the allegations in plaintiff's pleading—asserting a claim under *Pleasant v. Johnson*, 312 N.C. 710 (1985)—with the provisions of the insurance policy—which covered as an "insured" "anyone . . . using with [employer's] permission a covered 'auto,' " but excluded coverage for bodily injury to a "fellow employee" of an "insured"—negated any duty by defendant to defend plaintiff against liability arising from the wrongful death of plaintiff's co-worker, his "fellow employee." Moreover, the holding of *Pleasant* (that "the Workers' Compensation Act did not shield a co-employee from common law liability for willful, wanton and reckless acts") was inapplicable in a wrongful death action grounded in negligence. **Ortez v. Penn Nat'l Sec. Ins. Co., 114.**

Claim for breach of duty to settle—Financial Responsibility Act—only a right, not a duty, for an insurance carrier to settle claims—Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's widow and estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff, along with the co-worker's widow and estate, then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had breached its duty by failing to settle an intentional tort claim, the trial court erred in finding such a breach by defendant because the Financial Responsibility Act (N.C.G.S. § 20-279.21) provided an insurance carrier with the right to settle claims, but no duty to do so. Moreover, defendant exercised its right to seek a settlement, but the estate rejected defendant's offer. **Ortez v. Penn Nat'l Sec. Ins. Co., 114.**

JUDGMENTS

Revocation of probation—clerical error—basis for revocation—incorrect box checked—The judgment revoking defendant's probation was remanded to the trial court for correction of a clerical error where, although the trial court's findings in open court clearly indicated that the basis for revocation was the commission of a new criminal offense (driving while impaired), the court checked an additional box on the judgment and commitment form erroneously linking revocation to defendant's failure to pay court and supervision fees (as alleged in his probation officer's violation report). **State v. McCullough, 183.**

JURISDICTION

Personal jurisdiction—waiver—subject matter jurisdiction—judicial admission—The district court did not err in denying defendant's motion to dismiss plaintiff's complaint and motion for a domestic violence protection order on jurisdictional grounds where defendant: (1) waived any right to contest the court's personal jurisdiction over him by failing to raise such a challenge in his consolidated answer and motions, and (2) made a judicial admission in his first verified answer that plaintiff was a resident of Orange County, North Carolina—as plaintiff had alleged in her complaint and motion—thus bringing the matter under the court's subject matter jurisdiction pursuant to Chapter 50B of the North Carolina General Statutes. **Honacher v. Uhlhorn, 304.**

JURY

Juror misconduct—discussing the case outside the courtroom—investigation by trial court—no abuse of discretion—no showing of prejudice—In a prosecution for first-degree murder, the trial court did not abuse its discretion in removing a juror and an alternate juror who had allegedly discussed the facts of the case outside of the courtroom, where, after an eyewitness reported the alleged misconduct, the trial court promptly held a hearing and conducted a thorough investigation, during which it determined that the evidence—including testimony from the eyewitness and from the jurors involved, as well as video footage (taken by the eyewitness) showing part of the jurors' out-of-court conversation—substantiated the allegations of juror misconduct. The court properly acted within its discretion to ensure an impartial jury; furthermore, defendant failed to demonstrate any prejudice resulting from the jurors' removal or that the second alternate juror whom the court selected to replace the removed juror was incompetent or biased. **State v. Nobles, 719.**

Substitution of juror—appearing to sleep—no abuse of discretion—In a prosecution on charges including first-degree murder, where, about halfway through defendant's trial, defense counsel informed the trial court that a juror seemed to be sleeping, suggested the juror might have missed some evidence, and requested a substitution, but did not renew his objection after the trial court denied the initial request—and no further issues with the juror were raised—defendant showed no abuse of discretion by the trial court. **State v. Boyd, 624.**

Voir dire—reopened after jury impaneled—peremptory challenge—In an action arising from a property dispute, the trial court erred in allowing defendants to reopen voir dire toward the end of plaintiffs' case-in-chief—to address a claim by defendants that one juror had been dishonest during the initial voir dire about his knowledge of and connection to plaintiffs—and to exercise a peremptory challenge to excuse that juror and have him replaced with an alternate juror; Supreme Court precedent prohibited a peremptory challenge—in contrast to a challenge for cause—after a juror had been passed and accepted by the parties. Accordingly, the judgment entered in favor of defendants was vacated and the matter was remanded for a new trial. **Warren v. Bonner, 615.**

