231 N.C. App.—No. 4 Pages 516-715

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 18, 2016

MAILING ADDRESS: The Judicial Department
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OF
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[1] Appointed 1 January 2015. [2] Sworn in 1 January 2015. [3] Sworn in 1 January 2015. [4] Appointed 31 July 2015. [5] Deceased 3 May 2015.
[6] Deceased 11 September 2015. [7] Retired 31 December 2014. [8] Resigned 31 December 2014. [9] Resigned 31 December 2014.

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COURT OF APPEALS

CASES REPORTED

FILED 7 JANUARY 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory orders and appeals—no substantial right—Defendants' appeal in a medical negligence and wrongful death case from an interlocutory order was dismissed. Defendants' appeal was from a discovery order that barred them from obtaining discovery by one means, but expressly permitted them to both seek the discovery at issue by another means and to move the trial court to modify the order if necessary to further the interests of justice. Under these circumstances, defendants' appeal did not affect a substantial right. **Britt v. Cusick, 528.**

statements were either reasonable inferences drawn from the evidence or were not so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. **State v. Rodelo, 660.**

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Equitable distribution—payments on marital debt—source of funds—findings—The trial court erred in an equitable distribution action by distributing all of defendant's payments toward the marital debt associated with Pennington Farms

whether Harley, injured in an automobile accident, was covered by the underinsured motorist policy of her grandfather, Thurman. In light of the very particular circumstances in this case, Harley was a resident of Thurman's household as defined under the policy at the time of the accident. **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Paschal, 558.**

INTESTATE SUCCESSION

Abandonment of spouse—not living together—essential element—The trial court properly granted summary judgment for defendants in an action for a declaratory judgment barring a husband and his heirs from inheriting by intestate succession from his deceased wife. Even though the couple lived in the same house, plaintiffs alleged constructive abandonment based on the level of care the husband provided for his wife. However, not living with the other spouse at the time of such spouse's death is a necessary element of N.C.G.S. § 31A-1. **Joyner v. Joyner, 554.**

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Minimum contacts—employment contract—California company and North Carolina employee—Contacts between a California defendant and North Carolina satisfied the constitutional minimum necessary to justify the exercise of personal jurisdiction over defendant under the Due Process Clause. Plaintiff's business in North Carolina was merged with defendant with an employment contract for plaintiff; plaintiff continued to work from North Carolina with defendant's knowledge and approval; and defendant was not just accommodating defendant's choice of residence, but was establishing a division in North Carolina. **Embark, LLC v. 1105 Media, Inc., 538.**

Motion to dismiss—nature of claim not clear—ruling deferred—In an employment dispute between plaintiff and defendant after plaintiff's company (Embark) merged with defendant, the trial court did not abuse its discretion by deferring a motion to dismiss Embark's claims where the trial court was not able to determine the precise nature of Embark's cause of action. **Embark, LLC v. 1105 Media, Inc., 538.**

Personal jurisdiction—finding of fact—not based solely on deposition testimony—The trial court did not err in a medical negligence case by denying defendant Quality Medical's motion to dismiss for lack of personal jurisdiction. While certain challenged deposition testimony was not competent to establish personal jurisdiction over Quality Medical, the trial court did not make any finding of fact solely predicated upon that deposition testimony. **Berrier v. Carefusion 203, Inc., 516.**

Personal jurisdiction—findings of fact—supported by the evidence—The trial court did not err in a medical negligence case by making findings of fact based upon evidence retrieved from the maintenance records of ventilators serviced by

inconvenient forum in a domestic action without first providing appropriate notice that the issue was being determined and without first allowing the parties to submit information. Even if defendant had a statutory right to submit information and was thus entitled to notice, he failed to show that he was not allowed to submit information, or that he would have submitted additional information had he received advanced notice. **Westlake v. Westlake, 704.**

Motion to dismiss—timely—no prejudice—There was no error in an equitable distribution, child custody and child support action where defendant filed a motion for contempt for custodial interference and plaintiff's motion to dismiss the contempt motion for failure to state a claim was granted. Although defendant contended that plaintiff failed to provide sufficient notice of her motion to dismiss, both statute and case law indicated plaintiff's motion was timely. Furthermore, defendant did not show that he was prejudiced, even assuming that plaintiff's motion to dismiss was not timely served. **Westlake v. Westlake, 704.**

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Motion to suppress—stale allegations—victim's allegations—probable cause—The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that certain allegations in the detective's affidavit were stale and did not support a finding of probable cause was overruled. The victim's allegations of inappropriate sexual touching by defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of defendant's residence. **State v. Rayfield, 632.**

Search warrant—affidavit not based on false and misleading information—The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that the search warrant was invalid because the detective's affidavit was based on false and misleading information was overruled. To the extent the detective made mistakes in the affidavit, those mistakes did not result from false and misleading information and the affidavit's remaining content was sufficient to establish probable cause. **State v. Rayfield, 632.**

Search warrant—person visiting house later arrested with contraband—probable cause to search house—The trial court erred in a prosecution involving

cocaine and marijuana possession by denying defendant's motion to suppress evidence obtained during a search of an apartment occupied by defendant from which a separate defendant who was later arrested was seen entering and exiting within a short period of time. The evidence included in the search warrant application clearly established probable cause that the separate defendant had been involved in a recent drug transaction, but the mere discovery of contraband on an individual does not provide *carte blanche* probable cause to search any location that may be remotely connected to that individual for additional contraband. **State v. McKinney, 594.**

Motion to suppress—magistrate—failed to include record of oral testimony—The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that the trial court (1) made incomplete findings and (2) failed to make any findings or conclusions as to whether the magistrate substantially violated N.C.G.S. § 15A-245 was overruled. Furthermore, the magistrate did not substantially violate N.C.G.S. § 15A-245(a) in failing to include a record of the detective's oral testimony. **State v. Rayfield, 632.**

SENTENCING

Prior record level—defendant's admission—statutory procedures—inappropriate—The trial court did not err by sentencing defendant as a prior record level III. The trial court did not fail to comply with N.C.G.S. § 15A-1022.1 because within the context of defendant's sentencing hearing, the procedures specified by N.C.G.S. § 15A-1022.1 would have been inappropriate. **State v. Snelling, 676.**

Probation point—no notice of intent—notice not waived—The trial court erred by including a probation point in its sentencing of defendant as a prior record level III. The trial court never determined whether the statutory requirements of N.C.G.S. § 15A-1340.16(a6) were met as there was no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point and the record did not indicate that defendant waived his right to receive such notice. **State v. Snelling, 676.**

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Statutory mitigating factors—support system in community—The trial court did not err in a second-degree murder, conspiracy to commit murder, and attempted murder case by failing to find the statutory mitigating factor that defendant has a support system in the community. Testimony demonstrating the existence of a large family in the community and the support of that family alone was insufficient evidence. **State v. Dahlquist, 575.**

SEXUAL OFFENDERS

Sex offender registration—petition for termination—Tier 1 sex offender—Adam Walsh Act—The trial court erred by denying defendant's

SCHEDULE FOR HEARING APPEALS DURING 2016

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2016:

January 11 and 25

February 8 and 22

March 7 and 28

April 11 and 25

May 9 and 23

June 6

July None

August 8 and 22

September 5 and 19

October 3, 17, and 31

November 14 and 28

December 12

Opinions will be filed on the first and third Tuesdays of each month.

KRISTIN BERRIER, individually and in her capacity as Administrator of the Estate of JACOB ALEXANDER BERRIER, deceased, and JUSTIN BERRIER, in his capacity as Administrator of the Estate of JACOB ALEXANDER BERRIER, deceased, Plaintiffs

v.

CAREFUSION 203, INC., CAREFUSION CORPORATION, LINCARE INC. d/b/a PEDIATRIC SPECIALISTS, LINCARE HOLDINGS, INC. d/b/a PEDIATRIC SPECIALISTS, JONMARK MAYES, SHELLEY R. BOYD, MASIMO CORPORATION, MASIMO AMERICAS, INC., and QUALITY MEDICAL RENTALS, LLC, Defendants

No. COA13-251

Filed 7 January 2014

1. Jurisdiction—personal jurisdiction—findings of fact—uncontested allegations in complaint—averments in affidavit

The trial court did not err in a medical negligence case by making certain challenged findings of fact in its order denying defendant Quality Medical's motion to dismiss for lack of personal jurisdiction. The uncontested allegations of the amended complaint in conjunction with the averments of the affidavit provided a sufficient basis to uphold the challenged findings of fact.

2. Jurisdiction—personal jurisdiction—finding of fact—not based solely on deposition testimony

The trial court did not err in a medical negligence case by denying defendant Quality Medical's motion to dismiss for lack of personal jurisdiction. While certain challenged deposition testimony was not competent to establish personal jurisdiction over Quality Medical, the trial court did not make any finding of fact solely predicated upon that deposition testimony.

3. Jurisdiction—personal jurisdiction—findings of fact—supported by the evidence

The trial court did not err in a medical negligence case by making findings of fact based upon evidence retrieved from the maintenance records of ventilators serviced by Quality Medical that were not related to the cause of action and denying defendant Quality Medical's motion to dismiss for lack of personal jurisdiction. The maintenance records supported the trial court's finding of fact number 1.

4. Jurisdiction—personal jurisdiction—traditional notions of fair play and substantial justice not offended

The trial court did not err in a medical negligence case by

concluding that the exercise of personal jurisdiction comported with due process. Given the quality and nature of the contacts between defendant Quality Medical and North Carolina, the connection between Quality Medical's contacts with the State and the cause of action, and the interest of North Carolina in protecting its citizens from tortfeasors, the maintenance of the suit in North Carolina did not offend traditional notions of fair play and substantial justice.

Appeal by defendant Quality Medical Rentals, LLC from order entered 14 November 2012 by Judge James C. Spencer in Guilford County Superior Court. Heard in the Court of Appeals 28 August 2013.

Van Laningham Duncan PLLC, by Alan W. Duncan, and Smith Moore Leatherwood LLP, by Richard A. Coughlin and Corinne B. Jones, for plaintiff-appellees.

Carruthers & Roth, P.A., by Robert N. Young, Richard L. Vanore, and Michael J. Allen, for defendant-appellant.

BRYANT, Judge.

Where Quality Medical does not challenge the applicability of our long-arm statute in the exercise of personal jurisdiction and competent evidence supports the trial court's findings of fact and conclusion of law that Quality Medical maintained minimum contacts with North Carolina such that the exercise of personal jurisdiction does not offend the notion of due process, we affirm the order of the trial court.

On 29 September 2011 and later on 3 April 2012, plaintiff Kristin Berrier, both individually and in her capacity as administrator of the Estate of Jacob Alexander Berrier, and Justin Berrier, in his capacity as administrator of the Estate of Jacob Alexander Berrier, filed and then amended a complaint against defendants CareFusion 203, Inc.; CareFusion Corporation; LinCare Inc. d/b/a Pediatric Specialists; LinCare Holdings, Inc. d/b/a Pediatric Specialists; Jonmark Mayes; Shelley R. Boyd; the Masimo Corporation; Masimo Americas, Inc.; and Quality Medical Rentals, LLC. In their amended complaint, plaintiffs sought relief on the basis of negligence from CareFusion, Pediatric Specialists, Mayes, Boyd, Masimo and Quality Medical. Plaintiffs claimed that CareFusion, Pediatric Specialists, Mayes, Boyd, and Masimo were liable for negligent infliction of emotional distress. Claiming breach of an implied warranty of merchantability and unfair and deceptive trade practices, plaintiffs sought relief from CareFusion, Pediatric Specialists,

and Masimo. Plaintiffs claimed that Pediatric Specialists, Mayes, and Boyd committed medical malpractice. Plaintiffs asked that punitive damages be assessed against CareFusion, Pediatric Specialists, Mayes, Boyd, and Masimo.

The allegations set forth in the complaint assert that in December 2007, Jacob Berrier, born 23 September 2007, was diagnosed with spinal muscular atrophy and placed on a ventilator. Other than for short periods of time, Jacob was unable to breathe on his own and was unable to move his head or extremities. On 5 November 2008, Pediatric Services became Jacob's supplier for medical equipment, products, respiratory supplies, and associated home ventilator program services. Pediatric Services provided Jacob with an LTV 950 ventilator and pulse oximeter. The LTV 950 ventilators were designed, manufactured, tested, inspected, marketed, and distributed by CareFusion. In June 2009, Pediatric Specialists entered into a service contract with Quality Medical Rentals, LLC, (Quality Medical) to service and repair LTV 950 ventilators. Quality Medical is a Florida corporation with its principal place of business in Largo, Florida.

Plaintiffs asserted that on 15 June 2009, Pediatric Specialists shipped an LTV 950 ventilator to Quality Medical from Winston-Salem, North Carolina. The LTV 950 ventilator was identified by its serial number – C15775 Ventilator. Quality Medical performed service and maintenance on the C15775 Ventilator on 22 June 2009 and then shipped the C15775 Ventilator back to Pediatric Specialists in Winston-Salem. On 18 July 2009, Pediatric Specialists employee and Center Manager Jonmark Mayes provided the C15775 Ventilator to Jacob. On 8 October 2009, the C15775 Ventilator malfunctioned – it stopped breathing for Jacob and failed to alarm. Jacob's mother was able to provide manual ventilation pending the arrival of EMS, and Jacob was then taken to a hospital where, for several days, he was treated for respiratory distress. The C15775 Ventilator was collected and returned to CareFusion which then returned the C15775 Ventilator to Pediatric Specialists reporting that it was in good mechanical and serviceable condition. Shelley Boyd, an employee of Pediatric Specialists, again delivered and set-up the C15775 Ventilator for Jacob at his home on 29 January 2010. That evening, the C15775 Ventilator once again malfunctioned; it stopped operating. The C15775 Ventilator alarm failed to sound, and the pulse oximeter failed to indicate by alarm that the C15775 Ventilator had stopped operating. When found, Jacob was not breathing and was without a pulse. He was admitted to Moses Cone Hospital's pediatric critical care unit in Greensboro where he died four days later.

On 8 June 2012, Quality Medical filed a motion to dismiss plaintiffs' amended complaint pursuant to Rule 12(b)(2) for lack of personal jurisdiction. In an accompanying memorandum of law, Quality Medical argued that it did not have sufficient minimum contacts with North Carolina in order for the trial court to exercise personal jurisdiction over it in this matter. Following a 19 September 2012 hearing, the trial court entered an order denying Quality Medical's 12(b)(2) motion. In its 14 November 2012 order, the trial court concluded that North Carolina's long arm statute authorized the exercise of personal jurisdiction and that plaintiffs' assertions established the minimum contacts necessary to satisfy the standards of specific jurisdiction. As such, the trial court's exercise of personal jurisdiction over Quality Medical comported with constitutional standards of due process. Quality Medical appeals.

On appeal, Quality Medical raises the following issues: whether the trial court erred by (I) including specific findings of fact in its order denying Quality Medical's motion to dismiss; and (II) concluding that the exercise of personal jurisdiction comports with due process.

Right to appeal

Pursuant to North Carolina General Statutes, section 1-277, "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C. Gen. Stat. § 1-277(b) (2011); *see also Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217 (2000) ("The denial of a motion to dismiss for lack of jurisdiction is immediately appealable." (citation omitted)).

I

Quality Medical argues that in the order denying Quality Medical's motion to dismiss for lack of personal jurisdiction, the trial court erred in making certain findings of fact. More specifically, Quality Medical contends that the trial court erred in making findings of fact based upon (1) unverified allegations in the amended complaint, (2) incompetent deposition testimony, and (3) service and maintenance records not relevant to the ventilator central to this case. We disagree.

Standard of review

The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon

> the procedural context confronting the court. Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005).

Quality Medical submitted a motion to dismiss plaintiffs' amended complaint for lack of personal jurisdiction. The motion was supported by an affidavit from Quality Medical manager Donald Perfetto and a memorandum of law contending that Quality Medical lacked sufficient minimum contacts with North Carolina for the trial court to exercise personal jurisdiction.

> [I]f the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations in the complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint. In order to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence).

Id. at 693-94, 611 S.E.2d at 182-83 (citations and quotations omitted).

Where, as here, the trial court holds an evidentiary hearing including depositions and arguments of counsel, "the trial court [is] required to act as a fact-finder, and decide the question of personal jurisdiction by a preponderance of the evidence." *Deer Corp. v. Carter*, 177 N.C. App. 314, 322, 629 S.E.2d 159, 166 (2006) (citation omitted).

> When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; . . . [w]e are not free to revisit questions of credibility or weight that have already been decided by the trial court.

Id. at 321, 629 S.E.2d at 165 (citation and quotations omitted).

(1) Unverified allegations

[1] Quality Medical first argues that the unverified allegations in plaintiffs' amended complaint are not competent evidence and should not have been considered by the trial court.

"Where unverified allegations in the complaint meet plaintiff's initial burden of proving the existence of jurisdiction ... and defendant[s] ... d[o] not contradict plaintiff's allegations in their sworn affidavit, such allegations are accepted as true and deemed controlling." *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (citation and quotations omitted).

Quality Medical specifically notes the trial court's finding of fact number 10, which states "the allegations of the Plaintiffs in the Amended Complaint, if proven, would constitute a clear source and connection of the cause of action to the contacts of Quality Medical."[1] Quality Medical argues that the trial court impermissibly relied upon the allegations of the amended complaint as the key factor in deciding the "source and connection of the cause of action to the contacts."

In the amended complaint, plaintiffs assert that "[u]pon information and belief, at all times relevant herein, Quality Medical serviced products, materials, and things, including but not limited to the C15775 Ventilator that is the subject of this action, that were used within North Carolina in the ordinary course of business." In its motion to dismiss the amended complaint and the accompanying documents, Quality Medical acknowledges that it is a limited liability company located in Florida, that "the vast majority of [its] business is servicing medical equipment," and that it receives medical equipment and service requests from Pediatric Specialists. It also states that "[i]n July 2009 Pediatric Specialists provided Plaintiffs ventilator # C15775 . . . [and that] Quality Medical serviced ventilator C15775 in Florida in June 2009." The amended complaint alleges that "[a]s a result of the C15775 Ventilator failure, Jacob [Berrier] suffered severe hypoxic injury and brain damage, including

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1. The trial court gave careful consideration to the existence of minimum contacts with the forum state in determining specific jurisdiction based on the following factors:

(1) quantity of the contacts;

(2) the nature and quality of the contacts;

(3) the source and connection of the cause of action to the contacts;

(4) the interest in the forum state; and

(5) convenience of the parties.

hypoxic-ischemic encephalopathy and diffuse cerebral edema, and remained in the Pediatric Critical Care Unit at the Hospital for four days, and then died." On this record, it is clear that the uncontroverted allegations of the amended complaint along with certain acknowledgments in Quality Medical's motion to dismiss and documentation in support thereof provide competent evidence to support the trial court's finding of fact number 10: "[I]f proven, [the allegations] would constitute a clear source and connection of the cause of action to the contacts of Quality Medical." *See Banc of Am. Sec.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83; *Inspirational Network*, 131 N.C. App. at 235, 506 S.E.2d at 758.

Quality Medical also challenges other findings of fact on the basis that the trial court relied heavily on unverified allegations in the amended complaint. In challenging these findings of fact, Quality Medical argues that "there is no evidence in the record that [it] had any knowledge of who the final user of any medical equipment would be or where the equipment would be used."

The trial court made pertinent findings of fact that Quality Medical performed service and repairs to medical equipment designed for home oxygen care and respiratory therapy; that some requests for Quality Medical's services came from Pediatric Specialists, which sent equipment from North Carolina to Quality Medical in Florida; and that Quality Medical returned the medical equipment from Florida to Pediatric Specialists in North Carolina. Though the trial court acknowledged Quality Medical's contention that when returning repaired medical equipment Quality Medical had no knowledge of the end user's identity, the trial court found unreasonable if not incredible the proposition that Quality Medical did not know the identity of the end user or that there would be an end user in North Carolina.

> 9. The [Trial] Court does find that the nature and quality of the contacts . . . establish a reasonable expectation on the part of Quality Medical that the serviced and repaired medical equipment received from and returned to North Carolina would be used by medically dependent consumers within the State.

Therefore, the uncontested allegations of the amended complaint in conjunction with the averments of the affidavit provide a sufficient basis to uphold the challenged findings of fact. *See Banc of Am. Sec.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83; *Inspirational Network*, 131 N.C. App. at 235, 506 S.E.2d at 758.

(2) Deposition testimony of Shelley Boyd and Jonmark Mayes

[2] Next, Quality Medical argues that the deposition testimony of Pediatric Specialists employee Shelley Boyd and former employee Jonmark Mayes was not competent to establish personal jurisdiction over Quality Medical.

In her deposition testimony, Shelley Boyd, an employee of Pediatric Specialists at the time of her deposition on 29 August 2012, testified that while the center for which she worked sent broken or malfunctioning equipment for repair to Quality Medical, she was unaware if Pediatric Specialists used Quality Medical for repair and maintenance services in 2009 and the beginning of 2010.

Jonmark Mayes, a former employee and center manager of Pediatric Specialists, stated in his deposition testimony that Pediatric Specialists used Quality Medical "the majority of the time" for periodic maintenance of ventilators but failed to be specific as to what period he was referring.

We agree with Quality Medical that the deposition testimony of Boyd and Mayes is not competent standing alone to support the trial court's findings of fact as to personal jurisdiction. However, Quality Medical does not allege and we do not find that the trial court made any finding of fact solely predicated upon the deposition testimony of Boyd or Mayes. Therefore, we review additional evidence that might be deemed competent to support the trial court's findings of fact as to personal jurisdiction.

(3) Service records of ventilators

[3] Quality Medical next argues that the trial court erred in making findings of fact based upon evidence retrieved from the maintenance records of ventilators serviced by Quality Medical that were not related to the cause of action.

The record reflects four maintenance or repair records from Pediatric Specialists of ventilators serviced by Quality Medical between 2008 and 2010. Of the four records, Quality Medical acknowledges and does not otherwise contest the record relating to its service of Ventilator C15775 in June 2009 but contends that the remaining three service reports, which relate to Ventilator C02515, are not relevant to the cause of action against Quality Medical. Quality Medical bases this contention on plaintiffs' failure to claim negligence in the maintenance of Ventilator C02515.

We point out that the question presented is whether competent evidence exists to support the challenged findings of fact. While the

maintenance records do not support one finding, exclusively, the maintenance records do support the trial court's finding of fact number 1:

> 1. . . . [O]n at least four separate occasions between September of 2008 and May [2010], [Quality Medical did] receive LTV950 ventilator medical devices from co-defendant Lincare [(Pediatric Specialists)] sent from North Carolina, on which Quality Medical performed service, maintenance and/or repair in Florida and then returned to Lincare [(Pediatric Specialists)] in North Carolina.

Quality Medical further contends that the service records for LTV950 ventilator serial number Ventilator C02515 are not competent evidence to support findings that in turn support the trial court's conclusion that the exercise of personal jurisdiction over Quality Medical based on specific jurisdiction does not violate due process. We consider this argument more fully in our discussion of issue II.

We note that on appeal, Quality Medical listed findings of fact 1, 2, 5, 6, 7, 8, 9, 10, and 14 as findings it intended to challenge as made in error. In its argument to this Court, Quality Medical directly challenged findings of fact 6, 7, 8, 9, and 10 for the following reasons: lacking sufficient basis; incompetent deposition testimony (though it failed to direct our attention to any finding of fact predicated on the testimony); and relevancy (but, again, failed to direct the attention of this Court to any finding of fact made in error as a result). To the extent that findings of fact 1, 2, and 5 are unchallenged by Quality Medical, those findings are binding on appeal.[2] *See In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal." (citation omitted)). Finding of fact 14 states in

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2. In its 14 November 2012 order, the trial court made the following findings of fact:

> 1. [(A)] The Court does find from the evidence presented that at least two Lincare personnel in North Carolina were of the opinion that Quality Medical provided maintenance services for Lincare's ventilator medical devices and that Quality Medical did, on at least four occasions between September of 2008 and May of [2010], receive LTV950 ventilator medical devices from co-defendant Lincare sent from North Carolina, on which Quality Medical performed service, maintenance and/or repair in Florida and then returned to Lincare in North Carolina.
>
> (B) The nature and quality of the contacts – Plaintiffs do not suggest that Quality Medical had direct contact with, or even knew the identity of, the ultimate users of the medical equipment which it serviced for its co-defendants Lincare, Inc. and Lincare Holdings, Inc., both d/b/a Pediatric Specialists, providers of home oxygen care and other respiratory therapy services. . . . There is no evidence of Quality Medical having any offices, employees, sales

pertinent part that "specific jurisdiction exists, the cause of action having arisen from or being related to Defendant Quality Medical's contacts with the forum." We will consider this finding as it relates to Quality Medical's arguments presented in issue II.

II

[4] Quality Medical argues that the trial court erred in concluding the exercise of personal jurisdiction comports with constitutional standards of due process. Specifically, Quality Medical contends that it did not purposefully avail itself of the opportunity to do business in North Carolina and that it lacked sufficient contacts with the state to satisfy the standard of specific jurisdiction. We disagree.

In its 14 November 2012 order denying Quality Medical's motion to dismiss, the trial court drew the following conclusion:

> Having considered the five factors used in determining the existence of the minimum contacts necessary to properly allow the exercise of that statutory jurisdiction, the Court finds that Quality Medical, having delivered the repaired and serviced medical equipment into the stream of commerce in North Carolina with the reasonable expectation that the equipment would be used by medically dependent consumers within the State, was "fairly warned" that litigation might result from injuries that were alleged to have arisen out of or were related to its activities in servicing or repairing the equipment and the Court further finds that *specific jurisdiction* exists, the cause of action having arisen from or being related to Defendant Quality Medical's contacts with the State.

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representatives or other agents in North Carolina (its only office is in Florida); it has no property (real or personal) in North Carolina; it has not actively or specifically solicited business or advertised in North Carolina, although it has a website which describes the services it performs at its Florida location; it is not licensed or registered to do business in North Carolina; and it has never previously been involved in litigation in North Carolina; and

2. The Court does find the above-referenced facts to be established by a preponderance of the evidence.

However, there likewise appears to be no serious dispute as to the following additional facts, which the Court also finds to be established by a preponderance of the evidence:

. . .

5. Some of the service requests came from Lincare locations in North Carolina[.]

(emphasis added). "When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Banc of Am. Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (citation and quotations omitted).

In addressing a challenge to personal jurisdiction over a non-resident defendant, a trial court must employ a two-step analysis. "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citation omitted). Quality Medical does not contest whether a basis for jurisdiction exists under North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4 (2011), instead contending only that the exercise of personal jurisdiction over it offends constitutional standards of due process.

Long-Arm Statute

The exercise of personal jurisdiction is authorized pursuant to our long-arm statute, General Statutes, section 1-75.4,

> in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
>
> . . .
>
> b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade[.]

N.C. Gen. Stat. § 1-75.4(4)(b.) (2011). "Under our 'long arm' statute, North Carolina courts may obtain personal jurisdiction over a non-resident defendant to the full extent permitted by the Due Process Clause of the United States Constitution." *Saxon v. Smith*, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997) (citation omitted).