JUVENILES

Delinquency—communicating threat of mass violence on educational property—true threat—sufficiency of evidence—In a juvenile delinquency case, where the juvenile complained about his school's spirit week by posting a message on social media saying "IMMA SHOOT UP [the school]," the trial court erred in denying the juvenile's motion to dismiss a petition alleging the offense of communicating a threat of mass violence on educational property (N.C.G.S. § 14-277.6), because the State failed to present substantial evidence that the juvenile's post constituted a "true threat." Instead, the evidence indicated that the juvenile's comment was merely a distasteful joke given: the explicit disclaimers on the post, in which the juvenile stated that he was only joking and that he did not own a gun; the context of the post (a complaint about spirit week lasting only three days instead of five); and the lack of evidence that any student or staff member felt threatened by or notified the school of the post. **In re C.S., 317.**

Delinquency—false report of mass violence on educational property—sufficiency of evidence—In a juvenile delinquency case, where the juvenile complained about his school's three-day (instead of five-day) spirit week by posting a message

JUVENILES—Continued

on social media saying "IMMA SHOOT UP [the school]," the trial court erred in denying the juvenile's motion to dismiss a petition alleging the offense of making a false report of mass violence on educational property (N.C.G.S. § 14-277.5). First, the State failed to show that the juvenile made a "report," since the post was not directed to anyone in particular and there was no evidence that anyone outside of law enforcement or the social media platform had seen it. Additionally, because of the post's context and self-negating language, in which the juvenile stated that he was only joking and that he did not own a gun, the State failed to show that a reasonable person would construe the post as reporting a credible threat. **In re C.S., 317.**

MORTGAGES AND DEEDS OF TRUST

Multiple deeds of trust—lien position—effect of loan modification by senior lienholder—no loss of priority—In a declaratory action to settle the lien priority between a senior deed of trust and a junior deed of trust (both duly recorded), where, after both deeds of trust had reached their maturity date, the holder of the senior deed of trust entered into a loan modification (which was also recorded) with the debtor to extend the maturity date of the loan and recapitalize the remaining principal balance, the loan modification did not operate to create a new deed of trust or to extinguish the senior deed of trust—as confirmed by the plain language of the senior deed of trust, loan modification, and relevant statutory provisions. Further, the senior deed of trust had not expired at the time of subsequent foreclosure proceedings; therefore, the senior deed of trust did not lose its lien position relative to the junior deed of trust and plaintiff, who purchased the property after the junior deed of trust was foreclosed, did not have superior title. The trial court's order granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment was reversed and the matter was remanded for entry of summary judgment in favor of defendants. **CL Howard Invs. I, LLC v. Wilmington Sav. Fund Soc'y, FSB, 234.**

MOTOR VEHICLES

Felony death by vehicle—motion to dismiss—impaired driving—proximate cause of death—substantial evidence—In a prosecution on multiple charges arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the trial court did not err in denying defendant's motion to dismiss the charge of felony death by vehicle where the State produced substantial evidence of the two contested elements of that offense: (1) that defendant was engaged in the offense of impaired driving, as shown by the level of delta-9-tetrahydrocannabinal (THC) in her blood, data from defendant's vehicle showing that she was driving 70 miles per hour (MPH) in a 45 MPH zone and never reduced her speed before the collision, and witness testimony that he saw defendant's vehicle "fly past" him on the wrong side of the road immediately before the crash; and (2) that defendant's impaired driving was the proximate cause of the victim's death, as shown by expert testimony regarding the potential effects of THC on driving—including decreased motor coordination, slowed reaction time, impaired time and distance estimation, and a tendency to weave side to side—along with the above-described vehicle data and witness testimony indicating the defendant's driving was consistent with appreciably impaired driving. **State v. Moody, 192.**

Negligence—jury instruction—last clear chance—no error—In a tort action brought after a truck struck and injured plaintiff as he walked in an empty parking

MOTOR VEHICLES—Continued

lot—in which the jury found that negligence by defendant (the truck driver) caused plaintiff's injuries, plaintiff was contributorily negligent, and defendant-driver had the last clear chance to avoid the collision—the trial court did not err in submitting the issue of last clear chance to the jury where the evidence, taken in the light most favorable to plaintiff, was sufficient as to each of the two disputed elements of that doctrine. The first disputed element—that a plaintiff's contributory negligence had placed him in a position from which he was powerless to extricate himself—was satisfied by evidence that plaintiff was struck after the truck entered the parking lot, drove safely past him, made a U-turn, and then approached him from behind. The second disputed element—that a driver had the time and means to avoid injury to a plaintiff by the exercise of reasonable care after he discovered, or should have discovered, the plaintiff's perilous position and his incapacity to escape it—was established where defendant-driver turned into an empty parking lot with his headlights on and plaintiff in his plain view, with approximately twelve seconds passing before the truck turned around and struck plaintiff. **Creech v. Town of Cornelius, 31.**

Special jury instruction—workers' compensation award to plaintiff—impact on tort damages award—no abuse of discretion—In a tort action brought after a truck (owned by one defendant) struck and injured plaintiff (a local television news reporter on a work assignment) as he walked in an empty parking lot, in which the jury found that negligence by a second defendant (a truck driver employed by a third defendant) caused plaintiff's injuries—resulting in an award of damages to plaintiff—the trial court did not abuse its discretion in declining to give defendants' requested special instruction pursuant to N.C.G.S. § 97-10.2(j) (which allows a trial court discretion to determine the amount of an employer's subrogation lien for the payment of compensation in workers' compensation cases). The court did instruct the jury about the workers' compensation benefits already received by plaintiff for the sole purpose of informing the jury that such amount would be deducted by the court from any amount of damages awarded to plaintiff in the tort action, a correct statement of the law as set forth in section 97-10.2(e). **Creech v. Town of Cornelius, 31.**

NEGLIGENCE

Accident at an intersection—city's actions before the accident—proximate cause of pedestrian's injuries—summary judgment—In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court properly granted summary judgment to defendant-city, finding that no genuine issue of material fact existed as to proximate cause. Specifically, the city's actions were not the proximate cause of the pedestrian's injuries where: (1) the injuries were not foreseeable given that, for ten years prior to the accident, there were no pedestrian-related accidents at that intersection and only two left-turn vehicle accidents; (2) the intersection's design complied with North Carolina law, which requires drivers turning left on a circular green light to yield to pedestrians; (3) the city promptly addressed a resident's safety complaint about the intersection by installing a "No Turn on Red" sign within three days; and most importantly, (4) it was the driver's negligence that caused the pedestrian's injuries. **Orsbon v. Milazzo, 96.**

Accident at an intersection—design of intersection, crosswalk, and pedestrian signals—city's duty of care to injured pedestrian—summary judgment—

NEGLIGENCE—Continued

In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court properly granted summary judgment to defendant-city, finding that no genuine issue of material fact existed in that the city did not breach its duty of care to the injured pedestrian. Importantly, the intersection design—including the pedestrian signals and crosswalk—complied with state law and specifically with the Manual on Uniform Traffic Control Devices (MUTCD), and the city's decision to install Leading Pedestrian Intervals (LPIs)—timing devices that allow pedestrians to cross before drivers get a green light—in accordance with routine retiming was reasonable, especially where the installation of LPIs was entirely optional under the MUTCD. Further, the city did not delay unreasonably in addressing any safety concerns, as it installed a "No Turn on Red" sign three days after receiving a resident's complaint and later expedited the installation of an LPI following the accident. **Orsbon v. Milazzo, 96.**