Due Process

"To satisfy the requirements of the due process clause, there must exist 'certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786 (citing *International Shoe Co. v. Washington*,

326 U.S. 310, 316 (1945)). "The concept of 'minimum contacts' furthers two goals. First, it safeguards the defendant from being required to defend an action in a distant or inconvenient forum. Second, it prevents a state from escaping the restraints imposed upon it by its status as a coequal sovereign in a federal system." *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (citation omitted). When evaluating whether minimum contacts with the forum exists, a court typically evaluates "the quantity and nature of the contact, the relationship between the contact and the cause of action, the interest of the forum state, the convenience of the parties, and the location of witnesses and material evidence." *Saxon*, 125 N.C. App. at 173, 479 S.E.2d at 794 (citation omitted).[3]

The trial court found that Quality Medical received repair requests for two of the ventilators referred to in the amended complaint, serviced those devices in Florida, and returned the devices to Pediatric Specialists in North Carolina. The trial court found implausible the proposition that Quality Medical did not know what the end use of the ventilators would be or that the end user – a medically dependent consumer – would be located in North Carolina. Based on the record before us, we uphold this finding. The trial court further found that, if proven true, the allegations of the complaint – namely that Quality Medical's negligence in servicing ventilator model LTV950, serial number C15775, resulted in injury, damage, and death – form the basis of the action. This Court has previously acknowledged that our State has a powerful public interest in protecting its citizens against out-of-state tortfeasors. *See id.* at 173, 479 S.E.2d at 794 ("In light of the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional in tort cases."); *see also Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000) (holding the exercise of jurisdiction did not offend due process where the defendant engaged in tortious conduct: alienation of affection and criminal conversation). Though on appeal Quality Medical asserts that North Carolina would be an inconvenient forum in which to litigate this action, it provides no support for this assertion.

Specifically, given the quality and nature of the contacts between Quality Medical and North Carolina, the connection between Quality

3. While we acknowledge Quality Medical's cited authority supporting its position that it did not purposefully avail itself of the privilege of conducting business in North Carolina, we recognize that the cases cited regard contractual relations, not tortious conduct.

Medical's contacts with the State and the cause of action, and the interest of North Carolina in protecting its citizens from tortfeasors, the maintenance of the suit in North Carolina does not offend traditional notions of fair play and substantial justice. *See Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786; *see also Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 609, 334 S.E.2d 91, 94 (1985) ("It was clear that the alleged tort would have its damaging effect in North Carolina. Simply because defendant was able to cause the injury without physically coming to this state does not defeat jurisdiction." (citation omitted)). Accordingly, we overrule Quality Medical's challenge to the trial court's exercise of personal jurisdiction.

Affirmed.

Judges STEPHENS and DILLON concur.

MARSHALL KELLY BRITT, JR., AS ADMINISTRATOR OF THE ESTATE OF DANA ROBINSON BRITT, PLAINTIFF
v.
KATHLEEN CUSICK, ET. AL., DEFENDANTS

No. COA13-387

Filed 7 January 2014

Appeal and Error—interlocutory orders and appeals—no substantial right

Defendants' appeal in a medical negligence and wrongful death case from an interlocutory order was dismissed. Defendants' appeal was from a discovery order that barred them from obtaining discovery by one means, but expressly permitted them to both seek the discovery at issue by another means and to move the trial court to modify the order if necessary to further the interests of justice. Under these circumstances, defendants' appeal did not affect a substantial right.

Appeal by defendants from order entered 28 November 2012 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 September 2013.

Conrad, Trosch & Kemmy, P.A., by William Conrad Trosch; and Janet, Jenner & Suggs, LLC, by Kenneth M. Suggs, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Harvey L. Cosper and John D. Branson, for defendants-appellants.

GEER, Judge.

Defendants Kathleen Cusick, the Charlotte-Mecklenburg Hospital Authority, doing business as Carolinas Healthcare System and doing business as Carolinas Medical Center, and Carolinas Physician Network, Inc., doing business as Charlotte Obstetrics and Gynecologic Associates, appeal from the trial court's order granting the motion of plaintiff Marshall Kelly Britt, Jr., as administrator of the Estate of Dana Robinson Britt, to quash defendants' notice of deposition and his motion for a protective order. Defendants' interlocutory appeal is from a discovery order that barred defendants from obtaining discovery by one means, but expressly permitted defendants to both seek the discovery at issue by another means and to move the trial court to modify the order if necessary to further the interests of justice. Under these circumstances, we hold that defendants' interlocutory appeal does not affect a substantial right, and we, therefore, dismiss the appeal.

Facts

On 30 September 2011, plaintiff filed an action against defendants, asserting claims for medical negligence, wrongful death, and "MISREPRESENTATION[,] FAILURE TO PRODUCE MEDICAL RECORDS/SPOILATION," stemming from Ms. Britt's death following an emergency caesarean section surgery. With respect to the claim that defendants wrongfully failed to produce medical records, the complaint alleged that during the course of plaintiff's law firm's investigation into whether Ms. Britt's death was caused by defendants' negligence, plaintiff's law firm repeatedly requested medical records from defendants that defendants wrongfully failed to produce, either intentionally or as a result of defendants' failure to exercise reasonable care in compiling medical records and delivering them to plaintiff.

Many of the allegations relating to this claim were based upon conversations between one of plaintiff's law firm's paralegals and various employees of defendants. The complaint alleged that plaintiff was entitled to "an inference that Defendants withheld evidence and/or destroyed evidence because that evidence . . . would have been adverse to Defendants." The complaint further alleged that as a result of defendants' failure to produce the requested medical records, in breach of certain statutory duties owed to plaintiff, plaintiff had been damaged in excess of $10,000.00.

On 5 December 2011, defendants filed an answer denying the material allegations of the complaint and a motion to dismiss the wrongful failure to produce medical records claim pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Apparently, defendants subsequently served a notice of deposition for Beth Ferguson, the paralegal with plaintiff's law firm, although the notice does not appear in the record on appeal. On 20 September 2012, plaintiff filed a motion to quash defendants' notice of deposition and for a protective order pursuant to Rule 26(c) of the Rules of Civil Procedure.

In the motion, plaintiff alleged that Ms. Ferguson had requested Ms. Britt's medical records from defendants and had spoken with employees of defendants about the medical records "[o]n a number of occasions." The motion further alleged that defendants had served plaintiff's counsel with a notice of deposition for Ms. Ferguson, but that allowing an oral deposition of Ms. Ferguson would "inevitably lead to the discovery of [plaintiff's] counsel's mental impressions and thought process." Such a deposition would, plaintiff alleged, constitute an "unreasonable annoyance, embarrassment, oppression, undue burden, and/or expense" and would violate the attorney client and work product privileges. Accordingly, plaintiff asked the court to enter an order quashing the deposition notice and prohibiting defendants from taking Ms. Ferguson's oral deposition or otherwise eliciting testimony regarding privileged information.

On 28 November 2012, the trial court entered an order granting plaintiff's motion to quash defendants' notice of deposition of Ms. Ferguson and motion for a protective order. The order provided that defendants' discovery of Ms. Ferguson was limited as follows: (1) "Plaintiff shall produce Beth Ferguson's testimony in written form to the Defendants;" (2) "[a]fter receiving Ms. Ferguson's written form testimony, the Defendants may ask follow-up written questions to Ms. Ferguson[;]" (3) "Plaintiff shall promptly respond to these follow-up questions;" and (4) "Ms. Ferguson may testify live at trial, but her testimony at trial shall be limited to information produced in her written form testimony and responses to Defendants [sic] follow-up written questions." The order further provided, "This Order may be modified by future Court Order if required in the interest of justice." Defendants appealed the trial court's order to this Court.

Discussion

We must first address this Court's jurisdiction over this appeal. "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). The appealed discovery order in this case is interlocutory because it fails to settle and determine the entire controversy.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.' " *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quoting N.C. Gen. Stat. § 1-277(a) (1996)). A substantial right is " 'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.' " *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (quoting *Blackwelder v. State Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)).

Generally, "orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment." *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980). As this Court has explained: "Our appellate courts have recognized very limited exceptions to this general rule, holding that an order compelling discovery might affect a substantial right, and thus allow immediate appeal, if it either imposes sanctions on the party contesting the discovery, or requires the production of materials protected by a recognized privilege." *Arnold v. City of Asheville*, 169 N.C. App. 451, 453, 610 S.E.2d 280, 282 (2005).

Although neither of these exceptions apply in this case, defendants argue that their appeal affects a substantial right under *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977), since the trial court's order, according to defendants, effectively precluded them from discovering highly material evidence through the oral deposition of the only witness with personal knowledge of the relevant matters.

In *Tennessee-Carolina Transportation*, the defendant sold 150 trailers to the plaintiff, and the plaintiff subsequently sued the defendant for breach of an implied warranty of fitness based upon allegations that certain metal in the trailers did not "measure up to the proper degree of hardness." *Id.* at 623, 231 S.E.2d at 600. Prior to trial, the defendant appealed from the trial court's discovery order prohibiting the defendant from taking the deposition of an out-of-state expert witness who, at the

plaintiff's request, had conducted tests on some of the trailers to determine the hardness of the relevant metal. *Id.* at 620-21, 623, 231 S.E.2d at 599, 600.

The Supreme Court held that the appealed order affected a substantial right of the defendant because the order "effectively preclude[d] the defendant from introducing evidence of the 'readings' concerning the hardness of the metal obtained by the tests which [the expert] made" -- evidence that was "highly material to the determination of the critical question to be resolved" at trial. *Id.* at 625, 629, 231 S.E.2d at 601, 603. The Court further noted that nothing in the record indicated that the taking of the expert's deposition would have delayed the trial or would have caused the plaintiff or the expert any unreasonable annoyance, embarrassment, oppression, or undue burden or expense. *Id.* at 629, 231 S.E.2d at 603.

In contrast, here, the trial court's order did not "effectively preclude" defendants from discovering relevant information from Ms. Ferguson. Rather, the trial court's order expressly provided for discovery from Ms. Ferguson, but, because Ms. Ferguson was a paralegal for plaintiff's counsel, delimited the manner of discovery by providing that plaintiff would produce Ms. Ferguson's intended testimony in writing and then she would be required to respond to written questions submitted by defendants. Importantly, however, the order further provided that it "may be modified by future Court Order if required in the interest of justice." Thus, if the written discovery proved inadequate, defendants could then move the trial court to modify the protective order to allow an oral deposition of Ms. Ferguson or other appropriate discovery under the circumstances.

Because defendants have not pursued the discovery authorized by the trial court, they cannot show that this order regulating the manner of discovery, but not prohibiting it, "effectively preclude[d] the defendant[s] from introducing evidence" that was "highly material to the determination of the critical question to be resolved" at trial. *Id.* at 625, 629, 231 S.E.2d at 601, 603.

This Court has previously held that an order denying an overly broad request for discovery does not affect a substantial right under *Tennessee-Carolina Transportation* when the record does not specifically show what "relevant and material information" the appellant was barred from obtaining as a result of the discovery order. *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524. Implicit in *Dworsky* is that the appellant could submit a request that did not amount to a fishing expedition. *Id.*

Here, similarly, defendants have not shown what relevant and material information they would obtain in an oral deposition that they cannot obtain using the procedure adopted by the trial court. While such a showing might be possible after completing the discovery allowed by the trial court, defendants cannot yet make that showing. Accordingly, as in *Dworsky*, *Tennessee-Carolina Transportation* does not apply here. We, therefore, dismiss defendants' appeal as interlocutory. *See also Carolina Overall Corp. v. E. Carolina Linen Supply, Inc.*, 1 N.C. App. 318, 319, 320, 161 S.E.2d 233, 234 (1968) (dismissing, as interlocutory, order denying in part defendant's motion for production and inspection of documents but permitting defendants " 'to come again and re-apply for production and inspection of documents specifying in more and greater detail the items sought to be discovered,' " when order "adequately protected the rights of all parties in this matter and no substantial right of the defendant was prejudiced"). *Cf. Norris v. Sattler*, 139 N.C. App. 409, 413, 533 S.E.2d 483, 486 (2000) (holding interlocutory discovery order barring defendant hospital from ex parte contact with plaintiff's treating physician regarding plaintiff's case did not affect substantial right since order did not preclude defendant from seeking discovery of physician through "multi-varied discovery methods detailed in Rule 26" of Rules of Civil Procedure).

Dismissed.

Chief Judge MARTIN and Judge STROUD concur.

CARTERET COUNTY O/B/O LANNI AMOR V KENDALL, PLAINTIFF
v.
GREGORY S. KENDALL, DEFENDANT

No. COA13-603

Filed 7 January 2014

Child Custody and Support—registration of out-of-state support order—equitable basis for refusal—erroneous

The trial court erred in failing to confirm registration and permit enforcement of the Colorado child support order in the State of North Carolina. The trial court's equitable basis for refusing to enforce the child support order was erroneous as a matter of law.

Appeal by Plaintiff from order entered 8 March 2013 by Judge Paul M. Quinn in Carteret County District Court. Heard in the Court of Appeals 21 October 2013.

Erin B. Meeks for Plaintiff.

No brief filed by Defendant.

DILLON, Judge.

Carteret County, on behalf of Lanni Amor Vero Kendall (Plaintiff), appeals from the trial court's order denying enforcement in North Carolina of a child support order originally entered in Colorado against Plaintiff's ex-husband, Gregory S. Kendall (Defendant). We reverse.

I. Factual & Procedural Background

Plaintiff and Defendant lived in Colorado at the time of their divorce in January 2009. When the divorce decree was entered, the Colorado court also entered an order requiring Defendant to pay child support for their minor child. Defendant subsequently relocated to North Carolina, prompting Plaintiff to seek registration and enforcement of the Colorado child support order in North Carolina. A notice of registration of the Colorado order in North Carolina was issued on 15 October 2012 and served on Defendant on or about 26 October 2012.

Defendant timely filed a request for a hearing to contest enforcement of the Colorado order in North Carolina. The matter was heard in Carteret County District Court on 7 February 2013, at which time

Defendant contended, essentially, that he had wrongfully been required to register as a sex offender in North Carolina and that this error had prevented him from securing employment through which he could earn wages to pay child support. Counsel for Plaintiff countered that Defendant's contention was without merit, as it bore no relation to any of the seven statutorily prescribed defenses available to contest registration and enforcement of the child support order under N.C. Gen. Stat. § 52C-6-607(a). The trial court issued its ruling in open court as follows:

> I'm going to go off the grill on this one and I'll say the same thing I did to you and this might be wrong – what I'm getting ready to do. I'm going to make up an eighth reason, (inaudible), and I'm not going to register the Order here today and . . . they're certainly free to appeal this and they probably will[.]"
>
> . . . .
>
> They're going to appeal this so, again, [Defendant], I feel for your position. I'm going to buy you a little more time on this but uh, eventually this is going to come down on you, okay? So do some scrambling, do whatever you need to do, but from today's standpoint, [we] don't have an angry Plaintiff here, she's moved to Colorado and I'm not going to register the Order. It's very appealable just like uh, another case I did today but I'm going to advocate a little bit for you today. All right. Have a good day.

The trial court subsequently entered a written order on 8 March 2013, finding that "Defendant [did] not raise any of the defenses enumerated in N.C. Gen. Stat. § 52C-6-607(a)" and that "Defendant's evidence [did] not support any of the defenses enumerated in 52C-6-607." Notwithstanding these findings, the trial court concluded as a matter of law that "in light of Defendant's legal challenge to his status as a registered sex offender, equity demands that the Colorado child support order not be registered in the State of North Carolina at this time." From this order, Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred in failing to confirm registration and permit enforcement of the Colorado child support order in the State of North Carolina. We agree.

The trial court's decision to deny enforcement of the child support order constituted a conclusion of law, reviewable by this Court *de novo*

on appeal. *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 462, 653 S.E.2d 192, 194 (2007). Under the *de novo* standard, "we may freely substitute our judgment for that of the [trial] court." *Ayers v. Bd. of Adjustment for Town of Robersonville Through Roberson*, 113 N.C. App. 528, 530-31, 439 S.E.2d 199, 201 (1994).

N.C. Gen. Stat. § 52C-6-607 provides as follows:

> (a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:
>
> (1) The issuing tribunal lacked personal jurisdiction over the contesting party;
>
> (2) The order was obtained by fraud;
>
> (3) The order has been vacated, suspended, or modified by a later order;
>
> (4) The issuing tribunal has stayed the order pending appeal;
>
> (5) There is a defense under the law of this State to the remedy sought;
>
> (6) Full or partial payment has been made; or
>
> (7) The statute of limitations under G.S. 52C-6-604 precludes enforcement of some or all of the arrears.
>
> (b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this State.
>
> (c) If the contesting party does not establish a defense under subsection (a) of this section to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

N.C. Gen. Stat. § 52C-6-607 (2011). This court has described the defenses enumerated in N.C. Gen. Stat. § 52C-6-607(a) as "narrowly-defined[,]" *Welsher v. Rager*, 127 N.C. App. 521, 525–26, 491 S.E.2d 661, 663–64 (1997), and as an "*exclusive* list of defenses" available to a party

contesting the validity or enforcement of a registered order, *State, By & Through Albemarle Child Support Enforcement Agency ex rel. George v. Bray*, 130 N.C. App. 552, 557, 503 S.E.2d 686, 690 (1998) (emphasis added).

Here, the trial court acknowledged both in open court and in its written order that Defendant had failed to carry his burden with respect to any of the relevant defenses under N.C. Gen. Stat. § 52C-6-607(a). Upon careful examination of the record on appeal and the transcript of the 7 February 2013 hearing, we agree that Defendant has not raised any defenses relevant to contesting enforcement of the child support order. Defendant's primary defense, which the trial court evidently accepted and used as its basis to rule in Defendant's favor, was his purported inability to earn wages due to the fact that he had been improperly required to register as a sex offender. This position – that it would be unfair to obligate him to pay child support under the circumstances – was clearly equitable in nature. We are aware of no authority supporting the proposition that an equitable defense may be raised to defend against enforcement of an out-of-state child support order registered in North Carolina. To the contrary, in *Berry*, this Court specifically held as follows:

> The trial judge erroneously concluded as a matter of law that "enforcement of foreign support orders under Chapter 52C of the General Statutes of North Carolina is an equitable remedy." Chapter 52C provides a legal remedy, not an equitable remedy. Any equitable defenses to the child support obligations that defendant may wish to raise can be raised only in Florida. If defendant is successful in Florida, he could then contest enforcement of the orders "in North Carolina under G.S. 52C-6-607(a)(3) on the grounds that the order has been modified."

187 N.C. App. at 464, 653 S.E.2d at 195 (citations omitted).

Accordingly, we must conclude in the instant case that the trial court's equitable basis for refusing to enforce the child support order was erroneous as a matter of law. Defendant's failure to raise any of the applicable statutory defenses required the trial court to confirm registration of the Colorado child support order such that the order could be properly enforced in North Carolina.

REVERSED.

Chief Judge MARTIN and Judge STEELMAN concur.

EMBARK, LLC AND DAVID B. WHEELER, PLAINTIFFS
v.
1105 MEDIA, INC., DEFENDANT

No. COA13-263

Filed 7 January 2014

1. Jurisdiction—long arm—merger of North Carolina and California companies—employment contract

The trial court properly concluded that jurisdiction existed under North Carolina's long arm statute in a breach of contract case involving a plaintiff who worked from North Carolina and his employer in California. The trial court made sufficient findings supporting the conclusion that plaintiff's performance was "authorized or ratified" by defendant under N.C.G.S. § 1-75.4(5)(b); moreover, the findings also established the requirements for N.C.G.S. § 1-75.4(5)(a) and (c) (the promise of payment for services within the state and the promise to deliver things of value within the state).

2. Jurisdiction—minimum contacts—employment contract—California company and North Carolina employee

Contacts between a California defendant and North Carolina satisfied the constitutional minimum necessary to justify the exercise of personal jurisdiction over defendant under the Due Process Clause. Plaintiff's business in North Carolina was merged with defendant with an employment contract for plaintiff; plaintiff continued to work from North Carolina with defendant's knowledge and approval; and defendant was not just accommodating defendant's choice of residence, but was establishing a division in North Carolina.

3. Jurisdiction—motion to dismiss—nature of claim not clear—ruling deferred

In an employment dispute between plaintiff and defendant after plaintiff's company (Embark) merged with defendant, the trial court did not abuse its discretion by deferring a motion to dismiss Embark's claims where the trial court was not able to determine the precise nature of Embark's cause of action.

Appeal by defendant from order entered 17 October 2012 by Judge C. Philip Ginn in Mitchell County Superior Court. Heard in the Court of Appeals 28 August 2013.

Adams, Hendon, Carson, Crow and Saenger, P.A., by Robert C. Carpenter, for plaintiffs-appellees.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Heather Whitaker Goldstein, Larry McDevitt and David M. Wilkerson, for defendant-appellant.

GEER, Judge.

Defendant 1105 Media, Inc. appeals from an order (1) denying its motion to dismiss for lack of personal jurisdiction as to plaintiff David B. Wheeler's claims and (2) deferring ruling on its motion to dismiss as to plaintiff Embark, LLC's claims. Because the trial court's unchallenged findings of fact support its conclusion that (1) the exercise of personal jurisdiction satisfies the requirements of our State's long arm statute, N.C. Gen. Stat. § 1-75.4 (2011), and (2) 1105 Media had sufficient minimum contacts with the State to satisfy the requirements of due process, we affirm the trial court's order as to Wheeler's claims. We further hold that the trial court did not abuse its discretion in deferring any ruling as to Embark's claims pending additional discovery.

Facts

Plaintiff Wheeler is the president, founder, and sole employee of plaintiff Embark, an event planning company organized in Illinois on 25 September 2007. Defendant 1105 Media is a Delaware corporation with its principal place of business in California. Neal Vitale is the president and Chief Executive Officer of 1105 Media. David Myers is the Vice President of Event Operations at 1105 Media.

On 29 March 2011, Wheeler, Embark, and 1105 Media entered into a contract as a result of which Embark became a division of 1105 Media and Wheeler became an employee of 1105 Media and the head of "Embark Events, a division of 1105 Media." The contract became effective 1 April 2011 and was terminable by either party after 1 January 2012 with 12 months notice. 1105 Media terminated the contract on 31 August 2011 without providing Wheeler or Embark any reason for the termination and refused to pay Wheeler's salary or other benefits after 31 August 2011.

Wheeler and Embark filed an action for breach of contract against 1105 Media on 9 March 2012 in Mitchell County Superior Court. 1105 Media moved to dismiss for lack of personal jurisdiction on 30 April 2012. On 17 October 2012, the trial court entered an order denying 1105

Media's motion to dismiss as to the claims of Wheeler, but withheld ruling on the motion to dismiss as to the claims of Embark.

In support of its decision, the trial court made the following findings of fact. Wheeler, the president and founder of Embark, was a resident of Mitchell County, North Carolina, and had been since August 2010. 1105 Media was at all relevant times a Delaware corporation with its principal place of business in California.

Prior to entering into a contract with 1105 Media, Wheeler, on multiple occasions, told Mr. Vitale, Mr. Myers, and other 1105 Media employees that he lived in and operated Embark from North Carolina. He also provided 1105 Media with Embark business cards that listed Embark's North Carolina address.

The contract between Wheeler, Embark, and 1105 Media was negotiated via email and telephone communications, and Wheeler wrote many of the emails and placed most of the telephone calls from North Carolina. Although Wheeler invited Mr. Myers and Mr. Vitale to North Carolina on several occasions, no officers or agents of 1105 Media ever came to North Carolina to meet with Wheeler or for any other purpose related to the contract. The contract was signed by the parties in Washington, D.C.

The contract was an employment contract between Wheeler and 1105 Media. The trial court found that it was unclear how the contract affected Embark, but, at Mr. Vitale's suggestion, Embark operated as a division of 1105 Media headed by Wheeler. The name of the division, coined by Mr. Myers, was "Embark Events, a Division of 1105 Media, Inc."

During his employment with 1105 Media, Wheeler lived and worked in Mitchell County, North Carolina, where he performed 75% of his duties for 1105 Media. All of his travel originated from North Carolina, and he did not perform any of his duties for 1105 Media at any of their other offices. He maintained an office and home phone number with a North Carolina area code, paid income and property taxes in North Carolina, and maintained a personal North Carolina checking and savings account. He received health care in North Carolina that was covered by 1105 Media's health insurance plan.

1105 Media paid for the rent and telephone bill for Wheeler's office in Mitchell County, and, at Wheeler's request, shipped his work computer to the North Carolina office. 1105 Media paid a monthly allowance of $450.00 for Wheeler's car, which was titled in North Carolina. 1105 Media directly deposited Wheeler's paycheck into his North

Carolina checking account, paid North Carolina payroll taxes, and had an "employer account number" with the North Carolina Employment Security Commission. No one at 1105 Media ever brought up any concerns about Wheeler living and working in North Carolina.

1105 Media marketed Embark Events and Wheeler as part of the 1105 Media brand and operation. It created specific 1105 Media thank you cards for Wheeler that he sent to 1105 Media clients. The cards contained Wheeler's name, the Embark Events logo, and listed the company name as "Embark Events, a division of 1105 Media, Inc." The only address on the card was the North Carolina office address.

Based on its findings, the trial court concluded that North Carolina had jurisdiction over Wheeler's claims against 1105 Media pursuant to North Carolina's Long Arm Statute, N.C. Gen. Stat. § 1-75.4(5), and that 1105 Media had sufficient minimum contacts with North Carolina such that it had purposefully availed itself of the jurisdiction of North Carolina.

The trial court also concluded that it was unclear whether the court had jurisdiction over 1105 Media with respect to Embark's claims. The order, therefore, denied 1105 Media's motion to dismiss as to Wheeler's claims, but withheld ruling as to Embark's claims until the parties completed discovery. 1105 Media appealed the order to this Court.[1]

I

"In order to determine whether North Carolina courts have personal jurisdiction over a nonresident defendant, a court must apply a two-step analysis: 'First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.' " W*ells Fargo Bank, N.A. v. Affiliated FM Ins. Co.*, 193 N.C. App. 35, 39, 666 S.E.2d 774, 777 (2008) (quoting *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)).

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation*,

1. Although the order denying 1105 Media's motion to dismiss is interlocutory, this Court has jurisdiction over the appeal pursuant to N.C. Gen. Stat. § 1-277 (2011) because 1105 Media argued that it lacked minimum contacts with North Carolina. *See Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982) ("[T]he right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1–277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2).")

Inc., 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). When, as here, both the defendant and the plaintiff submit affidavits addressing personal jurisdiction issues, " 'the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions.' " *Id.* at 694, 611 S.E.2d at 183 (quoting N.C.R. Civ. P. 43(e)). "If the trial court chooses to decide the motion based on affidavits, '[t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror.' " *Id.* (quoting *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981)).

The standard of review for this Court is " 'whether the findings of fact by the trial court are supported by competent evidence in the record[.]' " *Miller v. Szilagyi*, ___ N.C. App. ___, ___, 726 S.E.2d 873, 877 (2012) (quoting *Bell v. Mozley*, ___ N.C. App. ___, ___, 716 S.E.2d 868, 871 (2011), *disc. review denied*, 365 N.C. 574, 724 S.E.2d 529 (2012)). Here, neither party challenges the sufficiency of the evidence to support the trial court's findings of fact, and therefore, they are " 'presumed to be supported by competent evidence and [are] binding on appeal.' " *Id.* at ___, 726 S.E.2d at 877 (quoting *Bell*, ___ N.C. App. at ___, 716 S.E.2d at 871).

A. Long Arm Statute

[1] 1105 Media first argues that the trial court erred in concluding that jurisdiction was proper pursuant to North Carolina's Long Arm Statute, N.C. Gen. Stat. § 1-75.4(5), which states, in relevant part, that jurisdiction is proper in any action which:

> a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
>
> b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
>
> c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; . . .

1105 Media argues that the requirements of N.C. Gen. Stat. § 1-75.4(5)(b) were not met because that section requires that any services actually performed in North Carolina be "authorized or ratified by the defendant." According to 1105 Media, since the trial court made no findings as to whether 1105 Media authorized or ratified Wheeler's performance in North Carolina, the trial court's conclusion is not supported by its findings of fact.