Gross negligence—police officer—death of passenger—high-speed pursuit of suspect—no immunity—genuine issue of material fact—In a wrongful death case, where a state trooper crashed his police car during a high-speed pursuit of a suspected drunk driver, which resulted in the death of a 22-year-old passenger who was accompanying the trooper on a "ride-along" as part of an internship with the State Highway Patrol, the trial court erred in granting summary judgment in the trooper's favor. Although N.C.G.S. § 20-145 would prevent the trooper from being held personally liable for injuries to another resulting from his ordinary negligence, it could not provide the same immunity to the trooper for acts of gross negligence. Here, a genuine issue of material fact existed as to whether the trooper was grossly negligent where the evidence showed that he: was not authorized to take the passenger on a ride-along; and, by his own admission, drove in a manner where he was unable to maintain control of his car (specifically, he drove into a curve in the road at a speed of 113 miles per hour (despite the speed limit being 55 miles per hour), failed to observe the visible "Curve ahead" warning sign, failed to react to the suspect vehicle's turning and use of brake lights, and lost control of his car). **Higgins v. Mendoza, 581.**

Gross negligence—wanton conduct—sufficiency of evidence—summary judgment—In a negligence action filed against a town after an accident on a public roadway, where plaintiff was launched to the ground from his electric scooter after driving over a depressed, back-filled portion of the bicycle lane, which had been left unpaved and unmarked following excavation work performed by town employees when installing a sewer line, the trial court properly granted summary judgment to the town on plaintiff's gross negligence claim. A showing of gross negligence requires proof of wanton conduct; here, even assuming that the town had not provided sufficient warnings to cyclists of the backfilled area, plaintiff failed to forecast any evidence indicating that the town had acted with a bad purpose or reckless indifference to plaintiff's rights. **Saad v. Town of Surf City, 127.**

Ordinary—per se—summary judgment—genuine issues of material fact—In a negligence action filed against a town after an accident on a public roadway, where plaintiff was launched to the ground from his electric scooter after driving over a depressed, back-filled portion of the bicycle lane, which had been left unpaved and unmarked following excavation work performed by town employees when installing a sewer line, the trial court erred in granting summary judgment in the town's favor on plaintiff's claims of: (1) ordinary negligence, where there was a genuine issue of material fact regarding whether the town breached its duty of care given that it

NEGLIGENCE—Continued

knew about the backfilled area but still left it unmarked and unlit; and (2) negligence per se, where there was a genuine issue of material fact regarding whether the town violated a public safety ordinance requiring warnings for excavation sites. Further, the town's arguments on appeal—that plaintiff was contributorily negligent, that the trial court lacked jurisdiction over plaintiffs' claims, and that the town was protected by governmental immunity—lacked merit. **Saad v. Town of Surf City, 127.**

POLICE OFFICERS

Company Police Act—policing a public highway during construction—scope of jurisdictional authority—In a case involving the question of whether officers with a company police agency (plaintiff)—which had been hired by a construction company to provide law enforcement services, including traffic control/enforcement, for the duration of a public-private highway construction project—had jurisdiction pursuant to N.C.G.S. § 74E-6(c) of the Company Police Act (Act) when they activated their blue lights to block free-flowing traffic lanes adjacent to the construction area, the Court of Appeals determined that the superior court properly identified the applicable standard of review (de novo) but did not apply the standard correctly because it was operating under a misunderstanding of the Act's requirements. The superior court erred by vacating the final decision of the administrative law judge (ALJ) and entering declaratory judgment for plaintiff where its findings did not support its conclusions. The court did not reach the dispositive issue of whether the construction company had ownership or control over the highway property in question (and, thus, could have authorized plaintiff's actions) but instead focused on the applicability of various federal regulations and the effect of contract provisions on the scope of plaintiff's authority. Therefore, the court's decision and declaratory judgment were vacated and the matter was remanded for reconsideration by the ALJ. **Se. Pub. Safety Grp., Inc. v. N.C. Dep't of Just., 655.**

PROBATION AND PAROLE

Revocation of probation—new criminal offense—sufficiency of evidence—driving while impaired—The trial court did not abuse its discretion by revoking defendant's probation for committing a new criminal offense while on probation—driving while impaired (DWI)—where the State presented the charging officer's affidavit, defendant's arrest warrant for DWI, an intoxilyzer report showing that defendant had a blood alcohol level of 0.12, and testimony from defendant's probation officer regarding defendant's phone call to her notifying her of his arrest. The affidavit and intoxilyzer report, in particular, were sufficient to allow the trial court to independently determine that it was more probable than not that defendant had violated the terms of his probation. **State v. McCullough, 183.**

Revocation of probation—statutory right to confront adverse witnesses—affidavit in lieu of testimony—other evidence sufficient—The trial court did not commit prejudicial error in defendant's probation revocation hearing—based on defendant's commission of a new criminal offense while on probation (driving while impaired)— by failing to make an explicit finding that good cause existed for denying defendant the right to confront the charging officer, whose affidavit was submitted by the State. Where the State presented sufficient other evidence to support revocation, including an intoxilyzer report and testimony from defendant's probation officer (regarding defendant's phone call to her notifying her about his DWI and admitting that he had been driving), the arresting officer's testimony would have been extraneous. **State v. McCullough, 183.**

SATELLITE-BASED MONITORING

Order imposing 25-year term—on remand—trial court's additional findings—supported by competent evidence—In defendant's second appeal from an order imposing a 25-year term of satellite-based monitoring (SBM) after his conviction for indecent liberties with a child, the order was affirmed because the trial court's additional findings of fact—made on remand from the first appeal—were supported by competent evidence. In making these additional findings, the court properly considered evidence beyond the Static-99 risk assessment scoring defendant as a "four," which placed him at an "above average" risk for recidivism and served as the court's original basis for imposing SBM, including: defendant's admission that he was living in a halfway house when he committed the charged crime; testimony from a chief probation officer expressing concerns about being able to locate defendant given his unstable living conditions and frequent use of halfway houses; the relevant recidivism rates for offenders with a score of four; and the chief probation officer's recommendation that defendant receive the highest level of supervision. **State v. Belfield, 817.**

SEARCH AND SEIZURE

Motion to suppress—findings of fact—unresolved conflicts in evidence—incorrect legal standard—After defendant pleaded guilty to multiple charges (including possession of methamphetamine and carrying a concealed handgun) arising from a traffic stop, during which police searched defendant's person and vehicle after a K-9 unit performed a drug sniff, both defendant's plea agreement and the trial court's order denying defendant's motion to suppress were vacated and the matter was remanded for new proceedings. The court's findings of fact contained mere recitations of witness testimony that failed to resolve material conflicts in the evidence, including: whether the K-9 actually alerted to the presence of drugs inside the vehicle, especially given the absence of body camera footage of the alert and conflicting testimony among the witnesses regarding the sniff; and whether the officer who frisked defendant did so based on reasonable concerns about officer safety or solely to look for drugs. Further, the trial court applied the wrong legal standard when denying the motion to suppress, concluding that the officers had "reason" to search defendant's person and vehicle rather than determining whether the searches were supported by "probable cause." **State v. Stollings, 220.**

Motion to suppress—knock and talk—warrantless search—probable cause—exigent circumstances—In a prosecution on drug and weapon charges arising from an officer's "knock and talk" at defendant's house, the trial court properly denied defendant's motion to suppress where competent evidence supported the court's factual findings regarding the "knock and talk," which in turn supported the court's conclusions of law. Specifically, the court properly concluded that the "knock and talk" did not rise to the level of a Fourth Amendment search where the officer approached the home in a manner consistent with societal expectations when he followed a visitor to the front door, wearing attire that clearly identified him as a police officer. The fact that he had parked adjacent to the home, entered defendant's property through the side yard, and stood behind the visitor at the front door did not transform the "knock and talk" into a search. Further, the subsequent warrantless search of the house: (1) was supported by probable cause where the officer detected the strong odor of marijuana emanating from the residence; and (2) fell under the exigent circumstances exception to the warrant requirement because the officer believed drugs could be destroyed if he left to obtain a warrant, since defendant tried to prevent the officer from entering after he identified himself. **State v. Reel, 205.**

SEARCH AND SEIZURE—Continued

Warrantless search—curtilage—seizure of neglected animals—exigent circumstances—plain view doctrine—probable cause to search house—In a prosecution for felony cruelty to animals, officers' warrantless search of the curtilage of defendant's home and seizure of twenty-one dogs was not unconstitutional where the officers, in response to a call regarding a strong smell indicating a dead animal, had discovered that defendant was on probation from a prior conviction of animal cruelty and, as they walked up defendant's driveway, they could see and hear multiple animals exhibiting signs of poor health and living conditions and could smell ammonia and feces. The condition of the animals created exigent circumstances justifying their removal for emergency veterinary treatment. Further, based on the plain view discoveries of the animals on the front of the property, there was probable cause to search the backyard and inside the house (for which officers obtained a warrant). The trial court did not err, much less plainly err, by denying defendant's motion to suppress. **State v. Johnson, 160.**