However, based on our review of the order, the trial court did make sufficient findings supporting the conclusion that Wheeler's performance was "authorized or ratified." The court found that 1105 Media paid for Wheeler's North Carolina office space, directly deposited Wheeler's paycheck into his North Carolina checking account, paid North Carolina payroll taxes, never brought up any concerns about Wheeler living and working in North Carolina, created specific 1105 Media thank you cards with Wheeler's North Carolina address for him to send to 1105 Media clients, paid the telephone bill for Wheeler's North Carolina office, and shipped a computer to his office. These findings are more than enough to support the conclusion that Wheeler's performance of services in North Carolina for 1105 Media was authorized and ratified by 1105 Media.

In any event, although 1105 Media does not address N.C. Gen. Stat. § 1-75.4(5)(a) or (c), the trial court's findings of fact also establish that the requirements for those subsections of the statute are satisfied. As provided in N.C. Gen. Stat. § 1-75.4(5)(a), 1105 Media promised to pay Wheeler for the services Wheeler was to perform under his employment contract in North Carolina. Likewise, N.C. Gen. Stat. § 1-75.4(5)(c) is met by the trial court's finding that 1105 Media shipped to Wheeler's North Carolina office a work computer and directly deposited Wheeler's salary into his North Carolina bank account. Both the computer and paychecks are "things of value." N.C. Gen. Stat. § 1-75.4(5)(c). *See Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 567, 712 S.E.2d 696, 700 (finding payments sent from employer to employee during employment relationship constituted "thing of value" for purposes of long arm statute), *appeal dismissed and disc. review denied*, 365 N.C. 367, 719 S.E.2d 623 (2011).

The trial court, therefore, properly concluded that jurisdiction existed under North Carolina's long arm statute.

B. Minimum Contacts

[2] Under the Due Process Clause, a court may exercise personal jurisdiction over a non-resident defendant only if there exists "sufficient 'minimum contacts' between the nonresident defendant and our

state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945)). More specifically, "[i]n each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice." *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786. Instead, the "relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.' " *Id.* (quoting *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501, 100 S. Ct. 559, 567 (1980)).

"There are two types of personal jurisdiction. General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently 'continuous and systematic.' Specific jurisdiction exists when the cause of action arises from or is related to defendant's contacts with the forum." *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (internal citation omitted). Here, the trial court denied the motion to dismiss as to Wheeler's claims based on specific jurisdiction.

For specific jurisdiction, the focus is on "the relationship among the defendant, this State, and the cause of action." *Tom Togs*, 318 N.C. at 366, 348 S.E.2d at 786. In determining whether minimum contacts exist, our courts examine several factors: " '(1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state, and (5) the convenience to the parties.' " *Cambridge Homes of N.C. Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 412-13, 670 S.E.2d 290, 295-96 (2008) (quoting *Cooper v. Shealy*, 140 N.C. App. 729, 734, 537 S.E.2d 854, 857-58 (2000)). " 'A contract alone may establish the necessary minimum contacts where it is shown that the contract was voluntarily entered into and has a 'substantial connection' with this State.' " *Banc of Am. Secs.*, 169 N.C. App. at 696, 611 S.E.2d at 184 (quoting *Williamson Produce, Inc. v. Satcher*, 122 N.C. App. 589, 594, 471 S.E.2d 96, 99 (1996)).

In *Better Bus. Forms, Inc. v. Davis*, 120 N.C. App. 498, 499, 462 S.E.2d 832, 833 (1995), this Court held that there was personal jurisdiction over non-resident defendants for breach of a contract to purchase a North Carolina business. The plaintiff in *Better Business* was

a "Florida corporation with an office and place of business in Forsyth County, North Carolina." *Id.* It sold an operating division of its company, which had sales offices in Winston-Salem, North Carolina and Roanoke, Virginia, to a Virginia corporation owned by the defendants. *Id.* After the merger, the North Carolina sales office "continued to do all of the administrative work necessary to service the Winston-Salem operation," and generated half of the company's sales. *Id.* at 501, 462 S.E.2d at 834.

In its due process analysis, this Court noted that the "active negotiations to purchase a North Carolina business, some of which were conducted in North Carolina, demonstrate a purposeful attempt by defendants to avail themselves of the privilege of conducting business in this State." *Id.* at 500, 462 S.E.2d at 834. The Court found it insignificant that one of the individual defendants had never stepped foot in North Carolina or personally conducted or managed any of the North Carolina activities, concluding instead that "jurisdiction here is based on the benefits received by defendants from the underlying contract which has a substantial connection with North Carolina." *Id.* at 501, 462 S.E.2d at 834.

We believe that the facts here parallel those in *Better Business*. The trial court's findings show that 1105 Media voluntarily entered into a contract whereby it created a division of its company that had an office and head of operations in North Carolina. 1105 Media negotiated the contract knowing that Wheeler was a resident of North Carolina and that Embark was operated out of North Carolina.[2] 1105 Media's proposal to make Embark a division of 1105 Media and hire Wheeler to head the division "demonstrate[s] a purposeful attempt by [1105 Media] to avail [itself] of the privilege of conducting business in this State." *Id.* at 500, 462 S.E.2d at 834.

Additionally, 1105 Media's performance during the course of the contract further demonstrates that the contract at issue in this case is materially indistinguishable from the one in *Better Business* that this Court concluded had a substantial connection with North Carolina. 1105 Media treated the North Carolina operation as part of itself: it paid for the North Carolina office rent and telephone and created 1105 Media thank you cards for Wheeler to send to 1105 Media clients that identified

2. Defendant argues that the trial court made no findings as to 1105 Media's knowledge that Wheeler resided in and operated Embark from North Carolina. We disagree. The trial court's finding of fact that Wheeler told 1105 Media's officers that he lived in North Carolina and operated Embark from this State is a sufficient finding regarding 1105 Media's knowledge of those facts.

"Embark Events, a Division of 1105 Media, Inc." as having a North Carolina address. As in *Better Business*, "jurisdiction here is based on the benefits received by defendants from the underlying contract which has a substantial connection with North Carolina." *Id.* at 501, 462 S.E.2d at 834.

Defendant attempts to distinguish *Better Business* on the bases that (1) Embark was incorporated in Illinois and not North Carolina; (2) no events were produced, performed, or contemplated in North Carolina; and (3) no significant revenue was generated from any operations of Embark Events. None of these purported distinctions is material.

Better Business focused not on the purchased business' state of incorporation, but rather on the location of its offices and where it did business. *Id.* at 500-01, 462 S.E.2d at 834. In this case, after entering into the contract with Wheeler and Embark, 1105 Media established a division office in North Carolina and 75% of Wheeler's services for 1105 Media were performed in North Carolina. *Compare id.* ("After the purchase, Graphics Supply's Winston-Salem office continued to do all of the administrative work necessary to service the Winston-Salem operation, including purchasing, shipping, bookkeeping, accounting, and accounts receivable."). Where the events Wheeler arranged for Embark actually took place -- as opposed to where Wheeler's services were rendered -- is no more material than where the *Better Business* clients were located or where their products where shipped.

Finally, although the Court noted in *Better Business* that the defendants did financially benefit from the Winston-Salem office, *id.* at 501, 462 S.E.2d at 834, the Court did not hold that a generation of revenues was necessary. The focus was on "the benefits received by defendants from the underlying contract." *Id.* Here, those benefits were Wheeler's services, 75% of which were rendered in North Carolina. Accordingly, under *Better Business*, the trial court properly concluded that 1105 Media had sufficient minimum contacts with respect to Wheeler's claims. *See also Brickman v. Codella*, 83 N.C. App. 377, 384, 350 S.E.2d 164, 168 (1986) (finding personal jurisdiction over non-resident defendant where defendant's contacts with State "were 'purposefully directed' toward [plaintiff] in order to obtain his financial assistance with a new business venture whereby [defendant] *sought* personal commercial benefit" (emphasis added)).

Moreover, where the cause of action is a breach of contract, the substantial performance of the contract by the plaintiff in the forum state with the defendant's knowledge, permission, or endorsement is

a factor weighing in favor of a finding of specific jurisdiction over the defendant. Here, 1105 Media employed Wheeler as the head of a division of its company and marketed Wheeler and Embark as part of the 1105 Media brand and operation. With 1105 Media's knowledge and, therefore, its permission, Wheeler performed 75% of his duties under the contract from North Carolina. *See Chapman v. Janko, U.S.A., Inc.*, 120 N.C. App. 371, 373, 462 S.E.2d 534, 536 (1995) (finding jurisdiction over nonresident, non-domesticated corporation in action for breach of contract for consultation services by resident plaintiff where plaintiff performed substantial services for corporation in North Carolina and corporation listed plaintiff as a " 'U.S.A. sales rep' " on its own letterhead, even though employer had no employees residing in North Carolina, only contacted plaintiff through telephone, letter, or outside North Carolina, and contacts involved negotiations only); *Dataflow Cos. v. Hutto*, 114 N.C. App. 209, 213, 441 S.E.2d 580, 582-83 (1994) (finding personal jurisdiction over out-of-state defendants for breach of contract where supplies were shipped to defendants from plaintiff's North Carolina office, plaintiff spent considerable time engineering and designing computer system in North Carolina, and defendants sent payments to North Carolina office).

However, 1105 Media vigorously argues that Wheeler was simply a telecommuting employee and that this Court should adopt the reasoning of other courts that have held that when a telecommuting employee brings suit against his out-of-state employer in an action related to the employment relationship, the employer's withholding of state payroll taxes and payment of unemployment insurance to the forum state, alone, is not enough to establish purposeful availment or minimum contacts with that state. In support of this argument, defendant cites *Slepian v. Guerin*, 172 F.3d 58, 1999 WL 109676, 1999 U.S. App. LEXIS 3371 (9th Cir. Mar. 1, 1999) (unpublished).[3]

In *Slepian*, the Court, in considering a telecommuting employee's lawsuit, held it did not have personal jurisdiction over the defendant employer because the defendant's actions toward the forum state amounted to nothing more than an "accommodation of [the plaintiff's] choice of residence." 1999 WL 109676, at *2, 1999 U.S. App. LEXIS 3371, at *7. Here, however, the circumstances do not involve a mere

3. 1105 Media also cites *Waldron v. Atradius Collections, Inc.*, No. 1:10-cv-551, 2010 WL 2367392, 2010 U.S. Dist. LEXIS 145275 (D. Md. June 9, 2010), another unpublished opinion. The district court, however, declined to decide the question of personal jurisdiction and instead simply transferred venue from Maryland to Illinois. 2010 WL 2367392, at *3, 2010 U.S. Dist. LEXIS 145275, at *9-*10.

telecommuting employee and, therefore, we need not consider whether North Carolina should adopt the *Slepian* reasoning.

In this case, the trial court found that Wheeler did not simply work from home, but rather worked out of his "1105 Media office" in Mitchell County, North Carolina -- an office paid for by 1105 Media and constituting a traditional work site of 1105 Media. *See Wait v. Travelers Indem. Co. of Ill.*, 240 S.W.3d 220, 225 (Tenn. 2007) ("An employee telecommutes when he or she takes advantage of electronic mail, internet, facsimile machines and other technological advancements to work from home or a place other than the traditional work site.").

More importantly, the trial court's findings establish that 1105 Media's actions were not merely an accommodation to Wheeler's choice of residence, but rather a result of 1105 Media's own initiative to create an operating division and office in North Carolina in an ongoing and mutually beneficial business relationship. *See Sheets v. Integrated Info. Util. Sys., Inc.*, No. CIV. 98-1328-KI, 1999 WL 417274, at *1, 1999 U.S. Dist. LEXIS 9719, at *2-*3 (D. Or. June 17, 1999) (declining to follow lower court's recommendation in *Slepian* and finding jurisdiction over out-of-state corporation in action for breach of employment contract of telecommuter where employer initiated contact with employee, and employee's residence in forum state was, at least in part, for convenience of employer due to employer's financial concerns and inability to pay for employee's relocation).

Defendant also argues that the trial court erred by failing to make a finding as to which party initiated contact. While this is a relevant factor to the minimum contacts analysis, our Supreme Court has noted that "[n]o single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case." *B. F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986). Additionally, "Rule 52(a)(1) [of the Rules of Civil Procedure] does not require the trial court to recite all of the evidentiary facts; it is required only to find the ultimate facts, i.e., those specific material facts which are determinative of the questions involved in the action and from which an appellate court can determine whether the findings are supported by the evidence and, in turn, support the conclusions of law reached by the trial court." *Mann Contractors, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 774, 522 S.E.2d 118, 120-21 (1999).

In this case, the fact that Wheeler sent out the first email was not a determinative factor in the minimum contacts analysis. The trial court

made sufficient findings of 1105 Media's contacts with the State to support its exercise of jurisdiction. The court was not then required to make findings of fact on issues that would not alter the conclusion. The trial court could reasonably determine that the question of whom initiated the contact was not material in light of the facts of this case, where the parties engaged in a balanced negotiation, the ultimate structure of their business relationship was proposed by 1105 Media, and 1105 Media entered into a contract with the North Carolina plaintiffs knowingly, voluntarily, and for their own economic benefit. We, therefore, hold that the trial court did not err in concluding that 1105 Media had purposeful minimum contacts with North Carolina.

Once a court finds that a defendant has established minimum contacts with the forum State, it must consider those contacts in light of (1) the interests of North Carolina and (2) the convenience of the forum to the parties. We note, however, that "once the first prong of purposeful minimum contacts is satisfied, the defendant will bear a heavy burden in escaping the exercise of jurisdiction based on other factors." *Banc of Am. Secs.*, 169 N.C. App. at 701, 611 S.E.2d at 187.

With respect to North Carolina's interest, "[i]t is generally conceded that a state has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 787. Here, Wheeler, a resident of North Carolina, has been injured by 1105 Media's alleged breach of contract, the damaging effect of which is felt in this State. *See Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 609, 334 S.E.2d 91, 94 (1985) (finding that damaging effect of tort felt in North Carolina was a factor supporting exercise of jurisdiction).

As for the convenience of the parties, litigating in North Carolina would not be convenient for 1105 Media, but, by the same token, litigation in another state would not be convenient for Wheeler. The record does "not indicate that any one State would be more convenient to all of the parties and witnesses than another." *Banc of Am. Secs.*, 169 N.C. App. at 700, 611 S.E.2d at 186. *See Climatological Consulting Corp. v. Trattner*, 105 N.C. App. 669, 675, 414 S.E.2d 382, 385 (1992) (holding that although three of defendant's material witnesses were located in Washington, D.C., "this fact is counterbalanced by the fact that plaintiff's materials and offices are located here[,]" and "North Carolina is a convenient forum to determine the rights of the parties").

Finally, with respect to the fairness of this State's exercising jurisdiction, "[i]t is well settled that a defendant need not physically enter

North Carolina in order for personal jurisdiction to arise." *Better Bus.*, 120 N.C. App. at 501, 462 S.E.2d at 834. Moreover, 1105 Media has not "pointed to any disparity between plaintiff[s] and itself which might render the exercise of personal jurisdiction over it unfair." *Tom Togs*, 318 N.C. at 368, 348 S.E.2d at 787.

We, therefore, hold that the contacts in this case rose to the level satisfying the constitutional minimum under the Due Process Clause necessary in order to justify the exercise of personal jurisdiction over 1105 Media. Accordingly, we affirm the trial court's order denying 1105 Media's motion to dismiss Wheeler's claims.

II

[3] Defendant next argues that the trial court erred in limiting its ruling to Wheeler's claims and withholding ruling on 1105 Media's motion to dismiss with respect to Embark's claims. Defendant points out that the jurisdictional analysis does not consider a plaintiff's contacts with North Carolina, but rather "the relationship among the defendant, this State, and the cause of action." *Id.* at 366, 348 S.E.2d at 786. It argues that, as a result, the analysis as to Wheeler should apply equally to 1105 Media.

While under this reasoning, our holding in this opinion would result in the conclusion that 1105 Media's motion to dismiss should have been denied as to both plaintiffs, we do not agree with 1105 Media's analysis. The trial court did not defer ruling as to jurisdiction over Embark's claims because of any confusion over Embark's contacts with North Carolina, but rather because it was unclear about the nature of Embark's cause of action. For specific jurisdiction, the sole basis for personal jurisdiction in this case, the focus is on "the relationship among the defendant, this State, *and the cause of action*." *Id.* (emphasis added). Defendant has not cited any authority suggesting that it was error for the trial court to defer ruling when it had insufficient information regarding the nature of Embark's cause of action. *See also Cambridge Homes of N.C.*, 194 N.C. App. at 412-13, 670 S.E.2d at 295-96 (holding that trial court, in determining minimum contacts, should consider, among other factors, " 'the source and connection of the cause of action to the contacts' " (quoting *Cooper*, 140 N.C. App. at 734, 537 S.E.2d at 858)).

In federal court, deferral of a motion to dismiss for lack of personal jurisdiction pending discovery is within the discretion of the trial court. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989) ("If the existence of jurisdiction turns on disputed factual questions, the court may resolve the challenge on the basis of a separate evidentiary hearing, or may

defer ruling pending receipt at trial of evidence relevant to the jurisdictional question."). This standard of review is consistent with this Court's holding that a trial court may choose either to hear a motion to dismiss for lack of minimum contacts based on affidavits or " 'the court may direct that the matter be heard wholly or partly on oral testimony or depositions.' " *Banc of Am. Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (quoting N.C.R. Civ. P. 43(e)).

Because the trial court was unable to determine based on the affidavits and pleadings the precise nature of Embark's cause of action, we cannot conclude that the trial court abused its discretion in deciding that the motion to dismiss as to Embark should be heard based on deposition testimony that more fully fleshes out that cause of action. Consequently, we also affirm the trial court's order to the extent that it defers ruling on the motion to dismiss as to Embark's claims.

Affirmed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

THOMAS E. GUST, PLAINTIFF
v.
THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA13-673

Filed 7 January 2014

Taxation—challenge to assessment—declaratory judgment action—prohibited

An appeal from the dismissal of a declaratory judgment action was itself dismissed by the Court of Appeals because the plain language of N.C.G.S. § 105-241.19 specifically prohibits a taxpayer from filing a declaratory judgment action to contest his tax liability. A taxpayer may challenge the Department of Revenue's tax assessment only by exhausting the statutory remedies set forth in N.C.G.S. §§ 105-241.11 through 105-241.18.

Appeal by plaintiff from the order entered 18 December 2012 by Judge Robert T. Sumner in Cleveland County Superior Court. Heard in the Court of Appeals 6 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General Perry J. Pelaez, for The North Carolina Department of Revenue.

Thomas E. Gust, pro se.

ELMORE, Judge.

Plaintiff appeals from the 18 December 2012 judgment and order dismissing his complaint and petition for declaratory judgment rendered during the 10 December 2012 Civil Session of Cleveland County Superior Court. After careful consideration, we dismiss plaintiff's appeal.

I. Background

The dispute before us initiated when the North Carolina Department of Revenue (the Department) issued a tax assessment against Thomas E. Gust (plaintiff) for his failure to pay individual income taxes for the 2003, 2004, 2005, and 2006 tax years. To contest the tax assessment, plaintiff filed a contested case petition with the Office of Administrative Hearings (OAH) on 8 November 2011. Before OAH issued its determination, plaintiff filed an action for declaratory judgment against the Department in Cleveland County Superior Court on 25 July 2012. The purported purpose of the action for declaratory judgment was to compel the Department to answer the following question: "Which North Carolina General Statute requires a person to file an income tax return with the Department for the same year(s) he is not required to file an income tax return with the Internal Revenue Service?" The trial court dismissed the declaratory action on 18 December 2012 pursuant to Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) and on the basis that the action was barred by the doctrine of sovereign immunity. It is from the entry of this order that plaintiff appeals.

In an attempt to resolve plaintiff's OAH case, the Department served him with its first set of interrogatories and request for production of documents on 22 March 2012. When plaintiff failed to respond, the Department filed a motion to compel discovery. Plaintiff again refused to provide the requested discovery. As such, the Department filed a motion to dismiss the contested case as a sanction against plaintiff. On 15 August 2012, OAH granted the Department's motion and dismissed plaintiff's action with prejudice as a sanction for his noncompliance with the order compelling his response to discovery.

Plaintiff appealed OAH's dismissal to Wake County Superior Court pursuant to N.C. Gen. Stat. § 105-241.16. On 23 May 2013, Judge Donald

W. Stephens dismissed plaintiff's action with prejudice for want of subject matter jurisdiction. Judge Stephens found that plaintiff had not paid the tax, penalties, and interest due as required by N.C. Gen. Stat. § 105-241.16.

II. Declaratory Judgment

Plaintiff argues that the trial court erred in dismissing his action for declaratory judgment based on the Department's sovereign immunity defense. We are unable to reach the merits of this issue and therefore dismiss it.

Plaintiff avers that under the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 2-153 *et seq.*, the trial court had jurisdiction to hear his declaratory judgment action. This contention is unsupported by law. Our Supreme Court has held that the "declaratory judgment statutes themselves are not jurisdictional and they do not create or grant jurisdiction where it does not otherwise exist, nor do they enlarge or extend the jurisdiction of the courts over the subject matter or the parties." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 348, 323 S.E.2d 294, 308 (1984) (citation omitted). In the instant case, the trial court lacked jurisdiction to hear plaintiff's declaratory judgment action for the reasons set fourth below.

A taxpayer may challenge his tax liability pursuant to the procedures laid out in Chapter 105 of our general statutes. Under N.C. Gen. Stat. § 105-241.15 (2011), a taxpayer who disagrees with a notice of final determination issued by the Department may file a contested case hearing with OAH in accordance with Article 3 of Chapter 150B. A taxpayer aggrieved by OAH's determination may seek judicial review of the decision pursuant to N.C. Gen. Stat. § 105-241.16 (2011):

> A taxpayer aggrieved by the final decision in a contested case commenced at the Office of Administrative Hearings may seek judicial review of the decision in accordance with Article 4 of Chapter 150B of the General Statutes. Notwithstanding G.S. 150B-45, a petition for judicial review must be filed in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in G.S. 7A-45.4(b) through (f). Before filing a petition for judicial review, a taxpayer must pay the amount of tax, penalties, and interest the final decision states is due. A taxpayer may appeal a decision of the Business Court to the appellate division in accordance with G.S. 150B-52.

Notably, N.C. Gen. Stat. § 105-241.19 provides:

> The remedies in G.S. 105-241.11 through G.S. 105-241.18 set out the exclusive remedies for disputing the denial of a requested refund, a taxpayer's liability for a tax, or the constitutionality of a tax statute. **Any other action is barred. Neither an action for declaratory judgment, an action for an injunction to prevent the collection of a tax, nor any other action is allowed.**

N.C. Gen. Stat. § 105-241.19 (2011) (emphasis added).

Here, plaintiff has appealed the trial court's dismissal of his action for declaratory judgment. However, the plain language of N.C. Gen. Stat. § 105-241.19 is clear and unambiguous. It specifically prohibits a taxpayer from filing a declaratory judgment action to contest his tax liability. Instead, it provides that a taxpayer may challenge the Department's tax assessment only by exhausting the statutory remedies set forth in N.C. Gen. Stat. §§ 105-241.11 through 105-241.18. Accordingly, plaintiff was statutorily barred from filing the action for declaratory judgment, and we are unable to rule on the merits of his appeal. For this reason, plaintiff's appeal is dismissed.

Dismissed.

Judges McCULLOUGH and DAVIS concur.

ESTATE OF FRANCES JOYNER, HAZEL HALL. IKE COGDELL, JOHN COGDELL, BERTHA C. CLARK, JOSEPHNE C. SHACKLEFORD, NATHAN COGDELL AND SAMUEL COGDELL, Plaintiffs

v.

JESSIE BELL JOYNER, JESSIE MAE BRITT AND LINWOOD JOYNER, As Co Administrators of the Estate Of Warren Joyner, Defendants

No. COA13-545

Filed 7 January 2014

Intestate Succession—abandonment of spouse—not living together—essential element

The trial court properly granted summary judgment for defendants in an action for a declaratory judgment barring a husband and his heirs from inheriting by intestate succession from his deceased

wife. Even though the couple lived in the same house, plaintiffs alleged constructive abandonment based on the level of care the husband provided for his wife. However, not living with the other spouse at the time of such spouse's death is a necessary element of N.C.G.S. § 31A-1.

Appeal by plaintiffs from an order entered 17 October 2012 by Judge Phyllis M. Gorham in Lenoir County Superior Court. Heard in the Court of Appeals 9 October 2013.

Wooten & Turik, PLLC, by Dal F. Wooten, for plaintiff-appellants.

Holtkamp Law Firm, by Lynne M. Holtkamp, for defendant-appellees.

HUNTER, Robert C., Judge.

Plaintiffs appeal from an order entered 17 October 2012 in Lenoir County Superior Court by Judge Phyllis M. Gorham granting defendants' motion for summary judgment. On appeal, plaintiffs argue there was a genuine issue of material fact with respect to whether Warren Joyner ("Warren") constructively abandoned his wife, Frances Joyner ("Frances"). After careful review, we affirm the trial court's order granting summary judgment.

Background

All plaintiffs in this case are surviving siblings of Frances. Frances died intestate on 17 January 2011 without children and with her husband, Warren, as her only potential heir. Warren died intestate on 6 February 2011, survived only by his mother. Plaintiffs brought this action against the co-administrators of Warren's estate, Jessie Mae Britt and Linwood Joyner, and Warren's mother, Jessie Bell Joyner (collectively "defendants"), seeking a declaratory judgment to bar Warren and his heirs from inheriting from Frances on the ground that Warren actually or constructively abandoned Frances.

Warren and Frances were married for twenty-six years and lived in the same home until Frances's death. They were both disabled; Warren had kidney failure, and Frances was a double amputee with heart failure. Warren was unemployed for the last twenty years of the marriage.

The parties contest the level of care Warren provided for Frances. Plaintiffs claimed in depositions that: (1) Warren would not take Frances to doctors visits without compensation for his time and gas; (2) the couple ceased conjugal contact and Warren openly engaged in

homosexual relationships; (3) Warren moved into a separate bedroom in the home he shared with Frances; and (4) Warren refused to provide food or financial support for Frances for at least the last six years of their marriage. Defendants testified at the summary judgment hearing that Warren was the primary caretaker of Frances and was a loving, caring husband, and that Warren helped Frances around the house, cooked meals for her, checked her blood sugar, and provided her medication.

At the conclusion of deposition presentation and testimony at the hearing on defendants' motion for summary judgment, the trial court granted summary judgment for defendants. Plaintiffs timely appealed.

Discussion

I. Whether Summary Judgment was Proper

Plaintiffs' sole argument on appeal is that the trial court erred in granting defendants' motion for summary judgment. After careful review, we affirm.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). When reviewing a grant of summary judgment "evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "Summary judgment is appropriate where the movant proves that an essential element of the claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim." *Holloway v. Wachovia Bank & Trust Co., N.A.*, 339 N.C. 338, 351, 452 S.E.2d 233, 240 (1994) (citation omitted).