SENTENCING

Failure to find mitigating factor—stipulated in plea agreement—reversible error—request for different judge on remand denied—After defendant pleaded guilty to felony death by vehicle and other charges arising from a fatal car accident, the trial court committed reversible error at sentencing by failing to find a statutory mitigating factor that the State had stipulated to in defendant's plea agreement. Consequently, defendant's criminal judgments were vacated and the case was remanded for resentencing. However, defendant's request for a different judge to conduct his resentencing hearing was denied, since defendant failed to show that, absent a different judge, he would not be guaranteed the opportunity to receive the benefit of his plea agreement on remand. **State v. Curtis, 826.**

Special condition—prohibition on training during imprisonment—lack of authority to impose—In a murder prosecution of two defendants for the fatal shooting of a man outside of his home, the trial court exceeded its authority during sentencing by imposing, as a special condition, a prohibition on educational or vocation training for both defendants during the first twenty-two years of their imprisonment. Since that special condition was not an allowable punishment pursuant to the relevant sentencing statutes, those portions of defendants' judgments were reversed. **State v. Lacure, 486.**

SEXUAL OFFENDERS

Registration—mandatory—effect on validity of guilty plea—collateral consequence—In a criminal matter in which defendant pled guilty to an offense compelling mandatory sex offender registration (pursuant to N.C.G.S. § 14-208.7), in evaluating defendant's claim in a motion for appropriate relief that his plea was not voluntary because he was not made aware of the registration requirement prior to pleading guilty, the trial court did not err by holding that the registration requirement was a collateral rather than a direct consequence of the guilty plea. **State v. Spry, 641.**

Sex offender registration—petition to terminate—tier level—categorical approach—comparability of state and federal offenses—The trial court properly denied defendant's petition to terminate his sex offender registration after determining that he was not a Tier I sex offender, since the state offense he was convicted of—sexual activity by a substitute parent—was comparable to the generic federal offense of abusive sexual contact, thereby placing him in Tier II or III. To be sure, the statute

SEXUAL OFFENDERS—Continued

defining the federal offense required that a defendant act "knowingly" while the statute for the state offense lacked any mens rea requirement, thus prohibiting a wider range of conduct than the federal statute. Nevertheless, in affirming the denial of defendant's petition, the Court of Appeals concluded that the two offenses were still a categorical match because there was no realistic probability that the State of North Carolina could or would enforce its statute in a way that would sweep in conduct outside of what the generic federal crime encompassed (specifically, unintentional sexual activity by a substitute parent). **State v. Lingerfelt, 168.**

STATUTES OF LIMITATION AND REPOSE

Constitutional claims—following decision that claims under State Tort Claims Act not permitted—not time-barred—In an action asserting state constitutional claims, brought by an adult care home for disabled adults with mental illness and its owner (plaintiffs) against the division of the Department of Health and Human Services that provides regulatory oversight for such facilities (defendant) after the North Carolina Supreme Court issued an opinion in an earlier lawsuit between the parties—holding that plaintiffs' claims for negligent regulatory action could not be brought under the State Tort Claims Act (STCA)—the trial court erred in dismissing the complaint as time-barred where, although the applicable statutes of limitation for both negligence and constitutional claims were three years, they did not begin to run until the Supreme Court issued its decision differentiating general negligence claims as permissible under the STCA from "negligent regulation" claims as not thus permitted. **Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., 23.**