N.C. Gen. Stat. § 31A-1(a)(3) (2011) states that "[a] spouse who wilfully and without just cause abandons and refuses to live with the other spouse *and is not living with the other spouse at the time of such spouse's death*" loses intestate succession rights in the other spouse. N.C. Gen. Stat. § 31A-1(a)(3), (b)(1) (2011) (emphasis added). Plaintiffs cite *Powell v. Powell*, 25 N.C. App. 695, 699, 214 S.E.2d 808, 811 (1975), and *Meares v. Jernigan*, 138 N.C. App 318, 321, 530 S.E.2d 883, 885-86 (2000), for the proposition that a husband or wife could constructively abandon his or her spouse under section 31A-1 without leaving the marital home. They argue that Warren's failure to provide monetary

and emotional support amounted to constructive abandonment and that he should be divested of his right to intestate succession as a result. However, plaintiffs overlook the fact that *Powell* analyzes abandonment under N.C. Gen. Stat. § 50-16.2(4), which was repealed in 1995, and therefore is no longer controlling. Act of Oct. 1, 1995, ch. 319, sec. 1, 1995 N.C. Sess. 641. *Meares* analyzes section 31A-1(a)(3) and quotes language from *Powell* to support the proposition that a husband or wife could constructively abandon his or her spouse without leaving the marital home, but the decision stops short of reaching all elements in section 31A-1. *Meares*, 138 N.C. App at 321-22, 530 S.E.2d at 886. Our Supreme Court has made clear that abandonment alone is insufficient to deprive a spouse of intestate succession rights under section 31A-1. In *Locust v. Pitt Cnty. Mem'l Hosp., Inc.*, 358 N.C. 113, 118, 591 S.E.2d 543, 546 (2004), the Supreme Court held that "not living with the other spouse at the time of such spouse's death" is a necessary element of section 31A-1.

> Notably, under the wording of the statute, intent to abandon and abandonment even when combined, are insufficient to preclude an abandoning spouse from intestate succession. The abandoning spouse must also "not [be] living with the other spouse at the time of such spouse's death." N.C.G.S. § 31A-1. This Court has held that a spouse may abandon the other spouse without physically leaving the home, thus likely prompting the legislature to include the *additional requirement* in N.C.G.S. § 31A-1. Because *absence from the marital home is an element under the statute*, a determination of spousal preclusion from intestate succession cannot be made until the death of the other spouse.

Id. (emphasis added) (citations omitted). Because it is undisputed that Warren was not "absen[t] from the marital home" at the time of Frances's death, but was merely sleeping in a separate bedroom, plaintiffs failed to meet this required element of section 31A-1. *See id.* Accordingly, we affirm the trial court's entry of summary judgment in defendants' favor. *See Holloway*, 339 N.C. at 351, 452 S.E.2d at 240 ("Summary judgment is appropriate where the movant proves that an essential element of the claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim.").

As plaintiffs failed to cite *Locust* in their brief, we remind counsel of the duty of candor toward the tribunal, which requires disclosure of known, controlling, and directly adverse authority. *See* N.C. Rev. R. Prof. Conduct 3.3(a), (a)(2) (2012) ("A lawyer shall not knowingly: . . . fail

to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]"). While the duty to disclose *Locust* rests upon plaintiffs, defendants also failed to cite the case. We remind counsel of the need to be diligent in finding controlling authority.

Conclusion

Because plaintiffs failed to establish an element of their claim, we affirm the trial court's order granting defendants' motion for summary judgment.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF-APPELLEE

v.

WADE H. PASCHAL, JR., GUARDIAN AD LITEM FOR HARLEY JESSUP; REGGIE JESSUP; RANDALL COLLINS JESSUP; AND THURMAN JESSUP, DEFENDANTS-APPELLANTS

No. COA13-615

Filed 7 January 2014

1. Venue—motion to change—convenience of witnesses—denied—no abuse of discretion

There was no abuse of discretion in the trial court's order denying defendants' motion to change venue from Wake County in an action to determine insurance coverage after a car accident. Defendants did not demonstrate that the trial court's discretionary ruling denied them a fair trial, or that the ends of justice demanded a change of venue. Although Randolph or Chatham County may have been a more convenient forum for defendants, Wake County appeared to be a more convenient forum for plaintiff.

2. Insurance—underinsured motorist—resident of household

The trial court erred by granting summary judgment for plaintiff in a declaratory judgment action to determine whether Harley, injured in an automobile accident, was covered by the underinsured motorist policy of her grandfather, Thurman. In light of the very particular circumstances in this case, Harley was a resident

of Thurman's household as defined under the policy at the time of the accident.

Appeal by Defendants from orders entered 30 November 2012 and 6 December 2012 by Judge G. Wayne Abernathy in Superior Court, Wake County. Heard in the Court of Appeals 22 October 2013.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for Plaintiff-Appellee.

Moody, Williams, Roper & Lee, LLP, by C. Todd Roper, for Defendants-Appellants.

McGEE, Judge.

Sixteen-year-old Harley Jessup ("Harley") was injured on 15 April 2009 when a truck driven by her cousin, Randall Collins Jessup ("Randall"), ran off the road and into a ditch, causing Harley to be ejected from the truck. Harley, through her guardian *ad litem* Wade H. Paschal, Jr. ("Paschal"), and Harley's father, Reggie Jessup ("Reggie"), filed a complaint on 28 March 2012, alleging injury from the accident and medical expenses of $81,087.44. Randall's automobile insurance carrier tendered the $30,000.00 amount of its coverage. The 28 March 2012 complaint also included an underinsured motorist claim against an automobile policy ("the policy") of Harley's paternal grandfather, Thurman Jessup ("Thurman"), which was issued by North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Plaintiff").

Plaintiff initiated the present action by filing a complaint for declaratory judgment on 25 May 2012. Paschal, as guardian *ad litem* for Harley, along with Reggie, Randall, and Thurman were all named defendants. In Plaintiff's complaint, Plaintiff asked the trial court to rule that Harley was not covered by the policy. Plaintiff moved for summary judgment on 4 October 2012. Harley, through Paschal, along with Reggie, Randall, and Thurman, moved on 30 October 2012 to change venue from Wake County to either Chatham County or Randolph County. The motion for change of venue was denied by order filed 30 November 2012. In an order filed 6 December 2012, the trial court concluded that Harley was "not a resident of [Thurman's] household on April 15, 2009, and [was] therefore not entitled to coverage under the policy[.]" Based upon this conclusion, the trial court granted summary judgment in favor of Plaintiff. Paschal, as guardian *ad litem* for Harley, and Reggie and Thurman ("Defendants") appeal from the 30 October 2012 and the 6 December 2012 orders. Defendant Randall Collins Jessup is not a party to this appeal.

At the time of the accident, Thurman owned multiple houses and several hundred acres of farmland. Thurman and Reggie had owned a house together until the house burned in 2005. Harley lived with Reggie in that house for a short period after she was born. Thurman purchased a house at 6846 Brush Creek Road. ("Brush Creek house") in 1983, and lived there until sometime in the early 2000s. Thurman also purchased a house at 6615 Joe Branson Road ("Branson house") in 1997. The Branson house was approximately one mile from the Brush Creek house, and a person could walk from the Branson house to the Brush Creek house without leaving Thurman's property. Reggie and his children, including Harley, moved into the Branson house shortly after Thurman purchased it. In 2002, Thurman purchased a fifty percent interest in a house owned by his girlfriend, Donna Whitehead ("Ms. Whitehead"), located at 398 Browns Crossroads ("Browns Crossroads house"). After purchasing an interest in the Browns Crossroads house, Thurman spent most of his nights sleeping at either the Browns Crossroads house or the Brush Creek house. On rare occasions, Thurman would sleep at the Branson house.

Most of Thurman's mail, including bank statements, was sent to the Brush Creek house, and that is the address Thurman used for most official business, such as his tax returns and voter registration. The Brush Creek house was also where Thurman kept most of his clothing.

At his deposition, Thurman testified he owned over 100 head of cattle, approximately 4,000 hogs, and about 32,000 chickens, which were housed in different areas around his farm, including the Branson house, the Brush Creek house, and surrounding land. Thurman considered his farm to be a "family farm," and several relatives lived and work on the farm. Reggie lived in the Branson house with Harley and her brothers. Harley had lived primarily at that address since she was a very young child. Thurman paid all the bills associated with the Branson house. Those bills were sent to Thurman's Brush Creek house. Reggie did not pay anything to live in the Branson house. Thurman even paid for Reggie's phone service.

For many years, Thurman had taken continued responsibility for multiple family members, and some people not related to him by blood or marriage. For example, at the time of his deposition, Thurman had two children, not related to either him or Ms. Whitehead, living with him. Thurman had taken the two children in nine years earlier because the children's father was often out of the state for work. When the children's father was in town, Thurman allowed him to stay in one of Thurman's houses free of charge. Ms. Whitehead's daughter and her two

children also lived with Thurman and Ms. Whitehead. Harley and her brothers also lived with Thurman at times. Reggie had ongoing trouble with the law, and spent time in jail or prison on occasion. When Harley could not stay with Reggie due to Reggie's legal problems, she stayed with Thurman, at both the Browns Crossroads house and at the Brush Creek house. Around 2005, Harley spent a year living with Thurman because of Reggie's legal troubles. Thurman was appointed as Harley's guardian for that period of time. Harley's mother was not very involved in Harley's life, and did not appear to provide Harley with material assistance or much guidance.

Thurman testified he supported Harley through "every bit" of her life, providing food, clothes, housing, utilities, phone, and other expenses. Reggie drove a truck that belonged to Thurman and if something was needed for the Branson house, such as a washing machine, Thurman bought it. Thurman testified that when Harley was not living with him, he saw her two or three times a week. Harley testified she saw Thurman almost every day. Thurman had keys to all his houses, and felt free to enter them at any time. If Harley needed to go to the doctor or dentist, Thurman took her. When questioned at his deposition, Thurman agreed that Reggie, Harley, and her brothers were all a part of his household.

Plaintiff filed its complaint for declaratory judgment on 25 May 2012 and requested that the trial court "declare whether [Plaintiff's] UIM policy issued to Defendant Thurman Jessup [was] applicable to the claim of Harley Jessup." Harley, through Paschal, and Reggie, answered Plaintiff's complaint on 3 August 2012, and counterclaimed, asking that the trial court "declare the UIM policy issued to defendant Thurman Jessup applicable to the claims of Harley and Reggie arising from the accident on or about April 15, 2009." Plaintiff filed a motion for summary judgment on 4 October 2012. Defendants filed a motion on 30 October 2012 to change venue from Wake County to either Chatham County or Randolph County. The trial court denied Defendants' motion to change venue by order filed 30 November 2012. In an order entered 6 December 2012, the trial court granted Plaintiff's motion for summary judgment, ruling that Harley "was not a resident of the Defendant Thurman Jessup's household on April 15, 2009, and [was] therefore not entitled to coverage under the policy of UIM insurance issued by the Plaintiff to Defendant Thurman Jessup[.]" Defendants appeal.

I.

The issues in this appeal are whether (1) the trial court erred in denying Defendants' motion to change venue and (2) the trial court

erred in granting summary judgment in favor of Plaintiff by ruling that Harley was not a resident of Thurman's household. We affirm in part and reverse and remand in part.

II.

[1] Defendants acknowledge that Wake County was a proper venue for this action. However, Defendants argue the trial court abused its discretion by not changing venue to either Chatham County or Randolph County "for the convenience of witnesses and the promotion of justice." We disagree.

The trial court is given broad discretion when ruling on a motion to change venue for the convenience of witnesses:

> " '[T]he trial court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change.' " However, the court's refusal to do so will not be disturbed absent a showing that the court abused its discretion. The trial court does not manifestly abuse its discretion in refusing to change the venue for trial of an action pursuant to subdivision (2) of [N.C. Gen. Stat. § 1-83] unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue, or that failure to grant the change of venue will deny the movant a fair trial.
>
> . . . .
>
> In resolving this issue here, we do not set forth a "bright line" rule or test for determination of whether a trial court has abused its discretion in denying a motion to change venue. Rather, the determination of whether a trial court has abused its discretion is a case-by-case determination based on the totality of facts and circumstances in each case.

United Services Automobile Assn. v. Simpson, 126 N.C. App. 393, 399-400, 485 S.E.2d 337, 341 (1997) (citations omitted). Defendants fail to demonstrate that the trial court's discretionary ruling denying their motion to change venue denied them a fair trial, or that the ends of justice demanded a change of venue. Defendants simply argue that "it [was] more convenient for [Defendants] to litigate this action in either Randolph or Chatham County rather than Wake County." According to Defendants' motion to change venue, "Plaintiff's principal office is in

Wake County, North Carolina and it conducts business in said county." Chatham County borders Wake County, and the courthouses in these two counties are not separated by great distances.

Though Randolph or Chatham County may be a more convenient forum for Defendants, Wake County appears to be a more convenient forum for Plaintiff, and we find no abuse of discretion in the trial court's order denying Defendants' motion to change venue from Wake County. This argument is without merit.

III.

[2] Defendants argue the trial court erred in granting summary judgment in favor of Plaintiff because Harley was covered under the policy. We agree.

Although this is an action for declaratory judgment, because it was decided by summary judgment, we apply the standard of review applicable to summary judgment.

> Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "any party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, "the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials." All such evidence must be considered in a light most favorable to the non-moving party. On appeal, an order allowing summary judgment is reviewed *de novo*.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citations omitted).

This Court reviews a grant of summary judgment *de novo*, and should affirm the trial court's action if our *de novo* review uncovers any basis to support the grant of summary judgment. We agree with the trial court that the dispositive issue is whether the policy issued by Plaintiff covers Harley as a "family member" as that term is defined in the policy.[1] "Part C1" of the policy: "Uninsured Motorists Coverage," states in relevant part:

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1. Plaintiff and Defendants argue about whether Thurman could be considered a resident of 6615 Joe Branson Road. Determination of the place or places where Thurman resided, however, is only relevant to the extent, if any, that it can assist in determining what constituted Thurman's "household."

> We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
>
> 1. Bodily injury **sustained by an** insured **and caused by an accident; and**
>
> 2. **Property damage** caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **uninsured motor vehicle**.
>
> . . . .
>
> "**Insured**" as used in this Part means:
>
> 1. You [the named insured] or any **family member.** [(Emphasis in original)].

The policy includes the following definition of "family member:"

> **"Family member"** means a person related to [the named insured] by blood, marriage or adoption who is a resident of [the named insured's] household. This includes a ward or foster child. [(Emphasis in original)].

Resolution of the matter before us depends on whether Harley was "a resident of [Thurman's] household" under the policy. The policy does not define the words "resident" or "household." It is undisputed that Harley is related to Thurman Jessup by blood, and that she lived at 6615 Joe Branson Road at the time of the accident. The determination of whether Harley was also a resident of Thurman's household, however, is more complicated. The word "resident" is "flexible, elastic, slippery and somewhat ambiguous[,]" meaning anything from "a place of abode for more than a temporary period of time" to "a permanent and established home[.]" *Great American Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 656, 338 S.E.2d 145, 147 (1986) (citations and quotation marks omitted). This Court has held that when a term,

> if not defined, is capable of more than one definition [it] is to be construed in favor of coverage. . . . . "When an insurance company, in drafting its policy of insurance, uses a 'slippery' word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction

> of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound."

Fonvielle v. Insurance Co., 36 N.C. App. 495, 497-98, 244 S.E.2d 736, 738 (1978) (citations omitted).

Determinations of whether a particular person is a resident of the household of a named insured are individualized and fact-specific:

> Cases interpreting the phrase, "residents of the same household," as used in insurance policies, are legion. These cases can be divided into two categories: those involving clauses that exclude from coverage members of the insured's household, and those that extend coverage to such persons. Applying the general rule that coverage should be provided wherever, by reasonable construction, it can be, courts have restrictively defined "household" in those cases where members of the insured's household are excluded from coverage. On the other hand, where members of an insured's household are provided coverage under the policy, "household" has been broadly interpreted, and *members of a family need not actually reside under a common roof to be deemed part of the same household.* As pointed out by this court in *Fonvielle v. Insurance Co.*, . . . construction of such terms as "resident" and "household" in favor of coverage may lead to "the seemingly anomalous result" of a very narrow definition under one set of circumstances and a very broad definition under another.

Davis v. Maryland Casualty Co., 76 N.C. App. 102, 105, 331 S.E.2d 744, 746 (1985) (citations omitted) (emphasis added). Not only are relevant facts considered in making this determination, but intent, as well:

> As observed by our courts, the words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. "Residence" has many shades of meaning, from mere temporary presence to the most permanent abode. It is difficult to give an exact or even satisfactory definition of the term "resident," as the

> term is flexible, elastic, slippery and somewhat ambiguous. Definitions of "residence" include "a place of abode for more than a temporary period of time" and "a permanent and established home" and the definitions range between these two extremes. This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection.
>
> Our courts have also found . . . that in determining whether a person in a particular case is a resident of a particular household, the intent of that person is material to the question.

Great American, 78 N.C. App. at 656, 338 S.E.2d at 147 (citations omitted). A minor may be a resident of more than one household for the purposes of insurance coverage. *Davis*, 76 N.C. App. at 106, 331 S.E.2d at 746 (citation omitted).

We find the particular factual situations in *Davis* and *Great American* instructive for our analysis. In *Davis*, this Court held:

> Applying these general principles to the case *sub judice*, we believe that the minor plaintiff was as much a resident of her insured father's household as that of her mother. While the father maintained a separate residence from that of the mother, the evidence discloses that there existed between the father and the minor plaintiff a continuing and substantially integrated family relationship. We therefore hold that the trial court correctly concluded that the minor plaintiff . . . was a resident of her insured father's household within the meaning of the insurance policy, and is entitled to coverage thereunder.

Davis, 76 N.C. App. at 106, 331 S.E.2d at 747 (citations omitted). The following facts were considered by this Court in *Great American*, where the issue was whether the defendant was a resident of his parents' household for insurance purposes:

> The forecast of evidence before the trial court showed that at the time of the collision, Sean Wale [the defendant] was an emancipated person who was enlisted in the United States Navy and stationed at Norfolk, Virginia. He

enlisted in November of 1979. At the time he enlisted he gave his parents' home address in Salisbury as his home address. During his enlistment, he had no housing other than his military station. Also, during his enlistment, he visited his parents from time to time and, just prior to the April collision, he had completed a 14-day convalescent leave spent at his parents' home and was returning to his base in Norfolk. At the time of the collision, Sean gave the investigating highway patrolman a home address the same as his parents' home address in Salisbury. In June 1982, when asked by an insurance adjuster where he was, Sean answered, "At home," giving his parents' address. After he got out of the service in August of 1982, Sean stayed with his parents for several weeks while he looked for a place to live.

When Sean left to join the Navy, he removed all of his personal belongings from his parents' home. When he visited his parents on leave, he slept on a living room couch and had no bed or dresser of his own. When he enlisted in the Navy, he never intended to return to his parents' home. He did not consider himself to be a resident of his parents' household at the time of the collision. Sean's parents did not consider Sean to be a resident of their household at the time of the collision.

. . . .

The forecast of evidence before the trial court raises a question as to Sean Wale's intent to remain a resident of his parents' household or to assume that status from time to time. Sean's habit of returning to his parents' home for furloughs and leaves and his returning there after discharge from the Navy tends to show an intent to make his parents' home his own. On the other hand, the forecast is complicated by Sean's own statement that he did not intend to return to that residence after his enlistment; this statement tends to show an opposite intent from that shown by his habits and activities. Thus, a material issue of fact has been raised which must be determined by the finder of fact.

Great American, 78 N.C. App. at 655, 656-57, 338 S.E.2d at 146-47 (citations omitted).

In the present case, evidence before the trial court, considered in the light most favorable to Defendants, tends to show that Thurman was the most constant caregiver in Harley's life. Thurman owned the Branson house where Harley was living at the time of the accident. Thurman did not charge any rent for Reggie, Harley, or her brothers to live there. Thurman had a key to the Branson house, and freely entered it whenever he desired. Thurman paid the utility bills for the Branson house, and bought appliances for the house as needed. The Branson house and the Brush Creek house were connected to each other by contiguous land owned by Thurman. Thurman considered these two houses to be part of his farm, which he considered to be a family farm. To this extent, Harley and Thurman could both be considered residents of Thurman's "family farm." Thurman spent much of his time at the Brush Creek house, and had most of his mail, including important documents, delivered to that address.

Though Thurman apparently did not spend many nights at the Branson house, he did see Harley most every day of the week, and he was a regular participant in Harley's life. Thurman was often the one who took Harley to the dentist or doctor. Thurman paid for the vast majority of Harley's expenses, including necessaries such as food and clothing, as well as lifestyle items, such as Harley's prom dress. In addition, when Harley did not have a parent with whom to live because her father was either in prison or otherwise prohibited from living with Harley, and her mother either could not or would not provide housing and support, Harley lived with Thurman. On these occasions, Thurman handled every responsibility, including helping Harley with her schoolwork and taking her to school. For a period of time when Reggie was incarcerated, Thurman was appointed legal guardian of Harley. A few years before the accident, Harley lived with Thurman for a year due to Reggie's legal troubles.

Finally, in the present case, unlike in *Great American*, both Harley and Thurman considered Harley to be a part of Thurman's household. When we consider all the relevant facts, we hold, in light of the very particular circumstances in this case, that Harley was a resident of Thurman's household as defined under the policy at the time of the accident. We reverse the 6 December 2012 order granting summary judgment in favor of Plaintiff and remand for entry of an order declaring that, at the time of the accident, Harley was a "family member," and thus an "insured," pursuant to the UIM policy issued by Plaintiff to Thurman.

Affirmed in part, reversed and remanded in part.

Judges BRYANT and STROUD concur.

SHOPE v. PENNINGTON

[231 N.C. App. 569 (2014)]

DOLORES MARIE SHOPE, PLAINTIFF
v.
RICHARD WAYNE PENNINGTON, DEFENDANT

No. COA13-525

Filed 7 January 2014

1. Divorce—equitable distribution—payments on marital debt—source of funds—findings

The trial court erred in an equitable distribution action by distributing all of defendant's payments toward the marital debt associated with Pennington Farms to defendant without making the proper findings as to the source of the funds used to make those payments. The matter was remanded for additional findings and for amendment of the distribution of those payments if necessary.

2. Divorce—equitable distribution—unequal award—payments on marital debt reconsidered

An equitable distribution order was remanded for reconsideration of an unequal award where the credit for payments on marital debt was also to be reconsidered.

Appeal by plaintiff from order entered 14 January 2013 by Judge Jacquelyn L. Lee in Lee County District Court. Heard in the Court of Appeals 23 October 2013.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for plaintiff-appellant.

Doster, Post, Silverman, Foushee & Post, P.A., by Jonathan Silverman, for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff Dolores Shope appeals from an amended equitable distribution order. On appeal, plaintiff argues that the trial court erred by failing to properly distribute the payments defendant made toward the marital debt associated with Pennington Farms and by awarding an unequal distribution in favor of defendant. After careful review, pursuant to *Bodie v. Bodie*, __ N.C. App. __, __, 727 S.E.2d 11, 15 (2012), we reverse the trial court's amended equitable distribution order and remand for additional findings.

Background

Plaintiff and defendant married on 21 November 2002, separated 28 May 2009, and subsequently divorced. At the time of trial, plaintiff was 71 years old, and defendant was 72. Plaintiff worked as a manager at McDonald's in Spring Lake, North Carolina and earned approximately $10.00 per hour. In addition, she received $1,419.40 each month in social security benefits and $282.95 per month from her pension. Defendant operated Pennington Farms, a poultry business located in Carthage, North Carolina. His approximate average monthly gross income was $1,977.00—$1,275.00 earned from the operation of Pennington Farms and $702.00 in social security benefits. It is uncontroverted that the Pennington Farms's business, assets, and liabilities were marital property with the exception of the real property on which the business is located. The real property is defendant's separate property.

On 3 November 2011, the parties entered into an amended pretrial order that identified all the property and debts subject to equitable distribution. In regards to marital debt, the parties agreed that plaintiff had made payments of $11,841.84 towards marital debt associated with a vehicle. Defendant had paid $511,522.69 toward marital debt associated with Pennington Farms after the date of separation from funds "generated from Pennington Farms."

On 10 and 17 November 2011, the trial court held a hearing on the issue of equitable distribution. On 10 May 2012, the trial court entered an equitable distribution order, ultimately determining that an unequal distribution in favor of plaintiff was equitable. In that order, the trial court made the following, pertinent, conclusion:

> 33. That neither party presented evidence as to divisible property and therefore no divisible property is identified, classified, valued or distributed. Plaintiff solely paid the debt for her vehicle (Item 103) after date of separation; however, the decrease in this debt is due to the postseparation actions of [p]laintiff and is not treated as divisible property or debt. Defendant solely paid the marital debts listed in 30B above after date of separation; however the decrease in these debts is due to the postseparation actions of [d]efendant and is not treated as divisible property or debt.

With regard to the parties' acts to preserve the marital property, the trial court noted that "[d]efendant has paid $506,903.69 toward marital debts

associated with Pennington Farms after separation and before the date of trial."

On 24 May 2012, plaintiff filed a Rule 59(e) motion requesting the trial court amend its equitable distribution order or, in the alternative, grant a new trial for three basic reasons. First, plaintiff argued that the trial court erred in failing to classify the decrease in the marital debt associated with Pennington Farms as divisible property pursuant to N.C. Gen. Stat. § 50-20(b)(4)(d). Second, plaintiff contended that defendant actually paid a total of $511,522.69 toward the marital debt, not $506,903.69 as the trial court found. Finally, plaintiff argued that the trial court failed to properly value Pennington Farms.

On 14 January 2013, the trial court entered an order partially granting and partially denying plaintiff's Rule 59 motion. The trial court issued an amended equitable distribution order that reclassified the payments defendant made towards the marital debt associated with Pennington Farms as divisible property, revalued those payments to $511,522.69, and distributed all those payments to defendant. The trial court denied plaintiff's request to revalue Pennington Farms. Finally, the trial court considered the factors listed in N.C. Gen. Stat. § 50-20(c) and concluded that an unequal distribution in favor of defendant was equitable.

Plaintiff timely appealed the amended order.

Arguments

[1] Plaintiff first argues that the trial court erred by distributing all of defendant's payments toward the marital debt associated with Pennington Farms to defendant without making the proper findings. Specifically, plaintiff contends that the trial court found that the funds for those payments were "generated" by Pennington Farms, a marital asset. However, plaintiff alleges that the trial court erred by failing to make any findings as to the source of those funds and by refusing to give her any consideration for defendant's use of marital property. Pursuant to *Bodie*, we agree and remand the matter back to the trial court for the making of additional findings of fact identifying the source of the funds defendant used to make those payments and amend its distribution of those payments in accordance with this opinion.

Our standard of review of a trial court's equitable distribution order is well-established:

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was

> unsupported by reason and could not have been a result of competent inquiry or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (internal citations omitted).

According to N.C. Gen. Stat. § 50–20(b)(4)(d) (2011), divisible property includes "[i]ncreases and decreases in marital debt and financing charges and interest related to marital debt." "A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (*from non-marital or separate funds*) for the benefit of the marital estate." *Bodi*e, __ N.C. App. at __, 727 S.E.2d at 15 (emphasis added). Our Courts have recognized that a credit may be used as a means to take into consideration a party's postseparation payments on marital debt. *See Wiencek-Adams*, 331 N.C. at 694, 417 S.E.2d at 453. However, "a spouse is entitled to some consideration for any post-separation use of marital property by the other spouse." *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002). In other words, if a spouse uses marital property to pay down marital debt, the other spouse is entitled to some consideration for that use.

We find guidance from this Court's recent decision in *Bodie*. In *Bodie*, the trial court found that the plaintiff paid $216,000.00 toward the marital debts. *Id.* at __, 727 S.E.2d at 15. However, the trial court failed to properly classify these payments as divisible property or make any findings regarding the source of those funds. *Id.* The Court noted that:

> Plaintiff has not cited any cases, and we know of none, holding that a spouse is entitled to a "credit" for post-separation payments made using marital funds. As a result, in order to properly evaluate the trial court's treatment of post-separation marital debt payments, the source of the funds used to make the payments should be identified.

Id. In other words, pursuant to *Bodie*, defendant would not be entitled to full credit for those payments toward marital debt if those payments were made using marital funds. Thus, in order for us to determine whether the trial court properly distributed those payments to defendant, the source of funds for defendant's payments must be identified.

In its amended equitable distribution order, the trial court found that:

> The [d]efendant has paid $511,522.69 toward marital debts associated with Pennington Farms after the date of separation and before the date of trial as stipulated to in Schedule M of the pretrial order. The funds for these payments came from the [d]efendant *by virtue of his effort in operating Pennington Farms after the date of separation which generated income to pay these debts*. The Court will consider this divisible property, as defined in G.S. 50-20(b)(4) and (d) in its final judgment. This divisible property is assigned to the [d]efendant.

(Emphasis added). Here, unlike *Bodie*, the trial court properly classified the defendant's payment of debts associated with Pennington Farms as divisible property in its amended equitable distribution order. However, the trial court distributed all of those payments, $511,522.69, to defendant without making specific findings as to the source of those funds. While a trial court may distribute payments unequally, *see Stovall v. Stovall*, 205 N.C. App. 405, 413, 698 S.E.2d 680, 686 (2010), plaintiff would be entitled to some consideration of those payments if the source of those funds was marital property. *See Bodie*, __ N.C. App. at __, 727 S.E.2d at 15. Here, the trial court's identification of the source of those funds is ambiguous. However, given that the average monthly gross income defendant earned from the operation of Pennington Farms was $1,275.00, it seems unlikely that defendant was able to generate over half of a million dollars in debt payments solely on income he earned from his work on the farm. In other words, the numbers do not add up. Consequently, the trial court erred in not making clear findings as to the source of these funds and, if the source included defendant's use of the marital property to generate income, in not giving plaintiff any consideration for that use. Therefore, we remand this matter back to the trial court to make additional findings of fact which identify the source of the funds used to pay down the marital debt associated with Pennington Farms and redistribute those payments if necessary.

[2] Next, plaintiff argues that the trial court abused its discretion by entering an amended equitable distribution award in favor of defendant based on exactly the same distributional factors it relied on in its original equitable distribution order which favored plaintiff. Because defendant may not be entitled to a full credit for the payments he made toward the marital debt associated with Pennington Farms, which would factor in the trial court's determination of whether an unequal distribution was equitable pursuant to N.C. Gen. Stat. § 50-20(c), we remand.

Pursuant to N.C. Gen. Stat. § 50–20(c), an equal division of marital property is equitable. "However, a trial court may consider all the factors listed in § 50–20(c) and find that an equal division of marital property would not be equitable under the circumstances." *Petty v. Petty*, 199 N.C. App. 192, 199, 680 S.E.2d 894, 899 (2009).

One of the statutory factors a trial court must consider is the "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution." N.C. Gen. Stat. § 50-20(c)(11a). In the amended equitable distribution order, when the trial court addressed this factor, it found that it favored defendant because he had paid $506,903.69 toward marital debts. Initially, we note that this figure is not consistent with the trial court's findings. Specifically, the trial court found that defendant paid $511,522.69. Additionally, given that defendant may not be entitled to a full credit for these payments, *see Bodie*, __ N.C. App. at __, 727 S.E.2d at 16, it may be necessary for the trial court to reconsider this factor and determine whether an unequal division in favor of defendant is still justified. Thus, we must reverse and remand the amended equitable distribution order back to the trial court for findings consistent with this opinion.

Conclusion

Because the trial court failed to make findings regarding the source of the funds defendant used to pay the marital debt and refused to give plaintiff any consideration for those payments even though the source of those funds may have come from marital property, we reverse and remand the matter back to the trial court to make findings and redistribute those payments if necessary. In addition, we remand the matter back to the trial court to make findings as to whether an unequal distribution in favor of defendant is still equitable in light of our opinion.

REVERSED AND REMANDED.

Judges CALABRIA and ROBERT N. HUNTER, JR. concur.

STATE v. DAHLQUIST

[231 N.C. App. 575 (2014)]

STATE OF NORTH CAROLINA
v.
ALLEGRA ROSE DAHLQUIST

No. COA13-437

Filed 7 January 2014

1. Sentencing—statutory mitigating factors—age or immaturity at time of offense

The trial court did not err in a second-degree murder, conspiracy to commit murder, and attempted murder case by failing to find the statutory mitigating factor that defendant's age or immaturity at the time of the commission of the offense significantly reduced her culpability for the offense. Evidence of planning, actively participating in the crimes on at least two separate dates, and covering her own tracks all tended to negate defendant's claim that she was unable to appreciate her situation or the nature of her conduct.

2. Sentencing—statutory mitigating factors—support system in community

The trial court did not err in a second-degree murder, conspiracy to commit murder, and attempted murder case by failing to find the statutory mitigating factor that defendant has a support system in the community. Testimony demonstrating the existence of a large family in the community and the support of that family alone was insufficient evidence.

3. Criminal Law—invited error—reliance on evidence from co-defendants' trials

The trial court did not err in a second-degree murder, conspiracy to commit murder, and attempted murder case by erroneously relying on evidence obtained from the trial and sentencing hearing of the co-defendants. Defendant invited any alleged error by repeatedly relying on evidence gained from her testimony at one co-defendant's trial and evidence obtained from the other's sentencing hearing in support of her arguments that the trial court should find the existence of mitigating factors.

Appeal by defendant from judgments entered 15 November 2010 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

McCULLOUGH, Judge.

Defendant Allegra Rose Dahlquist appeals from judgments entered upon pleading guilty to second-degree murder, two counts of conspiracy to commit murder, and attempted murder. Defendant seeks a new sentencing hearing arguing that the trial court failed to find two mitigating factors and that the trial court erroneously relied on evidence obtained from the trial and sentencing hearing of her co-defendants. After careful review, we find no error.

I. Background

On 16 December 2008, defendant Allegra Rose Dahlquist was indicted for murder and conspiracy to commit murder for events that occurred on 30 November 2008. On 9 February 2010, defendant was indicted for attempted first-degree murder and conspiracy to commit first-degree murder for events that occurred on 25 November 2008.

On 13 August 2010, defendant pled guilty to the following: second-degree murder, two counts of conspiracy to commit murder, and attempted murder. As part of defendant's plea agreement, the State agreed to reduce the first-degree murder charge to second-degree murder. Defendant agreed "to cooperate with Wake County investigators and to testify truthfully and consistently with any statement made to investigators if called upon to do so."[1]

At her 13 August 2010 plea hearing, the State proffered the following as a factual basis for the guilty plea: Defendant, Aadil Kahn ("Kahn")[2], Ryan Hare ("Hare") and Drew Shaw ("Shaw") all attended Apex High School and were friends. Defendant and Hare became involved in a romantic relationship. At some point, their relationship ended, and defendant began a romantic relationship with Matthew Silliman ("Silliman"),

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1. Defendant testified at co-defendant Ryan Patrick Hare's trial. *See State v. Hare*, __ N.C. App. __, 722 S.E.2d 14 (2012) (unpublished).

2. Khan pled guilty to second-degree murder, conspiracy to commit murder, attempted first-degree murder, and conspiracy to commit first-degree murder for the events that occurred on 25 and 30 November 2008. *See State v. Khan*, 366 N.C. 448, 449-50, 738 S.E.2d 167, 168-69 (2013).

the victim. Hare was jealous of the relationship between Silliman and defendant. Eventually, defendant and Hare resumed their relationship in November 2008. Hare began to form a plan to kill Silliman. Sometime in mid-November, Kahn was brought into the conspiracy to kill Silliman. Defendant was brought into the conspiracy one or two weeks prior to 25 November 2008.

On the night of 25 November 2008, defendant and Silliman were riding around Apex in defendant's vehicle. They picked up Hare and Kahn in her vehicle. Once they reached a rural road in Wake County, Hare put a zip tie around Silliman's throat in an unsuccessful attempt to strangle him. Kahn had also planned to taser Silliman, but the taser failed to work.

Thereafter, Silliman was taken to an abandoned house owned by defendant's family. Silliman stayed at this house from 25 November 2008 until his death on 30 November 2008.

Silliman remained at the abandoned house during this time period because defendant, Kahn, and Hare had devised a plan and told Silliman that an individual by the name of Roger was "after him and that [Silliman] needed to get out of town, and they were proposing train departure times for him to leave during that week."

On 29 November 2008, defendant participated in digging a grave for Silliman. On 30 November 2008, defendant picked up Shaw from his residence. Kahn and Hare were already with Silliman. Shaw's role involved waiting outside the abandoned house, holding a baseball bat, in the event that Silliman attempted to escape.

Defendant read Silliman tarot cards and an e-mail in an effort to distract him. While Silliman was distracted, Hare came up behind Silliman and hit him with a hammer but the hammer did not faze Silliman.

At this point, Shaw left the abandoned house and defendant took Shaw back to his residence. Defendant then returned to the house, at which time Silliman had been drinking wine mixed with horse tranquilizers. Silliman became "groggy" and started to fall asleep. Silliman's hands were zip tied in front of him and his feet were zip tied together. Duct tape was put over Silliman's mouth and a plastic bag was placed over his head. Defendant placed a zip tie over the plastic bag around Silliman's neck and Hare tightened the zip tie. Silliman's cause of death was suffocation and asphyxiation.

On 2 December 2008, Shaw confessed to his grandmother that he had been involved in this incident and named defendant, Kahn, and Hare as fellow participants.

On 15 November 2010, defendant was sentenced in the aggravated range to two consecutive terms of 180 to 225 months.

The trial court found and defendant admitted to the existence of the aggravating factor that "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." The trial court found as mitigating factors that defendant "aided in the apprehension of another felon," "defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage of the criminal process," and "defendant has accepted responsibility for the defendant's criminal conduct." The trial court then determined that the aggravating factors outweighed the mitigating factors and that the aggravated sentence was justified.

Defendant did not give notice of appeal at that time. On 17 December 2012, defendant filed a petition for writ of certiorari to this Court. This petition was granted by order entered on 28 December 2012.

II. Discussion

Defendant advances the following issues on appeal: whether the trial court erred by (A) failing to find two statutory mitigating factors and (B) relying on evidence from Hare's trial and Khan's sentencing hearing to impose an aggravated sentence.

A. Mitigating Factors

Defendant argues that the trial court failed to find two statutory mitigating factors: (1) that defendant's "age, or immaturity, at the time of the commission of the offense significantly reduced defendant's culpability for the offense" pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(4) and (2) that "defendant has a support system in the community" pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(18).

(i). Standard of Review

A "[f]inding that a mitigating factor exists is within the trial judge's discretion[.]" *State v. Kinney*, 92 N.C. App. 671, 678, 375 S.E.2d 692, 696 (1989). "[T]he trial judge has wide latitude in determining the existence of aggravating and mitigating factors, for it is he who observes the demeanor of the witnesses and hears the testimony." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988) (citation and quotations omitted).

It is well established that "[t]he defendant bears the burden of proof to establish the existence of mitigating factors." *State v. Thompson*, 314 N.C. 618, 625, 336 S.E.2d 78, 82 (1985) (citation omitted).

> [A] trial court must find a statutory mitigating factor if that factor is supported by uncontradicted, substantial, and credible evidence. To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence. Even uncontradicted, quantitatively substantial and credible evidence may simply fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation. While evidence may not be ignored, it can be properly rejected if it fails to prove, as a matter of law, the existence of the mitigating factor.

State v. Richardson, 341 N.C. 658, 674-75, 462 S.E.2d 492, 503 (1995) (citations and quotations omitted).

1. N.C. Gen. Stat. § 15A-1340.16(e)(4)

[1] First, defendant argues that the trial court erred by failing to find a mitigating factor when evidence supporting N.C.G.S. § 15A-1340.16(e)(4), that defendant's "age, immaturity, or limited capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense[,]" was supported by uncontradicted and substantial evidence. Specifically, defendant argues that she was only seventeen (17) years old at the time of the crimes and that she presented expert testimony as to "her immaturity, coupled with her depression and susceptibility to control by her peers, especially Ryan Hare."

The mitigating factor listed under N.C.G.S. § 15A-1340.16(e)(4) "includes two inquiries – one as to immaturity (or mental capacity) and one as to the effect of such immaturity upon culpability." *State v. Moore*, 317 N.C. 275, 280, 345 S.E.2d 217, 221 (1986) (citation omitted). "[A]ge alone is insufficient to support this factor. By its use of the term 'immaturity,' the General Assembly contemplated an inquiry which is 'broader than mere chronological age' and which is 'concerned with all facts, features, and traits that indicate a defendant's immaturity and the effect of that immaturity on culpability.' " *State v. Barton*, 335 N.C. 741, 751, 441 S.E.2d 306, 312 (1994) (citations and quotation marks omitted). We emphasize that "[i]t is within the trial judge's discretion to assess the conditions and circumstances of the case in determining whether the defendant's immaturity or limited mental capacity significantly reduced culpability." Sta*te v. Holden*, 321 N.C. 689, 696, 365 S.E.2d 626, 630 (1988).

We find *State v. Holden*, 321 N.C. 689, 365 S.E.2d 626 (1988), to be instructive. In *Holden*, a seventeen (17) year old defendant pled guilty

to the second-degree murder of her infant daughter. The defendant argued that the trial court erred by failing to find the statutory mitigating factor that her immaturity or limited mental capacity at the time of the murder significantly reduced her culpability for the offense. *Id.* at 696, 365 S.E.2d at 630. The Supreme Court held that although there was uncontradicted evidence that the defendant had the emotional maturity of a twelve or thirteen year old and that she had a diminished intellectual capacity and an IQ of 70, evidence of "planning, weighing of options, and covering her own tracks tended to negate defendant's claim that she was unable to appreciate her situation or the nature of her conduct." *Id.* at 696-97, 365 S.E.2d at 630. The *Holden* Court held that the trial court did not abuse its discretion in failing to find that the defendant's culpability was reduced by her immaturity or limited mental capacity. *Id.*

In the present case, defendant was seventeen years old at the time of the crimes. Defendant's expert witness Dr. Moira Artigues, an expert in forensic psychiatry, testified that defendant's emotional maturity level was that of an eleven (11) or twelve (12) year old. Dr. Artigues also testified that defendant had trouble academically and socially, was suffering from depression and anxiety, was "smashed down by life," and was "easy prey" for manipulation by Hare. However, similar to *Holden*, the State's summary of the facts conflicted with defendant's contention that her youth and immaturity reduced her culpability for the crime. The State's summary of the facts tended to show that defendant participated in the planning of the events that occurred on 25 November and throughout 30 November 2008. Defendant actively participated in carrying out the murder of Silliman by such actions as distracting him, placing the zip tie around his neck, and assisting in digging a grave for him. Further, after the murder of Silliman, she attempted to cover her tracks by disposing of his belongings and telling Silliman's family that she did not know Silliman's whereabouts. Evidence of planning, actively participating in the crimes on at least two separate dates, and covering her own tracks all "tend[] to negate defendant's claim that she was unable to appreciate her situation or the nature of her conduct." *Holden*, 321 N.C. at 696-97, 365 S.E.2d at 630.

Based on the foregoing, we hold that defendant has failed to meet her "burden of showing that the evidence compels the finding and that no contrary inference can reasonably be drawn." *State v. Colvin*, 92 N.C. App. 152, 160, 374 S.E.2d 126, 132 (1988). Accordingly, we are unable to hold that the trial court abused its discretion in failing to find the mitigating factor pursuant to N.C.G.S. § 15A-1340.16(e)(4). Defendant's argument is overruled.

2. N.C. Gen. Stat. § 15A-1340.16(e)(18)

[2] Next, defendant argues that the trial court erred by failing to find a mitigating factor where there was uncontradicted and substantial evidence presented as to whether defendant had a "support system in the community" pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(18). We disagree.

Defendant directs us to the following testimony of Dr. Artigues in support of her argument:

> [Defendant] has repaired her relationship with her mother and grandmother. Her mother and grandmother have stood by her through all of this and I think that has demonstrated to [defendant] that they love her. She was able to say to me that she was grateful for them one of the last times I visited her, and that was very different from how she had been speaking about her relationship with them before.

Defendant also argues that Dr. Artigues testified that defendant had received psychiatric treatment after her arrest.

While the foregoing evidence supports the conclusion that defendant has restored her relationship with her family – specifically her mother and grandmother – and that defendant has received some psychiatric treatment, the evidence does not speak to the existence of "a support system in the community." In *State v. Kemp*, 153 N.C. App. 231, 569 S.E.2d 717 (2002), our Court held that "[t]estimony demonstrating the existence of a large family in the community and support of that family alone is insufficient to demonstrate the separate mitigating factor of a community support system." *Id.* at 241-42, 569 S.E.2d at 723. Here, the testimony defendant relies on simply fails to establish, by a preponderance of the evidence, the existence of a community support system as a statutory mitigating factor. Thus, we hold that the trial court did not abuse its discretion and defendant's argument is overruled.

B. Evidence Considered during Sentencing Hearing

[3] Next, defendant argues that during her sentencing hearing, the State failed to present any evidence of her role in the offenses and that the trial court erroneously relied on evidence obtained from the trial of her co-defendant Hare and from the sentencing hearing of her co-defendant Khan to impose an aggravated sentence. Defendant contends that because of this error, she is entitled to a new sentencing hearing. We disagree.

Defendant relies on *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983), for the contention that a trial court cannot rely on evidence from another proceeding in fashioning a defendant's sentence. In *Benbow*, the defendant and three other co-defendants robbed and murdered an owner of a warehouse on 28 December 1981. The defendant agreed to testify for the State in the trial of his co-defendants in return for acceptance of a plea to second-degree murder. *Id.* at 540, 308 S.E.2d at 648-49. At the defendant's sentencing hearing, the defendant and the State stipulated to a particular set of facts as an accurate narration of the events leading up to the victim's death. *Id.* at 540, 308 S.E.2d at 649. Defendant's evidence in mitigation consisted of the testimony of several witnesses. The State presented no rebuttal evidence and relied on the evidence presented during the trials of the defendant's co-defendants to support the aggravating factors. *Id.* at 543, 308 S.E.2d at 650. The Supreme Court stated the following:

> We emphasize that a defendant's liability for a crime . . . is determined at the guilt phase of a trial or, as in the case *sub judice*, by a plea. At sentencing the focus must be on the offender's individual culpability. It is therefore proper at sentencing to consider the defendant's actual role in the offense as opposed to his legal liability for the acts of others.
>
> . . .
>
> [A]t any sentencing hearing held pursuant to a plea of guilty, reliance on evidence from the trials of others connected with the same offense is improper absent a stipulation. Even with such a stipulation reliance exclusively on such record evidence from other trials (in which the defendant being sentenced had no opportunity to examine the witnesses) as a basis for a finding of an aggravating circumstance may constitute prejudicial error. In such other trials the focus is necessarily upon the culpability of others and not on the culpability of the defendant being sentenced. Thus, by proper stipulation and in the interests of judicial economy, the sentencing judge may consider the evidence from such other trials, but only as incidental to his present determination of defendant's individual culpability as a factor in sentencing.

Id. at 546-49, 308 S.E.2d at 652-54.

In the present case, however, defendant repeatedly relied on evidence gained from her testimony at Hare's trial and evidence obtained from Khan's sentencing hearing in support of her arguments that the trial court should find the existence of mitigating factors:

> [Defendant's Counsel:] I was in the courtroom, just like the Court was, when I heard her testify to it. . . . and while I was sitting there listening to her testify the lawyer part of me was saying, "Oh, my gosh, Allegra, you don't have to be so graphic about yourself," but she was, because she was absolutely, purely honest to this court and to the jury about her responsibility and about what happened, and the truth is she was the only one that was, and the purity of that exists somewhere in the evil of what happened.
>
> . . . .
>
> [Defendant's Counsel:] I have an exhibit. It's Defendant's Exhibit Number 1. . . . This, Your Honor, is a document that was testified to at trial, or at least maybe at the hearing of Mr. Khan[.]
>
> . . . .
>
> [Dr. Moira Artigues (defendant's witness):] To complete my evaluation [of defendant] I looked at selected discovery materials. This case was unique in that I was able to watch much of Ryan Hare's trial on the WRAL archives[.]
>
> . . . .
>
> [Dr. Moira Artigues:] I was able to watch [the prosecutor in Hare's trial's] closing, and in that he summarized the evidence very well, and what [the prosecutor] concluded was that [defendant] had been manipulated by Ryan Hare[.]
>
> . . . .
>
> [Defendant's Counsel:] You heard her testify at the [Hare] trial they were doing the things that they were doing at the end to [Silliman.] [SIC]
>
> . . . .
>
> [Defendant's Counsel:] But Your Honor, I think if you listen to Dr. Artigues, and if you watched her – which I know you did – when she testified, I know you saw the

> raw emotion and reality and honesty that came out of this young woman – I know you saw it.

Based on the foregoing instances, we hold that defendant is precluded from arguing that the trial court's consideration of such evidence in imposing an aggravated sentence amounted to error. Section 15A-1443(c) of the North Carolina General Statutes provides that "[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) (2011). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Hope*, __ N.C. App. __, __, 737 S.E.2d 108, 111 (2012) (citation omitted). Accordingly, defendant has waived his right to appellate review of this issue.

Affirm.

Judges McGEE and DILLON concur.

STATE OF NORTH CAROLINA
v.
ADRIAN TAREL EPPS, DEFENDANT

No. COA13-495

Filed 7 January 2014

Homicide—first-degree murder—failure to instruct on involuntary manslaughter

The trial court did not err in a first-degree murder case by declining to instruct the jury on involuntary manslaughter. The evidence showed that defendant acted voluntarily in stabbing the victim, thus resulting in his death.

Judge HUNTER, Robert C. dissenting.

Appeal by defendant from judgment entered 25 September 2012 by Judge Hugh B. Lewis in Gaston County Superior Court. Heard in the Court of Appeals 26 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.

Michael E. Casterline for defendant-appellant.

STEELMAN, Judge.

Where the evidence at trial showed that defendant acted voluntarily in stabbing McGill, resulting in his death, the trial court did not err in declining to instruct the jury on involuntary manslaughter.

I. Factual and Procedural Background

On 6 May 2011, Adrian Tarel Epps (defendant) was hosting a social event at his house. One of the guests was defendant's cousin, who brought her boyfriend, Antwan McGill (McGill). A fight occurred in the yard between defendant and McGill, and defendant was beaten by McGill. Defendant returned to the house by the screen door to the kitchen. McGill followed defendant to the house. When McGill approached the screen door, defendant stabbed him through the door. McGill was dead on arrival at the hospital emergency room. The coroner found McGill's death to have resulted from a single stab wound.

Defendant was charged with first-degree murder. At the jury instruction conference, defendant requested an instruction on the lesser offense of involuntary manslaughter. The trial court denied that request. The trial court instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter, as well as the defenses of self-defense and the castle doctrine. On 25 September 2012, the jury found defendant guilty of voluntary manslaughter. The jury also found the existence of two aggravating factors. The trial court found defendant to be a prior felony record level IV, and sentenced defendant to an aggravated range sentence of 121-155 months imprisonment.

Defendant appeals.

II. Involuntary Manslaughter

In his sole argument on appeal, defendant contends that the trial court erred in refusing to instruct the jury on the lesser offense of involuntary manslaughter. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osori*o, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "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. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

B. Analysis

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). In the instant case, defendant contends that the evidence at trial would have permitted the jury to find defendant guilty of involuntary manslaughter and to acquit him of the other homicide charges.

"The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Fisher*, ___ N.C. App. ___, ___, 745 S.E.2d 894, 901 (2013) (quoting *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997)). Thus, for the jury to be given an instruction on involuntary manslaughter, there must have been evidence presented to show that (1) defendant lacked intent, and that (2) the action causing McGill's death either (a) did not amount to a felony and was not ordinarily dangerous to human life, or (b) was the result of culpable negligence.

At trial, the evidence presented was that defendant fought with McGill, and that defendant retreated to the kitchen. The evidence further showed that defendant stabbed McGill through the screen door, that the knife had a 10-12 inch blade, that defendant's arm went through the screen door up to the elbow, and that the stab wound pierced McGill's lung and nearly pierced his heart, and was approximately four and one-half inches deep. Defendant contends that he was intoxicated and barely aware of his actions; that he was afraid for his life and acting to fend off an attack; and that his actions were reckless but not intended to cause death.

Defendant relies on *State v. Debiase*, 211 N.C. App. 497, 711 S.E.2d 436, *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011). In *Debiase*, defendant and the victim, guests at a party, got into an altercation, which concluded with defendant striking the victim with a bottle, inflicting an injury from which the victim eventually died. We held that:

> despite the fact that Defendant acted intentionally at the time that he struck Mr. Lien with the bottle, the evidence contained in the present record is susceptible to the interpretation that, at the time that he struck Mr. Lien, Defendant did not know and had no reason to believe that the bottle would break or that the breaking of the bottle would inflict a fatal wound to Mr. Lien's neck. Death resulting from such a series of events would, under the previous decisions of this Court and the Supreme Court, permit an involuntary manslaughter conviction.

Debiase, 211 N.C. App. at 506, 711 S.E.2d at 442. We held that the trial court erred by declining to instruct the jury on the lesser-included offense of involuntary manslaughter, and remanded for a new trial.

The facts of the instant case are distinct from those in *Debiase*. In *Debiase*, defendant was holding the bottle during the fight. As a result, the jury was permitted to consider the possibility that his use of the bottle was not intentional. In the instant case, however, defendant was not armed with the knife during the fight, nor was defendant involved in an altercation at the time of the fatal stabbing. Sometime after the fight had ended, defendant was in the kitchen, inside of the house, when McGill approached the screen door. Defendant consciously grabbed the knife, which he had not been previously holding, and stabbed McGill through the screen door.

Defendant cites us to numerous other cases with fact patterns similar to the facts in *Debiase*, reaching the same result. In each of those cases, a defendant instinctively or reflexively lashed out, involuntarily resulting in the victim's death. In the instant case, however, defendant's conduct was entirely voluntary. The evidence in the record shows that defendant's conduct was intentional, and that the stabbing was not an action which was (a) not a felony, or (b) resulting from culpable negligence. Based upon our review of the record, we see no evidence which would have merited an instruction on involuntary manslaughter.

We hold that the trial court did not err by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

NO ERROR.

Judge BRYANT concurs.

HUNTER, Robert C., Judge, dissenting.

Based on decisions by this Court and our Supreme Court and taking the evidence in the light most favorable to defendant, I believe the evidence would permit a reasonable jury to find defendant guilty of involuntary manslaughter. Consequently, I would conclude that the trial court committed reversible error in failing to charge the jury on involuntary manslaughter and that defendant is entitled to a new trial.

Background

On 6 May 2011, Adrian Epps ("defendant") and his girlfriend, Jamie Vittatoe ("Ms. Vittatoe"), decided to have a small get-together at their home near the town of Stanley, North Carolina. They invited defendant's cousin Anitra Adams ("Ms. Adams") who invited her boyfriend of two months Antwan Rashard McGill ("Mr. McGill"). After Ms. Adams and Mr. McGill arrived, around 8 or 9 that night, Ms. Adams asked if defendant had any orange juice to mix with vodka. Defendant replied that they did not; instead, he cut up lime wedges for her to squeeze into her drinks. Over the course of the evening, the couples drank alcohol and smoked marijuana. While no one was able to definitively establish how much the parties drank, several of the witnesses testified that both defendant and Mr. McGill were quite intoxicated. In fact, one witness testified that defendant was so intoxicated that he was "stumbling" around and fell down twice. Moreover, several witnesses claimed that Mr. McGill got sick in the bathroom from consuming too much alcohol. According to the postmortem toxicology report, Mr. McGill had a blood alcohol level of .16 and a small amount of Xanax in his system.