TERMINATION OF PARENTAL RIGHTS

Appointed counsel—withdrawal permitted at start of termination hearing—no inquiry—abuse of discretion—In a proceeding for termination of a mother's parental rights to her minor children, the district court abused its discretion in allowing an oral motion by respondent-mother's appointed counsel to withdraw at the start of a termination hearing—on the basis of appointed counsel's assertion that he had no contact with respondent-mother in over a year—where respondent-mother was not present and there was no further inquiry by the court into counsel's efforts to contact respondent-mother to provide her with notice of his intention to withdraw. The termination order entered was vacated, and the matter was remanded to the district court for a hearing, after adequate notice to respondent-mother, to determine whether appointed counsel had attempted to contact respondent-mother regarding his intent to withdraw and whether he had justifiable cause to make such a request. **In re D.E.-E.Y., 724.**

Best interest of the child—statutory factors—likelihood of adoption—other parent's rights not terminated—The district court did not abuse its discretion in determining that the termination of respondent-mother's parental rights was in the best interest of her minor son in light of its findings of fact reflecting consideration of each of the statutory factors set forth in N.C.G.S. § 7B-1110(a)—including the likelihood of adoption of the juvenile—despite the court's decision not to terminate the parental rights of the child's father, because termination of respondent-mother's parental rights increased the likelihood that the child would be adopted and thus aided in the achievement of his permanent plan. **In re K.J.D., 49.**

TERMINATION OF PARENTAL RIGHTS—Continued

Failure to make reasonable progress—supported by findings of fact—Where a juvenile was initially adjudicated dependent as the result of domestic violence between respondent-mother and the juvenile's father, but his removal from respondent-mother's care and custody was also the result of substance abuse concerns, the district court's adjudication that respondent-mother's willful failure to make reasonable progress in correcting the conditions that led to the child's removal—a ground permitting the termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(2)—was supported by its findings of fact that, over the nearly two-year period the child had been in the custody of the county department of social services, respondent-mother had consistently failed to comply with drug screens or to address her substance abuse issues, and, despite having completed domestic violence classes, continued to be involved in domestic violence situations. **In re K.J.D., 49.**

Grounds for termination—dependency—juveniles in legal and physical custody of other parent—unsupported by findings—In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court erred in determining that the statutory ground of dependency (N.C.G.S. § 7B-1111(a)(6)) existed where the juvenile petitions alleged, and the court found as fact, that the juveniles were in the legal and physical custody of their mother at the time the petitions were filed and, thus, were not in need of assistance or placement as required under the pertinent definition of "dependent" (N.C.G.S. § 7B-101(9)). **In re X.I.F., 799.**

Grounds for termination—neglect—evidence of willful abandonment at time of hearing—unsupported by findings—In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court erred in determining that the statutory ground of neglect (N.C.G.S. § 7B-1111(a)(1)) by means of willful abandonment existed where the court's findings of fact did not address evidence showing neglect at the time of the termination hearing, as required by precedent. **In re X.I.F., 799.**

Grounds for termination—willful abandonment—findings of fact supported by evidence—conclusions of law supported by findings—In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court's determination that the statutory ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) existed was upheld where: (1) the court's findings of fact pertaining to the six months immediately preceding the filing of the petitions—the relevant period under subsection 7B-1111(a)(7) and during which respondent-father was incarcerated—were supported by uncontradicted evidence that the juveniles received no visits, letters or other communications, or financial contributions from respondent-father, even though he knew the address where the juveniles resided with their mother and had been able to send money and two letters during an earlier period of incarceration; and (2) those findings of fact in turn supported the court's conclusions of law that respondent-father willfully abandoned the juveniles by voluntarily withholding his care and affection from them. **In re X.I.F., 799.**

Grounds for termination—willful abandonment—willfulness—Rule 17 guardian appointment not dispositive—In a termination of parental rights action brought by a child's legal guardians, the trial court properly terminated respondent-mother's rights based on willful abandonment (N.C.G.S. § 7B-1111(a)(7)), where the trial court's determination that respondent acted willfully was supported by the unchallenged findings of fact and, further, was not precluded by respondent's having been appointed a guardian pursuant to Civil Procedure Rule 17, which did not

TERMINATION OF PARENTAL RIGHTS—Continued

constitute per se evidence of incompetency. The trial court was not required to make specific findings on willful intent regarding whether respondent's deficient behavior constituted a manifestation of severe mental illness or otherwise make further inquiry into respondent's competency, since there was no evidence or argument that respondent suffered from mental illness. In fact, respondent's counsel argued that respondent's prior mental health report was not relevant; further, respondent admitted that her failure to seek visitation for seven months was due to problems with her phone and social media account. **In re K.J.P.W., 786.**