At some point during the evening, defendant and Mr. McGill began arguing; the witnesses provided contradictory accounts of the altercation. Defendant contended that the argument started when Mr. McGill made a derogatory comment about Ms. Vittatoe. Defendant and Mr. McGill went outside where a physical fight ensued. Defendant claimed that Mr. McGill pulled his legs out from under him and beat him so severely that defendant passed out twice. When defendant woke up the first time during the fight, he felt "dizzy." At this point, while defendant was still on the ground, Mr. McGill kicked him in the face, and defendant stated that it felt like his face "exploded" and his ears began ringing. When he woke up the second time, defendant alleged that he saw Ms. Adams and Mr. McGill sitting in Ms. Adams's car in the driveway. Defendant went back inside his house through a screen door located off a side porch. Defendant stated that he was in severe pain, his head was "killing" him, he felt lightheaded, and his vision was blurry. Defendant

left the outside door propped open because he believed Mr. McGill and Ms. Adams were leaving. When he entered the kitchen, defendant and Ms. Vittatoe began cleaning the blood out of his mouth. Defendant heard footsteps outside on his driveway. He turned and saw Mr. McGill coming toward the screen door. Fearing that Mr. McGill was coming back to hurt him further or to harm Ms. Vittatoe, defendant ran to the screen door and held it shut. During the struggle, defendant claimed he heard Ms. Adams yell something about a gun. At this point, defendant grabbed the knife he had used earlier to cut limes, turned, and stabbed once through the closed screen door. Defendant testified that he "wasn't trying to pay attention to exactly where [he] might hit [Mr. McGill] at, or how hard [he] might've swung the knife, or anything like that." Defendant went on to allege:

> I wasn't trying to gauge I'm going to hit [Mr. McGill] here with [the knife], I'm going to hit him there with it, I'm going to use this much force, I'm not going to use that much force, I'm going to pull back at this moment of that moment. None of that was going through my head. Only thing was going through my head was I need to protect myself. I was in fear for my life that it was going to either be my life or his life.

Ms. Adams and Devan Williams, a friend of Mr. McGill's, took Mr. McGill to the hospital where he was pronounced dead in the emergency room. According to the pathologist who performed the autopsy, Mr. McGill died as a result of excessive bleeding from a single stab wound in his upper chest.

At trial, defendant requested the trial court instruct on involuntary manslaughter. However, the trial court denied his request because involuntary manslaughter did not "apply" and noted defendant's objection for purposes of an appeal. The jury was instructed on first-degree murder, second-degree murder, voluntary manslaughter, and the defenses of self-defense and defense of habitation. The jury found defendant guilty of voluntary manslaughter. The trial court sentenced defendant to a minimum of 121 months to a maximum of 155 months imprisonment. Defendant appealed.

Argument

Defendant's sole argument on appeal is that the trial court committed reversible error by refusing to instruct the jury on involuntary manslaughter. Specifically, defendant contends that although there was contradictory evidence presented at trial, there was sufficient evidence

presented to permit the jury to find him guilty of involuntary manslaughter. Taking the evidence in a light most favorable to defendant, I agree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed de novo by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "In determining whether the evidence is sufficient to support the submission of the issue of a defendant's guilt of a lesser included offense to the jury, courts must consider the evidence in the light most favorable to the defendant." *State v. Debiase*, 211 N.C. App. 497, 504, 711 S.E.2d 436, 441 (internal quotation marks omitted), *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011). Our Supreme Court has noted that "[c]onflicts in the evidence are for the jury to resolve, not this Court" when deciding whether the trial court erred in not submitting an instruction on involuntary manslaughter. *State v. Lytton*, 319 N.C. 422, 427, 355 S.E.2d 485, 488 (1987). "It is reversible error for the trial court to fail to instruct on a lesser offense when evidence has been introduced which supports the finding of such a lesser offense." *State v. Fisher*, 318 N.C. 512, 524, 350 S.E.2d 334, 341 (1986).

Involuntary manslaughter is a lesser included offense of second-degree murder and voluntary manslaughter. *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989). Unlike voluntary manslaughter which requires that a defendant have an intent to kill, *see State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978), "involuntary manslaughter can be committed by the wanton and reckless use of a deadly weapon such as a firearm [*see State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983)] or a knife [*see State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979)][,]" *State v. Buck*, 310 N.C. 602, 605, 313 S.E.2d 550, 552 (1984).

Here, the evidence, when taken in the light most favorable to defendant, could support a verdict of involuntary manslaughter based on the theory that defendant killed Mr. McGill as a result of his reckless use of the knife. At trial, defendant's own testimony establishes that he was not trying to intentionally inflict a fatal wound; specifically, defendant testified that he was not aiming at any particular area on Mr. McGill's body or consciously using any specific amount of force. Instead, his testimony indicates that he was acting instinctively and reflexively when he grabbed the knife, turned, and made a single stabbing motion toward Mr. McGill through a closed screen door. While it is uncontroverted that

defendant intentionally used the knife, our Supreme Court has made it clear that the element of intent for purposes of manslaughter is whether the defendant intended to inflict a fatal wound, not whether the use of the weapon was intentional. *See Buck*, 310 N.C. at 607, 313 S.E.2d at 553 (concluding that the trial court erred in not submitting the involuntary manslaughter instruction when "[the] defendant was wielding the butcher knife generally to defend against a felonious assault upon him, [but] the actual infliction of the fatal wound, according to [the] defendant, was not intentional"). While the testimony of other witnesses contradicts defendant's testimony concerning his lack of intent to kill Mr. McGill, their testimony does not matter because the trial court must consider the evidence in a light most favorable to defendant. Thus, the conflict in the evidence was for the jury to resolve, not the trial court by refusing to submit the lesser included offense to the jury. Consequently, I believe that defendant's own description of the events coupled with the fact that Mr. McGill was struck only once through a closed screen door during the altercation was enough to warrant the submission of the involuntary manslaughter instruction to the jury.

Unlike the majority, I believe the facts of this case are similar to those of *Debiase*. There, during an altercation, the defendant struck the victim with a beer bottle; although several of the witnesses claimed that the defendant struck him multiple times, defendant alleged to only have hit the victim once. *Debiase*, 211 N.C. App. at 499-501, 711 S.E.2d at 438-39. The victim died as a result of massive blood loss from a "gaping wound" on his neck. *Id.* at 498, 711 S.E.2d at 437-38. The victim also suffered a second, superficial wound on his head. *Id.* The pathologist who conducted the autopsy contended that both wounds could only have come from a broken beer bottle. *Id.* This suggested that the beer bottle broke at some point during the defendant's altercation with the victim.

At trial, the court refused to give an instruction on involuntary manslaughter. This Court reversed, concluding that the evidence, when taken in the light most favorable to the defendant, had the tendency to show that the defendant did not intend to kill or seriously injure the victim. *Id.* at 504, 711 S.E.2d at 441. In order to reach its conclusion, the Court reviewed numerous decisions of both this Court and our Supreme Court noting, in pertinent part, that:

> despite the fact that [the] [d]efendant acted intentionally at the time that he struck [the victim] with the bottle, the evidence contained in the present record is susceptible to the interpretation that, at the time that he struck [the victim], [the] [d]efendant did not know and had no reason to believe

> that the bottle would break or that the breaking of the bottle would inflict a fatal wound to [the victim's] neck.

Id.

Like *Debiase*, I believe that the evidence in the present case was sufficient to support a reasonable conclusion that Mr. McGill's death resulted from defendant's reckless use of the knife. It is uncontroverted that defendant and Mr. McGill had been engaged in a physical altercation which resulted after both had been consuming alcohol and drugs for several hours. Defendant's own testimony suggests that he reacted instinctively when he believed Mr. McGill was coming to hurt either himself or Ms. Vittatoe. In his testimony, defendant claimed that he struck at Mr. McGill without any conscious effort to hit him in any particular way. Moreover, the way in which he wounded Mr. McGill supports his contention that he was acting unintentionally. During the struggle, defendant swung the knife only once through a closed screen door. As a result, I believe the evidence in the present case was "susceptible," *Debias*e, 211 N.C. App. at 504, 711 S.E.2d at 441, to an interpretation that defendant did not intend to inflict a fatal wound when he swung once at Mr. McGill with the knife.

Moreover, I disagree with the majority's conclusion that *Debiase* is distinguishable because: (1) the altercation between Mr. McGill and defendant was over by the time defendant stabbed Mr. McGill; and (2) defendant had not been holding the knife when the fight began but, instead, grabbed it from the table once they were struggling at the door. While the fight between defendant and Mr. McGill had momentarily ceased at the time defendant entered his kitchen and began cleaning his wounds, Mr. McGill resumed his attack by trying to come in defendant's home. In addition, while the majority is correct that the *Debiase* defendant had the bottle in his hand prior to the altercation intensifying, *id.* at 499-502, 711 S.E.2d at 438-440, our Supreme Court has concluded that a defendant who grabs a weapon during the fight may still be entitled to the involuntary manslaughter instruction. *See Buck*, 310 N.C. at 603-604, 313 S.E.2d at 551-52 (holding that a defendant was entitled to an involuntary manslaughter jury instruction when the defendant's testimony was that he "instinctively" grabbed a butcher knife off a table to scare the victim). Thus, as in *Debiase*, defendant produced sufficient evidence for a reasonable jury to find him guilty of involuntary manslaughter, and the trial court erred in not giving the instruction on it.

In so concluding, I am mindful of other cases in which our Courts have held that a defendant was not entitled to an instruction on

involuntary manslaughter when there was no evidence that the killing was unintentional other than the defendant's own claim that he had not meant to kill and his actions were such that "[f]atal consequences were not improbable." *Fisher*, 318 N.C. at 526, 350 S.E.2d at 342. In *Fisher*, the defendant used a hunting knife during a fight and testified that he used it to "indiscriminately cut[] and jab[]" the victim. *Id.* While the defendant contended he was entitled to an instruction on involuntary manslaughter because the victim's death was accidental, this Court disagreed, noting that

> In this case, the defendant admits that he knowingly slashed and stabbed the deceased with a hunting knife. The defendant's use of a knife indicates a clear intent to inflict great bodily harm or death on the deceased. There can be no claim of accidental injury where one knowingly and willingly uses a knife to slash and stab his victim. Fatal consequences were not improbable in light of the defendant's use of his hunting knife in such a manner. As such, the defendant's actions would not fit within the definition of involuntary manslaughter and therefore the defendant would not qualify for such an instruction.

Id. at 525-26, 350 S.E.2d at 342.

Here, however, the manner in which defendant killed Mr. McGill, a single stabbing motion through a closed screen door during a struggle where both parties were intoxicated and defendant claimed to be "dizzy" and in severe pain, supports the theory that Mr. McGill's death was unintentional. In other words, unlike *Fisher* where the defendant's own actions conflicted with his claim that he did not intend to kill the victim, the manner in which defendant used the knife in the present case does not. Fatal consequences were not necessarily probable based on the manner in which defendant used the knife. Thus, I believe the facts at issue here are distinguishable from those cases because the record contains evidence other than defendant's "mere claim of lack of intent," *Debiase*, 211 N.C. App. at 509, 211 S.E.2d at 444, that supports defendant's contention that he did not intend to kill or injure Mr. McGill in any particular way. Consequently, I believe defendant's actions fit within the definition of involuntary manslaughter when the evidence is taken in the light most favorable to defendant.

Conclusion

In summary, while acknowledging that there was contradictory evidence presented at trial, I must respectfully dissent from the majority

as I believe that the trial court erred in not submitting an instruction to the jury on involuntary manslaughter when taking the evidence in the light most favorable to defendant. Thus, I would hold that defendant is entitled to a new trial.

STATE OF NORTH CAROLINA
v.
WALTER ERIC McKINNEY

No. COA13-384

Filed 7 January 2014

Search and Seizure—search warrant—person visiting house later arrested with contraband—probable cause to search house

The trial court erred in a prosecution involving cocaine and marijuana possession by denying defendant's motion to suppress evidence obtained during a search of an apartment occupied by defendant from which a separate defendant who was later arrested was seen entering and exiting within a short period of time. The evidence included in the search warrant application clearly established probable cause that the separate defendant had been involved in a recent drug transaction, but the mere discovery of contraband on an individual does not provide *carte blanche* probable cause to search any location that may be remotely connected to that individual for additional contraband.

Appeal by defendant from judgment entered 8 October 2012 by Judge Patrice A. Hinnant and order entered 11 October 2012 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 25 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for defendant-appellant.

CALABRIA, Judge.

Walter Eric McKinney ("defendant") appeals pursuant to N.C. Gen. Stat. § 15A-979(b) (2011) from an order denying his motion to suppress. We reverse.

On 22 April 2012, Officer Christopher Bradshaw ("Officer Bradshaw") of the Greensboro Police Department ("GPD") received a citizen complaint claiming that there was heavy traffic in and out of an apartment located at 302 Edwards Road in Greensboro ("the apartment"). The tip indicated that people who came to the apartment only stayed a short time. The complainant believed the traffic was related to narcotics, in part because the complainant had witnessed individuals exchanging narcotics in the parking lot with the person who lived in the apartment.

After receiving the tip, Officer Bradshaw went to the apartment and conducted surveillance in an unmarked automobile. Shortly thereafter, he observed an individual arrive in an automobile, enter the apartment, and then leave after approximately six minutes. Officer Bradshaw followed the automobile after it departed. Officer Strader of the GPD, who was driving a marked police vehicle, conducted a traffic stop on the automobile on the basis of minor traffic violations.

The individual driving the vehicle was identified as Roy Foushee ("Foushee"), who had a history of narcotics-related arrests. Subsequently, the officers searched Foushee and the automobile and found $4,258 in cash and a gallon-sized plastic bag containing seven grams of marijuana. Foushee was arrested for possession of marijuana. Subsequent to the arrest, Officer Bradshaw also searched Foushee's cell phone and discovered a series of recent text messages between Foushee and an individual named "Chad." Officer Bradshaw believed that these texts were related to a drug transaction.

Based upon the drugs and cash discovered from Foushee and the information gathered during his investigation, Officer Bradshaw obtained a search warrant to search the apartment. The subsequent search revealed that the apartment contained drugs, drug paraphernalia, and firearms. Officer Bradshaw arrested defendant, who was the occupant of the apartment.

Defendant was indicted for trafficking in cocaine, maintaining a dwelling for keeping and selling controlled substances, possession of both cocaine and marijuana with intent to sell and distribute, felony possession of marijuana, and possession of a firearm by a felon. On 7 September 2012, defendant filed a pretrial motion to suppress the evidence obtained from the search of the apartment, contending that the

warrant obtained by Officer Bradshaw for that search was not supported by probable cause. After a hearing, the trial court denied the motion.

Defendant then entered into a plea agreement whereby the State dismissed the charges of trafficking cocaine and felony possession of marijuana in exchange for defendant's guilty plea to the remaining charges. As part of the plea agreement, defendant specifically reserved his right to appeal the trial court's denial of his motion to suppress. The trial court consolidated all of defendant's charges for judgment and sentenced him to a minimum of 11 months to a maximum of 23 months in the North Carolina Division of Adult Correction. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress the evidence obtained during the search of the apartment. Specifically, defendant contends that the warrant obtained by Officer Bradshaw to search the apartment was not supported by probable cause. We agree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Pursuant to N.C. Gen. Stat. § 15A-244, an application for a search warrant must contain "[a]llegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244(3) (2011). "Probable cause need not be shown by proof beyond a reasonable doubt, but rather [by] whether it is more probable than not that drugs or other contraband will be found at a specifically described location." *State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007). "In determining . . . whether probable cause exists for the issuance of a search warrant, our Supreme Court has provided that the 'totality of the circumstances' test . . . is to be applied." *State v. Witherspoon*, 110 N.C. App. 413, 417, 429 S.E.2d 783, 785 (1993) (citations omitted).

> The standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue

> the warrant. [T]he duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.

State v. Torres-Gonzalez, ___ N.C. App. ___, ___, 741 S.E.2d 502, 507 (2013) (internal quotations and citations omitted).

In the instant case, Officer Bradshaw's application for a search warrant for defendant's apartment, which was incorporated by reference into the trial court's order denying defendant's motion to suppress, was essentially based upon the following evidence: (1) an anonymous citizen's complaint that the complainant had previously observed suspected drug-related activity occurring at and around the apartment; (2) a brief investigation of that complaint in which Officer Bradshaw witnessed Foushee come to the apartment and then leave after six minutes; (3) the arrest of Foushee, who had a history of narcotics arrests, shortly after he had left defendant's apartment, due to the discovery of a mostly-empty bag of marijuana and a large amount of cash; and (4) text messages between Foushee and an individual named Chad proposing a drug transaction. Defendant contends that the trial court erred by concluding that this evidence established the existence of probable cause.

The evidence included in Officer Bradshaw's search warrant application clearly establishes probable cause that Foushee had been involved in a recent drug transaction. However, the determinative question in this case is whether the application provided a substantial basis to allow the magistrate to conclude that there was probable cause of illegal drugs *at defendant's apartment*. *See Edwards*, 185 N.C. App. at 704, 649 S.E.2d at 649 (Probable cause requires a showing that "it is more probable than not that drugs or other contraband will be found *at a specifically described location*." (emphasis added)).

Our Courts have previously analyzed search warrant applications based upon information similar to Officer Bradshaw's application in the instant case in order to determine if probable cause to search a specific location had been established. In *State v. Campbell*, law enforcement obtained a warrant to search the defendant's residence based upon an affidavit stating that that affiant had probable cause to believe the residence contained drugs. 282 N.C. 125, 130, 191 S.E.2d 752, 756 (1972). To support this statement, the affidavit specifically noted that the affiant possessed narcotics-related arrest warrants for three individuals who were known to sell drugs and that all three of those individuals lived in the location to be searched. *Id.* Our Supreme Court held that the search warrant did not establish probable cause to search the subject premises:

> The affidavit implicates those premises *solely as a conclusion of the affiant.* Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit--that narcotic drugs are illegally possessed on the described premises--does not reasonably arise from the facts alleged.

Id. at 131, 191 S.E.2d at 757.

In *State v. Crisp*, law enforcement also obtained a search warrant to search the defendants' residence based upon an affidavit stating that the affiant had probable cause to believe the defendants had drugs on the property. 19 N.C. App. 456, 457, 199 S.E.2d 155, 155 (1973). To support this statement, the affiant stated that: (1) he had conducted a traffic stop of an individual who lived at the residence and discovered marijuana, both on his person and in his vehicle; and (2) he had conducted surveillance on the residence for a period of three to four months, during which time he observed heavy traffic entering and leaving at all times of the day and night. *Id.* at 457-58, 199 S.E.2d at 156. Relying upon the previously-quoted language in C*ampbell*, this Court held that the warrant did not establish probable cause to search the defendants' residence. *Id.* at 458, 199 S.E.2d at 156.

Finally, in *State v. Hunt*, law enforcement obtained a warrant to search the defendant's residence based upon the following facts: (1) law enforcement had received "constant complaints" from citizens regarding narcotics sales at the residence; (2) the complaints specifically noted that there was consistent traffic at the residence whereby incoming vehicles would conduct a short drug transaction, either inside or in front of the residence, and then leave; and (3) the affiant conducted surveillance for one day based upon the complaints and observed numerous vehicles come to the residence, stay about five to eight minutes, and then leave. 150 N.C. App. 101, 102-03, 562 S.E.2d 597, 599 (2002). This Court once again held that the application for the warrant failed to establish probable cause to search the defendant's residence:

> All that the affidavit offers are complaints from citizens suspicious of drug activity in a nearby house. There is no mention of anyone ever seeing drugs on the premises. The

> citizens only reported heavy vehicular traffic to the house. The officer verified the traffic. His verification, as the trial court found, was not a conclusion. What was a conclusion was the determination of the officer, based on his experience and the vehicular traffic, that drug trafficking was taking place. "The inference the State seeks to draw from the contents of this affidavit does not reasonably arise from the facts alleged." *Crisp*, 19 N.C. App. at 458, 199 S.E.2d at 156.

Id. at 107, 562 S.E.2d at 601.

Officer Bradshaw's application in the instant case cannot be materially distinguished from the defective search warrant applications in *Campbell*, *Crisp*, and *Hunt*. His affidavit stated, in relevant part:

> Around 4-22-2012 I received a citizen complaint for 302 Edwards Rd Apt C, Greensboro NC. The citizen advised that there was heavy traffic in and out of this apartment. They advised the traffic made short stays and believed it was narcotic related. They stated that they had actually seen narcotics changing hands in the parking lot with the resident of that apartment.
>
> On 4-22-2012 I established surveillance on the apartment. At 1241 hours I observed a red Pontiac, NC tag ALW-2397 arrive at the apartment. The driver exited the vehicle and entered the apartment. At 1247 hours the driver returned to the vehicle and left the area. A traffic stop was conducted on the vehicle for a violation of a chapter 20 law. During the investigation the driver was arrested for marijuana. He was also in possession of $4258 US currency. The driver, Roy Foushee, had a history of narcotics arrests. The marijuana was found in a large bag and was almost empty.
>
> I searched the driver's cell phone incident to arrest. Looking through his text messages I read several open messages. Most of the messages were related to the sale of narcotics. The last messages that were sent before the traffic stop were from Chad, 910-571-8959..
>
> > Chad- Bra when you come out to get the money can you bring a fat 25. I got the bread-
> >
> > 1212pm

> -can you bring me one more bra
>
> ME- about 45
>
> Chad- ight
>
> Through my training and experience I believe that Mr. Foushee delivered marijuana to the residents at 302 Edwards Rd Apt C.
>
> Based upon the facts described above and my training and experience, I believe that there is probable cause that items to be seized, particularly controlled substances in violation of GS 90-95, and other items listed herein, are in the premises to be searched, as described herein.

This information is insufficient to establish probable cause to search defendant's apartment. Just as in the previous cases, Officer Bradshaw's affidavit "implicates [defendant's] premises *solely as a conclusion of the affiant*." *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757. Neither Officer Bradshaw nor the anonymous citizen ever witnessed any narcotics in or about the apartment. While Officer Bradshaw specifically saw Foushee enter and exit the apartment prior to his arrest, there is nothing in his affidavit which suggests that he saw Foushee carry marijuana or anything else inside or that he brought anything back out upon his exit, despite Officer Bradshaw's conclusion that Foushee was making a delivery at that time. Moreover, while the text messages recovered from Foushee's phone suggest that he recently engaged in a narcotics transaction with an individual named Chad, Chad is never identified or connected with defendant's apartment in any way. Ultimately, "[t]he inference the State seeks to draw from the contents of this affidavit–that narcotic drugs are illegally possessed on the described premises–does not reasonably arise from the facts alleged." *Id.* Thus, the search warrant used to search defendant's apartment was defective because it was not supported by probable cause.

Nonetheless, the State contends that Officer Bradshaw's affidavit was sufficient to provide probable cause under this Court's decision in *State v. McCoy*, 100 N.C. App. 574, 397 S.E.2d 355 (1990). In *McCoy*, law enforcement officers conducted two controlled drug buys between an informant and the defendant in two different hotel rooms, but the defendant vacated the premises before search warrants could be obtained and executed. 100 N.C. App. at 576-77, 397 S.E.2d at 357. Noting that "North Carolina case law supports the premise that firsthand information of contraband seen in one location will sustain a finding to search

a second location," this Court held that there was probable cause to search a third hotel room which was registered to the defendant:

> The facts here show that a suspect, previously convicted of selling drugs, had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and that at two of those locations he had sold cocaine. Based on these facts, it was reasonable to infer that when the suspect occupied the third room, he still possessed the cocaine.

Id. at 578, 397 S.E.2d at 357-58. While the State correctly cites the *McCoy* Court's holding that contraband in one location can create probable cause to search a second location, it misrepresents the breadth of this holding. As both *Campbell* and *Crisp* demonstrate, the mere discovery of contraband on an individual does not provide *carte blanche* probable cause to search any location that may be remotely connected to that individual for additional contraband. *See Campbell*, 282 N.C. at 130-31, 191 S.E.2d at 756-57 (discovery of contraband during traffic stop of the defendant insufficient to provide probable cause to search the defendant's residence) and *Crisp*, 19 N.C. App. at 457-58, 199 S.E.2d at 156 (same). Instead, the State must still establish a reasonable nexus between the discovered contraband and the new location sought to be searched. While in *McCoy*, the State was able to adequately connect the defendant's very recent possession of cocaine in two nearby hotel rooms to the potential contraband in a third room at the same hotel, the mostly empty marijuana bag found on Foushee in the instant case has a much more tenuous connection to defendant's apartment which is insufficient to establish probable cause to search that location. Thus, we find the *McCoy* Court's holding inapplicable to this case.

Pursuant to *Campbell*, *Crisp*, and *Hunt*, we hold that the search warrant for defendant's apartment was not supported by probable cause. Accordingly, the trial court erroneously denied defendant's motion to suppress the evidence uncovered as a result of that search. The trial court's denial of that motion is reversed.

Reversed.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JAMAL ANTONIO McRAE

No. COA13-422

Filed 7 January 2014

Kidnapping—underlying felony—larceny—insufficient evidence

The trial court erred by denying defendant's motion to dismiss the charge of first-degree kidnapping. State alleged the specific felony of larceny as the basis for the first-degree kidnapping, but the State failed to prove each element of the larceny, specifically, the value of the goods stolen.

Appeal by defendant from judgment entered 3 September 2012 by Judge Thomas H. Lock in Robeson County Superior Court. Heard in the Court of Appeals 21 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

Law Office of Glenn Gerding, by Glenn Gerding for defendant-appellant.

STEELMAN, Judge.

Where the State alleged a particular felony as the basis for first-degree kidnapping, and then failed to prove the elements of that felony, the State failed to present evidence of each element of first-degree kidnapping. The trial court erred in denying defendant's motion to dismiss the kidnapping charge.

I. Factual and Procedural Background

On 26 March 2009, J.M., a 17 year-old high school student, was in her vehicle at a Burger King restaurant. Two men approached her vehicle. One of them, a black man who J.M. identified as Jamal McRae (defendant), was holding a small black handgun. At defendant's urging, J.M. moved into the passenger seat, and defendant climbed into the driver's seat. Another man got into the back seat of the vehicle. Held at gunpoint, J.M. gave defendant directions to go to Fayetteville. Later, at gunpoint, defendant forced J.M. to sexually gratify him. Defendant later forced J.M.

into the trunk of the vehicle, and drove around for 30-45 minutes. J.M. found the trunk release and when she heard the speaker for a drive-through, she got out of the trunk and ran into the Burger King.

Defendant was charged with one count of first-degree rape, two counts of first-degree sexual offense, one count of first-degree kidnapping, one count of robbery with a dangerous weapon, one count of conspiracy to commit robbery with a dangerous weapon, one count of conspiracy to commit kidnapping, and one count of assault with a deadly weapon with intent to kill. At the close of State's evidence, and then the close of all of the evidence, defendant made a motion to dismiss the charges against him. The trial court denied these motions. Defendant was found guilty of all counts. The jury also found four aggravating factors. The trial court arrested judgment on the conviction for conspiracy to commit second-degree kidnapping, and sentenced defendant to the following aggravated active sentences: (1) 420-513 months imprisonment for first-degree rape; (2) 420-513 months for two consolidated first-degree sexual offenses; (3) 144-182 months for first-degree kidnapping; (4) 120-153 months for robbery with a firearm; and (5) 36-53 months for the consolidated charges of assault with a deadly weapon with intent to kill and conspiracy to commit robbery with a firearm. All of these sentences were to run consecutively. The trial court further ordered defendant to register as a sex offender, and to be subject to satellite-based monitoring for the rest of his life.