Neglect—failure to make reasonable progress—sufficiency of evidence and findings—In a termination of parental rights proceeding initiated by a child's aunt, the trial court's conclusions that the parents' rights should be terminated on the grounds of neglect and failure to make reasonable progress were supported by sufficient findings of fact regarding the parents' history of substance abuse, failure to attend visitation, complete lack of a relationship with their son, and failure to complete portions of their case plan. Although the appellate court disregarded three challenged findings as being unsupported by competent evidence, the remaining challenged findings—along with unchallenged findings that were binding on appeal—were supported by clear, cogent, and convincing evidence. **In re H.R.P., 339.**

Notice requirement—notice given less than thirty days before hearing—continuance denied—harmless error analysis—no prejudice—The trial court's order terminating respondent mother's parental rights to her child was affirmed where, although the department of social services (DSS) did not provide the statutorily required notice of thirty days (N.C.G.S. § 7B-1106.1) and the hearing was held before the time to file a written response had expired, there was no evidence that the error caused respondent prejudice. Respondent did not contend that she was not served with or had no actual notice of the motion to terminate her parental rights; DSS provided all the elements of notice required by statute for the initial notice and the notice of hearing, though notice was untimely; there was no proffer by respondent of a responsive pleading or what affirmative defenses respondent would have asserted had she been given the full amount of time to file one; and respondent did not object to the lack of notice until the morning of the hearing when she asked for a continuance. **In re M.R.B., 63.**

TORTS, OTHER

Interference with parental rights—interference with contract—failure to state a claim—In an action brought by a father (plaintiff) against his former wife (the mother of two children with plaintiff) and the man with whom she lived (together, defendants) after one of plaintiff's children—primary physical custody of whom had been awarded to the mother—moved to Rhode Island to live with plaintiff, but after two years, returned to North Carolina to live with defendants, the trial court did not err in allowing defendants' motion to dismiss pursuant to Civil Procedure Rule 12(b)(6), where plaintiff failed to allege facts supporting his claims for tortious interference with parental rights and tortious interference with contract, in that, although plaintiff and the mother had signed agreements to modify custody before a notary to permit the child to move to Rhode Island and live with plaintiff, no court order modifying custody had been entered, and, thus, even taking as true plaintiff's allegation that defendants had "induced" the child who had been residing with him to live with defendants, such actions were entirely consistent with the controlling custody order, the terms of which could not be altered by contract. **Bossian v. Chica, 1.**

UNFAIR TRADE PRACTICES

Insurance—right to seek a settlement—no duty to settle—failure to act in good faith not shown—Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's widow and estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff, along with the co-worker's widow and estate, then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had breached its duty by failing to settle an intentional tort claim, the trial court erred in finding that defendant violated the Unfair Trade Practices Act (N.C.G.S. § 75-1.1 et seq.) because the Financial Responsibility Act (N.C.G.S. § 20-279.21) provided an insurance carrier with the right to settle claims, but no duty to do so. Moreover, defendant exercised its right to seek a settlement, but the co-worker's widow and estate rejected defendant's counteroffer requesting a one-day extension for delivery of payment—a circumstance insufficient to demonstrate a failure to act in good faith on defendant's part. **Ortez v. Penn Nat'l Sec. Ins. Co., 114.**

ZONING

Standing—allegations sufficient—pleading of special damages not required— In a declaratory action brought by four individual and two municipal plaintiffs (a city and a town)—seeking a determination that the county's rezoning of certain property (from primarily residential to wholly heavy industrial) was void—the trial court erred in allowing defendant county's motion to dismiss as to the town on the basis of lack of standing. The town's complaint sufficiently alleged a direct and adverse effect from the rezoning decision, including that it implicated a public water supply system installed in a creek proximate to the subject property that served the town. Further, unlike challenges to quasi-judicial rezoning, challenges to legislative rezoning—such as the act of the county's board of commissioners at issue in this case—do not require a pleading of special damages. **Gardner v. Richmond Cnty., 751.**