Defendant appeals.

II. Motion to Dismiss

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss the charge of first-degree kidnapping. We agree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

B. Analysis

The indictment charging defendant with first-degree kidnapping alleged that defendant confined, restrained, and removed J.M. from one place to another "for the purpose of facilitating the commission of a felony, larceny of a motor vehicle." Defendant contends that the State failed to present evidence of each element of this underlying felony, and therefore failed to satisfy each of the elements of the offense of first-degree kidnapping.

The State is not required to set forth in an indictment for kidnapping the specific felony that the kidnapping facilitated. *State v. Yarborough*, 198 N.C. App. 22, 26, 679 S.E.2d 397, 403 (2009), *cert. denied*, 363 N.C. 812, 693 S.E.2d 143 (2010). However, "[w]hen an indictment alleges an intent to commit a particular felony, the state must prove the particular felonious intent alleged." *Id.* at 27, 679 S.E.2d at 403 (quoting *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 270 (1982)).

For a larceny to be a felony, the value of the goods stolen must exceed $1,000; otherwise, the larceny is a misdemeanor. N.C. Gen. Stat. § 14-72(a) (2011). Therefore, the value of the goods stolen is an integral element of the crime of felony larceny. *See State v. Owens*, 160 N.C. App. 494, 500, 586 S.E.2d 519, 523-24 (2003).

In the instant case, defendant was charged with the robbery of J.M.'s motor vehicle under the robbery with a dangerous weapon charge. In that indictment, the State alleged that the vehicle had a value of approximately $2,500. However, at trial, the State presented no evidence of the value of the vehicle. Thus, at the close of the its evidence, the State had failed to present evidence of intent to commit felony larceny. The charge of first-degree kidnapping explicitly stated that the kidnapping was for the purpose of felicitating felony larceny, not robbery with a firearm which would not have required proof of the value of the vehicle. The State failed to present evidence of all of the elements of felony larceny, which was necessary to support a conviction of first-degree kidnapping. We therefore hold that the trial court erred in denying defendant's motion to dismiss the charge of first-degree kidnapping.

We reverse defendant's conviction for first-degree kidnapping, and remand these cases to the trial court for resentencing. Since defendant does not contest his other convictions on appeal, we hold that there was no error as to these convictions. N.C. R. App. P. 28(b)(6).

NO ERROR IN PART, REVERSED AND REMANDED IN PART.

Chief Judge MARTIN and Judge DILLON concur.

STATE v. MINYARD

[231 N.C. App. 605 (2014)]

STATE OF NORTH CAROLINA
v.
JAMES ALLEN MINYARD

No. COA13-377

Filed 7 January 2014

1. Sexual Offenses—attempted first-degree sexual offense—motion to dismiss—sufficiency of evidence—overt acts

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree sexual offense. Taken in the totality of the circumstances, the victim's statements provided circumstantial and substantive evidence such that a jury could believe that defendant intended to commit a first-degree sexual offense against the minor child and that overt acts were taken toward that end.

2. Indecent Liberties—motion to dismiss—sufficiency of evidence—multiple sexual acts—purpose of sexual gratification

The trial court did not err by denying defendant's motion to dismiss five counts of taking indecent liberties with a minor. There was no requirement for discrete separate occasions when the alleged acts were more explicit than mere touchings. Circumstantial evidence given by the victim's family and attending physicians provided the scintilla of evidence necessary for the trial court to find that multiple sexual acts were committed. Further, the victim's statements of defendant's alleged actions provided ample evidence to infer defendant's purpose of obtaining sexual gratification.

3. Constitutional Law—failure to conduct sua sponte inquiry into capacity to proceed—voluntarily ingesting intoxicants—waiver of right to be present

The trial court did not err in a multiple sexual offenses case by failing to conduct a *sua sponte* inquiry into defendant's capacity to proceed after he ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol. Because defendant voluntarily ingested these substances in a non-capital trial, he voluntarily waived his constitutional right to be present.

4. Discovery—in camera review—failure to disclose victim's medical records—no exculpatory materials

The Court of Appeals conducted an *in camera* review in a multiple sexual offenses case and concluded that the trial court did

not violate defendant's constitutional rights by refusing to disclose the victim's relevant medical records to defendant. No exculpatory materials existed within the relevant medical records.

Appeal by defendant from judgment entered 16 August 2013 by Judge Jerry Cash Martin in Burke County Superior Court. Heard in the Court of Appeals 10 October 2013.

Attorney General Roy Cooper, by Assistant Attorney Sherri Horner Lawrence, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

James Allen Minyard ("Defendant") appeals from a 16 August 2013 judgment entered after a jury convicted him of (i) attempted first degree sexual offense; (ii) five counts of taking indecent liberties with a minor; and (iii) attaining habitual felon status. Defendant argues the trial court erred by (i) denying Defendant's motion to dismiss the charge of attempted first degree sexual offense; (ii) denying Defendant's motion to dismiss the five counts of taking indecent liberties with a minor; and (iii) by not conducting a *sua sponte* inquiry into Defendant's capacity to proceed. Defendant also asks this Court to review documents inspected *in camera* by the trial court to determine whether Defendant received all exculpatory materials contained therein. After careful review, we hold the trial court did not err.

I. Facts & Procedural History

A Burke County grand jury indicted Defendant on 14 September 2009 for first degree sexual offense and six counts of taking indecent liberties with a minor, D.B. ("Theodore").[1] Defendant was also indicted as a habitual felon on 13 June 2011. The cases proceeded to a jury trial on 13 August 2012 in Burke County Superior Court. At the close of the State's evidence, the trial court dismissed one count of taking indecent liberties with a minor and the charge of first degree sexual offense and allowed the charge of attempted first degree sexual offense and the five

1. Pseudonyms are used to conceal the identities of the juveniles involved in this case.

counts of taking indecent liberties with a minor to proceed to trial. The jury found Defendant guilty of attempted first degree sexual offense, five counts of taking indecent liberties with a minor, and of attaining habitual felon status. The trial court issued concurrent sentences of 225–279 months imprisonment for attempted sexual offense and 121–155 months for the five counts of taking indecent liberties with a minor. The five sentences were consolidated into a single Class C judgment. Defendant entered written notice of appeal on 21 August 2012. The testimony presented at trial tended to show the following facts.

In February 2008, Defendant began dating Theodore's mother ("Pamela") after meeting on an Internet dating website. Pamela testified that her relationship with Defendant began well: the two spent time together, took trips together, and "had a good time." Pamela has three children: a son who was seven years old at the time of trial ("Phillip"), a daughter who was eleven years old at the time of trial ("Paulina"), and Theodore, who was thirteen years old at the time of trial. Pamela testified that Theodore has an IQ of 64, which "meant that he was mildly mentally retarded." Pamela testified that Defendant also had children at the time she met Defendant, including a six-year-old son ("Daniel") and an infant daughter ("Diana") he saw every other weekend.

Defendant and Pamela's relationship was not physically intimate. Pamela testified that "[a]fter several months I would question him a lot about why he never hugged me, why he never kissed me. We never had any intimacy at all." When asked about the lack of intimacy, Pamela stated that Defendant told her "that he had been hurt in the past and that he had already ruined lives by having children and he didn't want to ruin any more."

During their relationship, Pamela testified that Defendant "seemed to love my boys. He would always ask for the boys to come over and spend the night with [Daniel] and two other little boys that he kept a lot." Pamela testified that Theodore and Phillip spent the evening at Defendant's house "often," and at least one night a month while Pamela attended her scrapbooking club. Pamela spent evenings at Defendant's home "on the weekends he would get his daughter . . . because he said he didn't want to be alone with [Diana] because he never wanted something said . . . about him being alone with his daughter." Pamela testified that during her visits with Defendant, she would "sleep on the couch and [one of the little boys he kept] would sleep in his room with him, or if I slept in his bed then he would put pillows between us from my head to my feet." Defendant and Pamela's relationship lasted eighteen months and ended in July 2009, with Pamela telling Defendant "to make up his

mind about me. If he couldn't be intimate and go further in the relationship, then I – that isn't what I wanted."

In March 2008, Pamela was hospitalized for gastric bypass surgery and gave Defendant power of attorney over her children. Pamela's mother ("Grandmother") stayed with Pamela during her surgery, eventually leaving to see her grandchildren at Defendant's home. Grandmother said Defendant "wouldn't let [her] have [Pamela's] children . . . and he said he was going to call the Law on me." When a member of the sheriff's department arrived at Defendant's house, Grandmother testified that she spoke with the sheriff and left after finding out about the power of attorney. Grandmother testified that she liked Defendant at the start of the relationship with Pamela: "I thought that, you know, because they'd get out and go to those races and, you know, to Pizza Hut and have birthday parties with the kids. And I thought he was all right then."

Pamela testified that Theodore asked to stop going to Defendant's house in December 2008. Pamela said Theodore did not tell her why he wished to stop visiting Defendant at that time. In March 2009, Pamela said Theodore told her Defendant touched him. Pamela asked Defendant about touching Theodore, and Pamela testified that Defendant said he only touched Theodore when he helped bathe him. Theodore was present and Pamela testified that Theodore didn't disagree with Defendant's statement. Pamela also said Theodore was nine at the time and did not need her help bathing at that age. Pamela testified that around that time Theodore "started having nightmares and would wake up saying he was scared" and "would go to the bathroom and say that he was bleeding and that he was hurting." Pamela also testified she saw Theodore's bloody stools "two or three times."

In August 2009, Grandmother was watching Theodore during his summer vacation from school. Theodore began experiencing pain going to the bathroom:

> A. He was at my home. He was staying the week with me, so -- before he went back to school. And he had went to the bathroom and he come in there and said that he was hurting. And I asked him what was wrong. And he said that [Defendant] had hurt him in his behind and --
>
> Q. Did he -- did he say anything more particular than that or was that exactly what he said?
>
> A. He just said he entered -- I can't remember the exact words -- but he entered his bottom, his behind.

Q. All right. Did he say anything about touching his private part?

A. Yeah.

Q. What did he say about that?

A. He said he played with his, his front ends (phonetic).

Q. Okay. And when he told you that what was his demeanor like?

A. He was just crying, upset.

Grandmother called Pamela and asked if Theodore recounted these events to her, and Pamela said he had not. Grandmother called the Burke County Department of Social Services ("DSS"). Grandmother also said she was unaware that Defendant and Pamela were no longer dating at that time. Pamela asked Theodore about Grandmother's statements after Grandmother's phone call:

Q. Okay. Did you ever talk to [Theodore] after that?

A. I did.

Q. About [Defendant] touching him?

A. I did.

Q. What did he tell you?

A. He said that [Defendant] would spit in his hand and pull on his weenie, and that he would make him lay on his side and he would stick his weenie up his butt.

Q. Okay. And what did you do once you heard that?

A. I sent [Defendant] a really bad e-mail.

Q. Okay. And did [Theodore] tell you about how many times that happened?

A. He said five or six times.

Pamela contacted Defendant on 12 August 2009 and asked him to leave her alone. Pamela also stated that Defendant said "he did not want me to take [Phillip] out of his life and that I didn't deserve to have him." Pamela said Defendant began requesting reimbursement for repairs Defendant made to the heat pump on her home and that Defendant filed a lawsuit against Pamela seeking $1,279 in reimbursement for his work on the heat pump.

Pamela spoke with DSS on 18 August 2009, and thereafter took Theodore to the Burke County Child Advocacy Center, known as the Gingerbread House ("Gingerbread House"). Shelley Winters ("Ms. Winters"), a forensic interviewer at the Gingerbread House, interviewed Theodore on 19 August 2009. Ms. Winter's interview with Theodore was entered into evidence and played for the jury. Elizabeth Browning ("Ms. Browning"), a sexual assault nurse examiner, examined Theodore on 21 August 2009. Ms. Browning performed a medical exam where she asked Theodore if he had "any concerns about his body." Ms. Browning said:

> He told me that [Defendant] had put his private in his butt and had touched his wee-wee. He told me that he had spit on his finger and touched his . . . his weenie[.] . . . And he said that when he put it in his butt that it hurt. He said that it was big and hairy. He told me not to tell my mama but I did.

Ms. Browning also observed that Theodore had a healed anal fissure. Ms. Browning noted that this was not abnormal and that a number of causes, such as large bowel movements, could create an anal fissure. Ms. Browning also said Theodore stated that the Defendant would be "mean and whooped me . . . in the bedroom in his -- at his house."

Agent Angeline Mary Bumgarner ("Agent Bumgarner") of the Burke County Sheriff's Office worked as a child sex crimes detective and was assigned Theodore's case. Agent Bumgarner reviewed DSS reports concerning Theodore, reviewed video of Theodore's interview with Ms. Winters, reviewed Ms. Browning's medical report, spoke with Pamela, and charged Defendant with six counts of taking indecent liberties with a minor. Defendant was arrested on 21 August 2009. After arrest, Defendant made a statement that Agent Bumgarner read into evidence:

> "I, [Defendant], want to make the following statement: I started dating [Pamela] on February 8, 2008. I was comfortable with her and her kids and they were comfortable with me. Around the first part of March, 2009, [Pamela] contacted me and said [Theodore] told her that I had touched [Theodore], he wouldn't tell how he was touched. I told [Pamela] that I didn't want to be around her or her kids because I was paranoid because I didn't want to lose my own kids. [Pamela] begged me to come back, she would come over but I wouldn't let [Theodore] stay the night unless she was there. Whenever [Pamela's] kids stayed the night, each one had their own areas to sleep; there was a

> bunk bed, [Diana's] bedroom or the couch. Every now and then [Phillip], would sneek (sic) in my room and sleep and I would tell [Pamela] everytime (sic) that happened. I just had [Pamela] served for work that I did for her and money I used from my company to do the work."

Theodore testified at trial, saying that Defendant touched "[m]y butt and my wiener." When asked what part of Defendant's body touched him, Theodore said "[h]is wiener. His wiener." Theodore stated that Defendant's "wiener" touched his "butt" four or five times in Defendant's bedroom. Theodore testified that Defendant used to spank him with a leather belt and told Theodore not tell anyone about the spanking. When the State's counsel asked "how did his weenie touch your bottom?," Theodore answered that he did not remember how it happened. Theodore said Defendant's "weenie" touching his bottom made him sad. Theodore stated that he told Grandmother about Defendant touching him while he was in the bathtub. Theodore also testified that he spoke to Pamela, Grandmother, and to someone at the Gingerbread House about Defendant touching him.

Defendant moved to dismiss all charges at the close of the State's evidence. The trial court allowed the motion to dismiss the charges of first degree sexual offense and one charge of indecent liberties with a child, but allowed the charges of attempted first degree sexual offense and the remaining five charges of indecent liberties with a minor to proceed.

Defendant recounted positive experiences at the start of his relationship with Pamela, such as taking Pamela's children on road trips to Tweetsie Railroad, Grandfather Mountain, and the Blue Ridge Parkway. Defendant testified that he had diabetes, a prior gastric bypass surgery, and erectile dysfunction that affected his relationship with Pamela "horribly." Defendant testified that he took several types of medication to treat his erectile dysfunction and that "none of it worked." Defendant doubled his dosage "in hopes that, you know, I could give her the one thing that she wanted most in me." Defendant said his erectile dysfunction contributed to his breakup with Pamela. Regarding Theodore's pain using the restroom, Defendant testified that Theodore experienced pain using the restroom, suffered from constipation, and experienced large resulting bowel movements. Defendant testified that he had to remove and repair toilets occasionally after Theodore used the restroom, and that he did not believe Theodore received medication to treat the issue. Defendant also said that Grandmother did not like him from "day one."

Defendant testified about a two-week vacation to Dollywood in Pigeon Forge, Tennessee beginning 1 July 2009. Defendant, Pamela, Theodore, Phillip, Paulina, Daniel, Defendant's brother, and Defendant's brother's girlfriend and her children went on the trip. During the trip, Defendant planned to "stop by the chapel there in Pigeon Forge" and marry Pamela. However, Defendant testified that "the closer the time got to us being in that position, something just scared the socks off me and just said, you know, 'Don't do it.' " Defendant and Pamela's relationship ended shortly after in July 2009. Defendant renewed his motion to dismiss at the close of his case.

After the jury began deliberations, Defendant's counsel notified the court that Defendant was "having a little problem." Defendant was asked to "stay vertical" and the trial court told him:

> [Defendant], you've been able to join us all the way through this. And let me suggest to you that you continue to do that. If you go out on us, I very likely will revoke your conditions of release. I'll order you arrested. We'll call emergency medical services; we'll let them examine you. If you're healthy, you'll be here laid out on a stretcher if need be. If you're not healthy, we will continue on without you, whether you're here or not. So do your very best to stay vertical, stay conscious, stay with us.

Before the jury returned, the trial court received a report that Defendant had "overdosed." One of Defendant's witnesses, Evelyn Gantt, told the court that Defendant consumed eight Xanax pills because "[h]e was just worried about the outcome and I don't know why he took the pills." Defendant's counsel and the State did not wish to be heard on the issue and Defendant's pretrial release was revoked. The sheriff was directed to have Defendant examined by emergency medical services ("EMS"), and Defendant was then escorted from the courtroom. The court then made findings of fact:

> The Court finds Defendant left the courtroom without his lawyer.
>
> The Court finds that while the jury was in deliberation -- the jury had a question concerning an issue in the case -- and prior to the jurors being returned to the courtroom for a determination of the question, the Court directed the Defendant to -- who was in the courtroom at that point -- to return to the Defendant's table with his counsel.

Defendant refused, but remained in the courtroom. The Court permitted that.

The Court noticed that after the question was resolved with the juror, that while the jury was out in deliberations working on Defendant's case, the Defendant took an overdose of Xanax. While he was here in the courtroom and while the jury was still out in deliberations, Defendant became lethargic and slumped over in the courtroom.

. . . .

The Court finds that outside of the jury's presence the Court noted that Defendant was stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs.

. . . .

The Court finds that Defendant's conduct on the occasion disrupted the proceedings of the Court and took substantial amount of time to resolve how the Court should proceed. The Court finally ordered that Defendant's conditions of pretrial release be revoked and ordered the Defendant into the custody of the sheriff, requesting the sheriff to get a medical evaluation of the Defendant.

The Court finds that Defendant, by his own conduct, voluntarily disrupted the proceedings in this matter by stopping the proceedings for a period of time so the Court might resolve the issue of his overdose.

The Court notes that the -- with the consent of the State and Defendant's counsel that the jurors continued in deliberation and continued to review matters that were requested by them by way of question.

The Court infers from Defendant's conduct on the occasion that it was an attempt by him to garner sympathy from the jurors. However, the Court notes that all of Defendant's conduct that was observable was outside of the jury's presence.

The Court notes that both State and Defendant prefer that the Court not instruct jurors about Defendant's absence. And the Court made no reference to Defendant

> being absent when jurors came in with response to -- or in response to question or questions that had been asked.

After the jury entered its verdict, the trial court amended its statement after EMS indicated that Defendant consumed "fifteen Klonopin" and two 40-ounce alcoholic beverages, which the court inferred were from the "two beer cans . . . found in the back of his truck." Defendant was tried and sentenced as a habitual felon on 16 August 2012. Defendant made a motion to dismiss at the close of evidence in his habitual felon proceeding, which was denied. Defendant timely filed his notice of appeal on 21 August 2012.

II. Jurisdiction & Standard of Review

Defendant appeals as of right from a decision of the trial court. N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2011).

Defendant raises three issues on appeal. The first issue concerns whether sufficient evidence exists showing Defendant attempted to penetrate Theodore's anus with his penis in violation of N.C. Gen. Stat. § 14-27.4(a)(1) (2011). Defendant argues that insufficient evidence existed and that his motion to dismiss was thus improperly denied. The second issue on appeal is whether sufficient evidence exists to show Defendant committed five counts of indecent liberties with a minor in violation of N.C. Gen. Stat. § 14-202.1(a)(1) (2011). Defendant again argues his motion to dismiss these counts was improperly denied. The first two issues are issues of law, and reviewed *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). Further:

> A motion to dismiss should be denied if there is substantial evidence of each essential element of the charged offense and substantial evidence that the defendant is the individual who committed it. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The court must consider the evidence in the light most favorable to the State. Furthermore, the State is entitled to every reasonable inference to be drawn from the evidence.
>
> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for

> it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt.

State v. Foreman, 133 N.C. App. 292, 298, 515 S.E.2d 488, 493 (1999) *aff'd as modified*, 351 N.C. 627, 527 S.E.2d 921 (2000) (internal citations and quotation marks omitted). "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *State v. Rasor*, 319 N.C. 577, 585, 356 S.E.2d 328, 334 (1987).

The third issue on appeal is whether the court improperly failed to institute, *sua sponte*, a competency hearing during the trial when Defendant became "stuporous and non-responsive" during the trial. This issue is a question of law, and is reviewed *de novo*. "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

Lastly, Defendant asks this Court to review sealed documents provided to the trial court for *in camera* review of Theodore's medical and other records to determine if Defendant received all exculpatory evidence. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court held that a defendant accused of sexual abuse of a child may "have confidential records of a child abuse agency turned over to the trial court for *in camera* review and release of material information." *State v. Kelly*, 118 N.C. App. 589, 592, 456 S.E.2d 861, 865 (1995) (citing *Ritchie*, 480 U.S. at 39). If the trial court conducts an *in camera* inspection but denies the defendant's request for the evidence, the evidence should be sealed and "placed in the record for appellate review." *State v. McGill*, 141 N.C. App. 98, 101, 539 S.E.2d 351, 355 (2000) (quoting *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977)). Further:

> On appeal, this Court is required to examine the sealed records to determine if they contain information that is both favorable to the accused and material to [either his] guilt or punishment. If the sealed records contain evidence which is both "favorable" and "material," defendant is constitutionally entitled to disclosure of this evidence.

Id. at 101–02, 539 S.E.2d at 355 (quotation and citation omitted). We review the trial court's determination of whether a sealed record contains exculpatory evidence *de novo*. *State v. McCoy*, ___ N.C. App. ___, ___, 745 S.E.2d 367, 370 (2013).

Analysis

i. Attempted First Degree Sexual Offense

[1] Defendant argues the trial court erred by denying his motion to dismiss and allowing the State to present evidence to the jury concerning his first charge, attempted first degree sexual offense. We disagree.

N.C. Gen. Stat. § 14-27.4 (2011) provides:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.

A sexual act is defined as "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. Gen. Stat. § 14-27.1(4) (2011). "The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). The State need not present evidence of an actual attempted penetration, but the evidence presented must be sufficient to show the defendant intended to engage in the completed offense. *State v. Dunston*, 90 N.C. App. 622, 624–25, 369 S.E.2d 636, 638 (1988).

Here, the age requirements are satisfied: Defendant was forty-five years old and Theodore was nine years old in March 2009, when Theodore first spoke of Defendant touching him in the bathtub. We next turn to whether there is a scintilla of evidence showing Defendant's intent. In *State v. Buff*, 170 N.C. App. 374, 612 S.E.2d 366 (2005), the defendant argued the State did not put forward sufficient evidence for an attempted second degree sexual offense. *Id.* at 380, 612 S.E.2d at 371. This Court held substantial evidence existed and affirmed the trial court's denial of the motion to dismiss:

> Waters testified that he observed defendant "[go] down her pants" while fondling L.W.'s breast. He then observed defendant remove L.W.'s pants and touch her "private," which was clarified to mean between her legs, but did not observe him insert anything inside her private. As noted previously, L.W. testified that she never consented to any

> type of sexual conduct with defendant, and sufficient evidence as to L.W.'s physical helplessness was offered. Therefore, when taken in the light most favorable to the State, the evidence presented *showed defendant committed several overt acts*, *including touching L.W.'s breast and vaginal area*, *demonstrating intent to commit a sexual act* against L.W.'s will and without her consent. The evidence, therefore, was sufficient to reach the jury as to the charge of attempted second degree sexual offense.

Id. at 380–81, 612 S.E.2d at 371 (emphasis added).

Here, only Theodore's testimony could be considered when the trial court denied the motion to dismiss. *State v. Ludlum*, 303 N.C. 666, 669, 281 S.E.2d 159, 161 (1981) (noting that corroborative testimony cannot be considered "substantive evidence of the facts stated"). The trial court recognized this and re-stated only Theodore's testimony before denying Defendant's motion to dismiss on attempted first degree sexual offense. Theodore's testimony, taken in the light most favorable to the State, shows Defendant "committed several overt acts . . . demonstrating intent to commit a sexual act." *Buff*, 170 N.C. App. at 380, 612 S.E.2d at 371. The act of placing one's penis on a child's buttocks provides substantive evidence of intent to commit a first degree sexual offense, specifically anal intercourse. *See* N.C. Gen. Stat. § 14-27.1(4); *Buff*, 170 N.C. App. at 380–81, 612 S.E.2d at 371.

Defendant points to testimony showing intent in *State v. Mueller*, 184 N.C. App. 553, 647 S.E.2d 440 (2007). In *Mueller*, the defendant took his victim to secluded areas and would "place his penis between her thighs and move back and forth until he ejaculated on her." *Id.* at 563–64, 647 S.E.2d at 448–49. The defendant in *Mueller* repeated this act over several years and also told the victim "he loved her and wanted to have sex with her." *Id.* This Court held the defendant's actions were sufficient for the trial court to find the evidence of intent required for attempt. *Id.* Defendant argues *Mueller* "sharply" contrasts with the present case; however, the distinction is inappropriate. While the acts in *Mueller* and statements by the defendant clearly show the intent necessary for attempt, so too did the State's evidence in *Buff* where "defendant committed several overt acts, including touching L.W.'s breast and vaginal area, demonstrating intent to commit a sexual act." *Buff*, 170 N.C. App. at 380, 612 S.E.2d at 371. Similarly here, while Theodore did not testify that Defendant stated a desire to engage in anal intercourse with him, Defendant's acts themselves provide evidence of the required intent. Intent may be present in the absence of a fully completed act. *See*

State v. Sines, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899, *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003) (holding the requisite intent existed in an attempted statutory sexual offense where the sexual act did not occur). Thus the first element is satisfied.

The next required element is an overt act. Overt acts are sometimes coupled with demands for sexual acts. For example, in *State v. Henderson*, 182 N.C. App. 406, 642 S.E.2d 509 (2007), "[t]he evidence in the instant case tended to show that defendant removed his pants, walked into the room where his seven-or eight-year-old daughter was seated, stood in front of her, and asked her to put his penis in her mouth." *Id.* at 412–13, 642 S.E.2d at 513–14. This was held to be an overt act satisfying the second element of attempt. *Id.*; *see also Sines*, 158 N.C. App. at 85, 579 S.E.2d at 899 ("Defendant's placement of his penis in front of victim's face, coupled with his demand for oral sex, comprise an overt act[.]").

Theodore's testimony does not include statements that Defendant demanded he perform a sexual act. However, the alleged acts themselves are overt acts exceeding mere preparation and statements of intent are not explicitly required. *Buff*, 170 N.C. App. at 380, 612 S.E.2d at 371 ("[T]he evidence presented showed defendant committed several overt acts, including touching L.W.'s breast and vaginal area, demonstrating intent to commit a sexual act."). Thus, Theodore's testimony that Defendant placed his penis on Theodore's buttocks satisfies the second element of attempt.

Lastly, the third element requires that the attempted crime was not consummated. *Miller*, 344 N.C. at 667, 477 S.E.2d at 921. Here, the trial court noted that only corroborative direct testimony showed Theodore's anus was penetrated by Defendant. However, Theodore's testimony by itself provides evidence of at least a non-consummated "sexual act" and satisfies the evidentiary predicate for the third element of attempt.

Taken in the totality of the circumstances, Theodore's statements provide the circumstantial and substantive evidence such that a jury could believe that Defendant intended to commit **a first degree sexual offense against Theodore and that overt acts** were taken toward that end. We therefore hold the trial court did not err in denying Defendant's motion to dismiss the charge of attempted first degree sexual offense.

ii. Indecent Liberties with a Minor

[2] Defendant next argues the State presented insufficient evidence to support five counts of indecent liberties with a minor. Defendant argues that Theodore's statements that Defendant touched his buttocks

with his penis " 'four or five times' only establishes suspicion or conjecture that there were five touchings and not four." Defendant further argues Theodore's testimony was insufficient to establish the touchings occurred in separate incidents. We disagree.

N.C. Gen. Stat. § 14-202.1 (2011) provides:

> (a) 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 either:
>
> (1) Willfully 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; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

§ 14-202.1 does not require a completed sex act nor an offensive touching of the victim. "Indecent liberties are defined as such liberties as the common sense of society would regard as indecent and improper. Neither a completed sex act nor an offensive touching of the victim are required to violate the statute." *State v. McClary*, 198 N.C. App. 169, 173, 679 S.E.2d 414, 417–18 (2009) (citations and quotation marks omitted). Further:

> The State is required to show that the action by the defendant was for the purpose of arousing or gratifying sexual desire. A variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor. Moreover, the variety of acts included under the statute demonstrate that the scope of the statute's protection is to encompass more types of deviant behavior and provide children with broader protection than that available under statutes proscribing other sexual acts.
>
> . . . .
>
> The requirement that defendant's actions were for the purpose of arousing or gratifying sexual desire may be inferred from the evidence of the defendant's actions.

Id. at 173–74, 679 S.E.2d at 418 (quotation and citation omitted). Similar to first degree attempted sexual offense, "the crime of indecent liberties

is a single offense which may be proved by evidence of the commission of any one of a number of acts." *State v. Hartnes*s, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990).

Here, Theodore, a mildly mentally retarded juvenile, testified that Defendant touched his "butt" with his penis four or five times. These alleged actions are ones that "the common sense of society would regard as indecent and improper." *McClary*, 198 N.C. App. at 174, 679 S.E.2d at 418 (citation and quotation marks omitted). The statute is designed to protect children against a broader range of sexually deviant behaviors and Defendant's alleged conduct falls within that ambit. *See id.*

A further issue is whether five total counts were justified by Theodore's testimony. Defendant argues that the "State must show that the defendant took indecent liberties with the child in separate incidents, rather than as part of a single transaction or occurrence." To support this assertion, Defendant points to *State v. Laney*, 178 N.C. App. 337, 631 S.E.2d 522 (2006), where we held that a defendant who put his hands on a victim's breasts and inside the waistband of the victim's pants were one continuous act of touching and not separate and distinct sexual acts warranting multiple charges. *Id.* at 341, 631 S.E.2d at 524–25. In *Laney*, evidence showed that both touchings occurred on the same evening, 21 January 2004. *Id.* at 341, 631 S.E.2d at 524. Theodore's testimony shows neither that the alleged acts occurred either on the same evening or on separate occasions. However, this Court in *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009) noted that no such requirement for discrete separate occasions is necessary when the alleged acts are more explicit than mere touchings:

> [I]n *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), this Court, in distinguishing *State v. Laney*, stated that as opposed to mere touching, "multiple sexual acts, *even in a single encounter*, may form the basis for multiple indictments for indecent liberties." *James*, 182 N.C. App. at 705, 643 S.E.2d at 38. Thus, this Court found that a different analytical path should be applied when dealing with "sexual acts" as opposed to touching in the context of charges of indecent liberties. *Id.*

Id. at 185, 689 S.E.2d at 425 (emphasis added); *see also State v. Coleman*, 200 N.C. App. 696, 706, 684 S.E.2d 513, 520 (2009), *rev. denied*, 364 N.C. 129, 696 S.E.2d 527 (2010).

This Court held, in *State v. Garrett*, 201 N.C. App. 159, 688 S.E.2d 118, 2009 WL 3818845 (2009) (unpublished), that a child's corroborated

testimony that a "defendant *touched* her private part, which she identified as her vagina" was sufficient to show *penetration* in a rape case. *Id.* at *4 (emphasis added). The defendant in *Garrett* argued that the child's testimony was "ambiguous" and showed only touching occurred, rather than penetration. *Id.* Here, similar facts exist: circumstantial evidence given by Theodore's family and attending physicians provide the scintilla of evidence necessary for the trial court to find that multiple sexual acts were committed against Theodore. Theodore's in court testimony describes an adult male touching a child while the child bathed and touching his buttocks with his penis "four or five times." The accusations levied by Theodore's in-court testimony are more properly categorized as distinct sexual acts similar to *James*, rather than mere "touchings" as in *Laney*, and thus the multiple counts can be proper.

Next, the requirement of "purpose of arousing or gratifying sexual desire" may be "inferred from the evidence of defendant's actions." *See* N.C. Gen. Stat. § 14-202.1; *McClary*, 198 N.C. App. at 174, 679 S.E.2d at 418 (citation and quotation marks omitted). Theodore's statements of Defendant's alleged actions provide ample evidence to infer Defendant's purpose of obtaining sexual gratification. *Cf. State v. Creech*, 128 N.C. App. 592, 599, 495 S.E.2d 752, 756 (1998) (holding defendant's actions in giving massages to young boys while wearing only his underwear and the child wearing only shorts were "for the purpose of arousing or gratifying sexual desire").

For the above reasons, we hold the Defendant's motion to dismiss the five counts of taking indecent liberties with a child was properly denied.

iii. Defendant's Capacity to Proceed

[3] Defendant argues that the trial court erred by failing to conduct a *sua sponte* competency hearing after he ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol. Because Defendant voluntarily ingested these substances in a non-capital trial, he voluntarily waived his constitutional right to be present. Thus, we disagree with Defendant that a *sua sponte* competency hearing was required and hold the trial court committed no error.

"[A] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (quotation marks and citation omitted) (emphasis in original); *see also State v. Whitted*, 209 N.C. App. 522, 527–28, 705 S.E.2d 787, 791–92 (2011)

(holding a defendant was denied a fair trial because the trial court did not inquire *sua sponte* into her competency); *State v. Coley*, 193 N.C. App. 458, 461, 668 S.E.2d 46, 49 (2008), *aff'd*, 363 N.C. 622, 683 S.E.2d 208 (2009). N.C. Gen. Stat. § 15A-1001(a) (2011) also requires a competency finding before defendants may stand trial:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

The State, a defendant, a defense counsel, or the trial court may move for a competency determination. N.C. Gen. Stat. § 15A-1002(a) (2011). If raised by any party, the trial court has a statutory duty to hold a hearing to resolve questions of competency. N.C. Gen. Stat. § 15A-1002(b).

On review, this Court "must carefully evaluate the facts in each case in determining whether to reverse a trial judge for failure to conduct *sua sponte* a competency hearing where the discretion of the trial judge, as to the conduct of the hearing and as to the ultimate ruling on the issue, is manifest." *State v. Staten*, 172 N.C. App. 673, 682, 616 S.E.2d 650, 657 (2005). Further:

> Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide* doubt inquiry. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Id. at 678–79, 616 S.E.2d at 655 (internal quotation marks and citations omitted). While the trial court's competency findings receive deference, other "findings and expressions of concern about the temporal nature of [a] defendant's competency" may raise a bona fide doubt as to a defendant's competency. *McRae*, 139 N.C. App. at 391, 533 S.E.2d at 560; *Whitted*, 209 N.C. App. at 529, 705 S.E.2d at 792 ("[D]efendants can be competent at one point in time and not competent at another.").

The appropriate test for a defendant's competency to stand trial is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has

a rational as well as factual understanding of the proceedings against him." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (quotation marks and citations omitted). A defendant need not "be at the highest stage of mental alertness to be competent to be tried." *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989). "So long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner." *Id.*

A trial court may also remove a defendant for disruptive conduct pursuant to N.C. Gen. Stat. § 15A-1032 (2011):

> (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.
>
> (b) If the judge orders a defendant removed from the courtroom, he must:
>
> (1) Enter in the record the reasons for his action; and
>
> (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.
>
> A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior.

Further, a trial court "has inherent power to take whatever legitimate steps are necessary to maintain proper decorum and appropriate atmosphere in the courtroom during a trial" including removing "an unruly defendant." *State v. Brown*, 19 N.C. App. 480, 485, 199 S.E.2d 134, 137, *appeal dismissed*, 284 N.C. 255, 200 S.E.2d 659 (1973).

"[I]n a non-capital trial, the defendant's right to be present is personal and may be waived." *State v. Forrest*, 168 N.C. App. 614, 622, 609 S.E.2d 241, 246 (2005); *see also State v. Wilson*, 31 N.C. App. 323, 327, 229 S.E.2d 314, 317 (1976) (holding the defendant's action of leaving during the jury charge was a voluntary waiver of his right to be present). Additionally, "[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) (2011) (emphasis added).

Other state and federal courts have addressed the issue of a defendant voluntarily ingesting intoxicants and destroying competency. *See* Victor G. Haddox, et. al, *Mental Competency to Stand Trial While Under the Influence of Drugs*, 7 Loy. L.A. L. Rev. 425, 442–43 (1974). In *People v. Rogers*, 309 P.2d 949 (Cal. App. 1957), the defendant intentionally injected himself with large doses of insulin to induce insulin shock and to avoid trial. *Id.* at 955–56. The First District Court of Appeal in California held

> there is ample authority for holding that a statute granting a right to an accused in categorical terms may be waived by the voluntary act of the person entitled. That is this case. *The defendant, by his own actions, induced the condition existing in the afternoon of the fourth day of the trial. This amounted to a waiver of the right to be mentally present* granted by section 1043 of the Penal Code. *If this were not the rule, many persons, by their own acts, could effectively prevent themselves from ever being tried.* A diabetic can put himself in insulin shock by simply taking insulin and then not eating, or by refusing to eat, or can disable himself by failing to take insulin. Surely, the Legislature in adopting section 1043 did not intend such an absurd result.

Id. at 957 (emphasis added); *see also United States v. Latham*, 874 F.2d 852, 865 (1st Cir. 1989) (Selya, J., concurring) ("When nonattendance results from *controllable* circumstance, waiver should generally follow."); *Hanley v. State*, 434 P.2d 440, 444 (Nev. 1967) ("The defendant's voluntary absence waives his right to be present and he cannot thereafter complain of a situation which he created.").

Here, the case was submitted to the jury for deliberations shortly after a lunch break on 15 August 2012. The trial court instructed Defendant to remain in the courtroom unless he needed to speak with his attorney. Defendant asked whether he could go to the courtroom lobby, which the trial court denied. The trial court temporarily recessed from 2:10 p.m. to 2:38 p.m., pending the jury's verdict. At 2:38 p.m., the jury asked for a transcript of Theodore's forensic interview, and Defendant's attorney alerted the trial court that Defendant was "having a little problem." The trial court said "[s]ir, stay with us if you will. If you go out, we're going to have to go on without you. If you want to see what happens here, try to stay vertical." A bench conference occurred between Judge Martin,

the State, and Defendant's counsel, the jury was brought back and told that no such transcript existed, and the jury again departed the courtroom. The trial court then warned Defendant that "[i]f you're not healthy we will continue on without you, whether you're here or not. So do your very best to stay vertical, stay conscious, stay with us."

The jury then asked to review the final ten minutes of the forensic interview DVD. Before the jury returned to the courtroom, Ms. Gantt told the trial court about Defendant's overdose. The trial court then revoked Defendant's bond, had Defendant taken into custody, and ordered an examination of Defendant by emergency medical services. Defendant's counsel and the State both agreed not to make any remarks about Defendant's absence when the jurors returned to the courtroom. The jury returned to the courtroom and watched the final ten minutes of the forensic interview. Defendant's statements to Agent Bumgarner were also published to the jury. The jury also requested to know when Pamela had her surgery, to which the trial court replied "[i]t is your duty to remember the evidence whether called to your attention or not."

The jury was again dismissed, and the trial court made its findings of fact that Defendant had disrupted the proceedings by leaving the courtroom against the instructions of the court and overdosing on drugs. The trial court found that Defendant was "stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs," but made these findings out of the jurors' presence. The court stated there was "nothing to indicate" the jurors were aware that Defendant was not present, but noted the requirement that the trial court instruct the jurors that Defendant's absence was "not to be considered in weighing evidence or determining the issue of guilt." Defendant's counsel asked that the instruction be given the following morning so that Defendant could re-join the proceedings.

At 4:31 p.m., Defendant's counsel and the State agreed to allow the jury to return to the courtroom and announce their verdict. The jury delivered their verdict finding Defendant guilty of attempted first degree sexual offense and five counts of taking indecent liberties with a minor. Defendant's counsel was directed to inform Defendant of these events and to request Defendant be present for the habitual felon phase the next morning as well as the sentencing phase of defendant's other charges.

The next morning on 16 August 2012 Defendant was present at the proceedings. The trial court informed Defendant he could choose to testify as to being a habitual felon. Defendant stated he was "hoping to testify yesterday," but that "[u]nfortunate circumstances" did not allow

it. The trial court re-stated that the court was considering the habitual felon charge that morning, and Defendant chose not to testify on the habitual felon charge.

The above facts provide ample evidence to raise a bona fide doubt whether Defendant was competent to stand trial. Defendant appeared lethargic, "stuporous," and non-responsive. Such conduct would ordinarily necessitate a *sua sponte* hearing. Evidence of irrational behavior, demeanor at trial, and any prior medical opinion on competence are all relevant to a *bona fide* doubt inquiry. *Staten*, 172 N.C. App. at 678–79, 616 S.E.2d at 655. The inability to "stay vertical" or to obey the commands of court personnel certainly would give rise to such a *bona fide* doubt. Defendant is also correct that competency may fluctuate during the course of a trial. *See Whitted*, 209 N.C. App. at 528–29, 705 S.E.2d at 792; *Shytle*, 323 N.C. at 688, 374 S.E.2d at 575.

However, Defendant *voluntarily* ingested large quantities of intoxicants in a short period of time apparently with the intent of affecting his competency. This more appropriately invokes an analysis of whether Defendant waived his right to be present during the proceedings. A defendant may waive his/her constitutional right to be present at non-capital trial via his/her own *voluntary actions* that squander those rights:

> [W]here the offense is *not capital* and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Diaz v. United States, 223 U.S. 442, 455 (1912) (emphasis added); *compare Drope v. Missouri*, 420 U.S. 162, 163–64 (1975) ("We granted certiorari in this case to consider petitioner's claims that he was deprived of due process of law by the failure of the trial court to order a psychiatric examination with respect to his competence to stand trial and by the conduct *in his absence of a portion of his trial on an indictment charging a capital offense*." (emphasis added)). Voluntary waiver of one's right to be present is a separate inquiry from competency, and in a non-capital case, a defendant may waive the right by their own actions, including actions taken to destroy competency.

The State and Defendant both cite *State v. Harding*, 110 N.C. App. 155, 429 S.E.2d 416 (1993). In *Harding*, this Court held the defendant

understood the nature of the proceedings against her and that the defendant's voluntary use of drugs throughout trial did not destroy her mental competency during trial. *Id.* at 166–67, 429 S.E.2d at 423–24. Defendant argues that *Harding* "implies that a greater degree of drug-induced impairment, such as that present in this case, could establish a lack of capacity to proceed." However, in *Harding*, the "defendant was present throughout the proceedings." *Id.* at 166, 429 S.E.2d at 423. The defendant did not "exhibit . . . any signs during trial of being under the influence of any controlled substance." *Id.* Thus, *Harding* never reached the issue of whether a defendant could forfeit his or her right to be present at trial by voluntarily intoxicating himself or herself. *Id.*

Finally, Defendant does not offer evidence that his absence prejudiced the proceedings. Defendant stated an intention to testify but already testified and concluded his case prior to ingesting the intoxicants. Defendant was absent only while the jury was outside the courtroom and deliberating its verdict. Further, any alleged error would have resulted from Defendant's own conduct. *See* N.C. Gen. Stat. § 15A-1443(c).

By voluntarily ingesting intoxicants, Defendant waived his right to be present during a portion of these proceedings. To hold otherwise would create a rule where "many persons, by their own acts, could effectively prevent themselves from ever being tried." *Rogers*, 309 P.2d at 957. Thus we hold the trial court did not err.

IV. Review of *In Camera* Documents

[4] After careful review of the sealed materials, we conclude the trial court did not violate Defendant's constitutional rights by refusing to disclose Theodore's relevant medical records to Defendant. No exculpatory materials existed within the relevant medical records and the trial court did not err in withholding the records. *See Kelly*, 118 N.C. App. at 592, 456 S.E.2d at 865.

IV. Conclusion

Based on the foregoing discussion, we hold the trial court did not err in denying Defendant's motions to dismiss, nor in choosing not to conduct a *sua sponte* competency hearing after Defendant voluntarily intoxicated himself and waived his right to be present during a portion of the proceedings.

NO ERROR.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JAMES KEVIN MOIR

No. COA13-589

Filed 7 January 2014

Sexual Offenders—sex offender registration—petition for termination—Tier 1 sex offender—Adam Walsh Act

The trial court erred by denying defendant's petition for termination of sex offender registration. Defendant was convicted of an offense qualifying him as a Tier I sex offender under the Adam Walsh Act, and he was eligible for termination from registration in 10 years. Upon remand, the trial court was instructed to re-evaluate its findings. Then, in its discretion, it could grant or deny defendant's petition.

Appeal by defendant from order entered 18 February 2013 by Judge Richard D. Boner in Catawba County Superior Court. Heard in the Court of Appeals 21 October 2013.

Attorney General Roy Cooper, by Associate Attorney General J. Rick Brown, for the State.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellant.

STEELMAN, Judge.

Where defendant was convicted of an offense qualifying him as a Tier I sex offender under the Adam Walsh Act, he was eligible for termination from registration in 10 years. The trial court erred in concluding that defendant was not a Tier I offender.

I. Factual and Procedural Background

On 9 January 2001, James Kevin Moir (defendant) was indicted for first-degree statutory sexual offense and indecent liberties with a child. On 5 September 2001, defendant pled guilty to two counts of indecent liberties with a child in exchange for the dismissal of the first-degree sexual offense charges. On 28 November 2001, defendant was sentenced to 16-20 months imprisonment. This sentence was suspended and defendant was placed on supervised probation for 60 months, and ordered

to pay court costs. Defendant was further required to register as a sex offender. Defendant did so on 15 March 2002. On 25 June 2007, defendant's probation was terminated by the court.

On 22 May 2012, defendant filed a Petition for Termination of Sex Offender Registration in the Superior Court of Catawba County. On 18 February 2013, the trial court denied defendant's petition.

Defendant appeals.

II. Request for Relief

In his sole argument on appeal, defendant contends that the trial court erred as a matter of law in ruling that the relief sought by defendant failed to comply with the federal Jacob Wetterling Act and the federal Adam Walsh Act. We agree.

A. Standard of Review

"Resolution of issues involving statutory construction is ultimately a question of law for the courts. [W]here an appeal presents [a] question[] of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*." *State v. Davison*, 201 N.C. App. 354, 357, 689 S.E.2d 510, 513 (2009) (citations and quotations omitted), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010).

B. Analysis

N.C. Gen. Stat. § 14-208.12A provides that:

> (a) Ten years from the date of initial county registration, a person required to register under this Part 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.
>
> ...
>
> (a1) The court may grant the relief if:
>
> (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 (2011). In the instant case, the trial court found that defendant had been subject to registration for at least 10 years, had not been subsequently arrested for or convicted of any offenses that would require registration, and had a low risk of re-offending. However, the trial court then found that:

> 11. Touching of the genital area of a minor with the intent to gratify sexual desire is considered "sexual contact" under the provisions of 18 U.S.C. § 2246(3), and sexual contact is classified as "abusive sexual contact" under 18 U.S.C. § 2244.
>
> 12. Abusive sexual contact is considered to be a Tier II offense under the provisions of 42 U.S.C. § 16911(3)(A)(iv).
>
> 13. The registration for Tier II offenses under the provisions of the Jacob Wetterling Act, 42 U.S.C. § 14071, and the provisions of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911, *et seq.*, is 25 years. This registration period cannot be reduced.
>
> 14. The defendant has not been registered as a sex offender for at least 25 years.

Based upon these findings, the trial court concluded that the termination of defendant's sex offender registration would not comply with the Jacob Wetterling Act, or its amended form, the Adam Walsh Act. The trial court therefore denied defendant's motion.

The federal statute in question, the Adam Walsh Act, provides the following definitions:

> (2) Tier I sex offender
>
> The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.
>
> (3) Tier II sex offender
>
> The term "tier II sex offender" means a sex offender other than a tier 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 tier I sex offender.

42 U.S.C. § 16911 (2006). We note that this act defines offender status by the offense charged, not by the facts underlying the case. Specifically, we read language such as "whose offense is punishable by imprisonment for more than 1 year[,]" as well as the lists of elements of the offense, as an indication that Tier status as a sex offender is based upon the elements of the offense, not upon the evidence presented as to the facts underlying it. In the instant case, however, the trial court based its ruling upon the facts underlying the plea, not upon the pled offense of indecent liberties.

The trial court's interpretation of federal statute was in error. In the instant case, defendant pled guilty to indecent liberties with a child. In *In re Hamilton*, ___ N.C. App. ___, 725 S.E.2d 393 (2012), we held that a conviction of indecent liberties with a child results in Tier I sex offender status. Pursuant to the Adam Walsh Act, a person convicted of indecent liberties would be subject to 15 years of registration, which may be terminated in ten years as provided in N.C. Gen. Stat. § 14-208.12A. *Id.* at ___, 725 S.E.2d at 399. Similarly, in *In re McClain*, ___ N.C. App. ___, 741 S.E.2d 893 (2013), the parties stipulated, and we held, that a defendant who pled guilty to indecent liberties with a child was a Tier I sex offender. *McClain* at ___, 741 S.E.2d at 896.

We find *Hamilton* and *McClain* determinative of the instant case. Defendant pled guilty to indecent liberties, and was therefore a Tier I sex offender. We hold that the relief he sought complied with the Adam Walsh Act. However, we noted in *Hamilton*:

> the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion. *See* N.C. Gen. Stat. § 14–208.12A(a1) (providing that a trial court "may" grant a petitioner relief if terms of the statute are met). Thus, after making findings of fact supported by competent evidence on each issue raised in the petition, the trial court is then free to employ its discretion in reaching its conclusion of law whether Petitioner is entitled to the relief he requests.

Hamilton at ___, 725 S.E.2d at 399.

Upon remand, the trial court is instructed to re-evaluate its findings in accordance with this opinion. It may then, in its discretion, grant or deny defendant's petition.

VACATED AND REMANDED.

Chief Judge MARTIN and Judge DILLON concur.

STATE OF NORTH CAROLINA
v.
DOUGLAS DALTON RAYFIELD, II

No. COA13-531

Filed 7 January 2014

1. Appeal and Error—preservation of issues—pretrial motion—objection at trial—basis of objection obvious from context

Defendant preserved for appellate review his argument that the trial court erred by admitting certain evidence. Defendant made a pretrial motion to suppress the evidence, which was denied, and objected at trial to the admission of the evidence. It was clear from the context that trial counsel and the trial judge understood that defendant wished to preserve his earlier objections on the grounds stated therein.

2. Search and Seizure—motion to suppress—stale allegations—victim's allegations—probable cause

The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that certain allegations in the detective's affidavit were stale and did not support a finding of probable cause was overruled. The victim's allegations of inappropriate sexual touching by defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of defendant's residence.

3. Search and Seizure—search warrant—affidavit not based on false and misleading information

The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that the search warrant was invalid because the detective's affidavit was based on false and misleading information was overruled. To the extent the detective made mistakes in the affidavit, those mistakes did not result from false and misleading information and the affidavit's remaining content was sufficient to establish probable cause.

4. Search and Seizure—motion to suppress—magistrate—failed to include record of oral testimony

The trial court did not err in a sexual offenses case by denying defendant's motion to suppress the evidence seized from his house. Defendant's argument that the trial court (1) made incomplete findings and (2) failed to make any findings or conclusions as to whether the magistrate substantially violated N.C.G.S. § 15A-245 was overruled. Furthermore, the magistrate did not substantially violate N.C.G.S. § 15A-245(a) in failing to include a record of the detective's oral testimony.

5. Evidence—prior crimes or bad acts—motive or intent—sufficiently similar—not so remote in time

The trial court did not err in a sexual offenses case by admitting into evidence certain pornography found in defendant's home and certain testimony about past sexual misconduct with another victim. The pornography was admissible to show defendant's motive or intent and the trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Further, the past sexual misconduct was sufficiently similar and not so remote in time such that

the testimony was relevant and admissible under N.C.G.S. § 8C-1, Rule 404(b).

Appeal by Defendant from order entered 8 September 2011 by Judge Jesse B. Caldwell, III and judgments entered 17 January 2012 by Judge Nathaniel J. Poovey in Gaston County Superior Court. Heard in the Court of Appeals 9 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Mark Montgomery for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

Douglas Dalton Rayfield, II ("Defendant") was indicted for multiple counts of sexual acts with K.C.,[1] a minor. Defendant was tried before a jury beginning 9 January 2012 in Gaston County Superior Court. The evidence presented at trial tended to show the following:

K.C. was fourteen years old at the time of trial. Her stepfather had known Defendant since childhood, and they were so close that he treated Defendant like a brother. K.C. and Defendant were regularly left unsupervised in her stepfather's house, and Defendant was allowed to transport her to and from various locations without third-party supervision. One day, when K.C. was eight years old, Defendant drove her to his house after working on a car at her stepfather's house. When they arrived at Defendant's residence, he told K.C. to get into a "limo" that was parked in his front yard so they could play a game. Once inside, Defendant told K.C. to pull down her pants. When she did, he touched his penis to her "vagina area." Defendant ejaculated on the seat and told K.C. it was "lotion."

On another occasion, K.C. was playing video games in her room when Defendant walked in and asked her to "help him make lotion." When she refused, Defendant said he would stop "bugging" her if she would help him. He told her to pull down her pants, put his mouth "in my vagina area," and was "licking all over." K.C. left the room to wipe off. When she returned, Defendant had his penis out. She again refused

1. Initials are used to protect the juvenile's identity.

to help him make "lotion." As K.C.'s father pulled into the driveway, Defendant zipped up his pants and left.

On a separate occasion, Defendant drove K.C. from her house to his house to look for a motorcycle part. Defendant brought K.C. to his room and showed her a video of a man having sexual intercourse with a young girl. Defendant told K.C. that he was the man. Defendant then showed K.C. images of a young girl posing "[l]ike a girl really shouldn't be posing" and suggested that K.C. make similar pictures. As the encounter continued, Defendant took off his pants and began "playing with himself." He eventually ejaculated and told K.C. that the ejaculate was not lotion, but actually was "what gets a girl pregnant."

Another time, Defendant groped K.C.'s breast area while they were in the car together. After doing so, he noted that she was "getting bigger."

Defendant twice transported K.C. to a motel. On one occasion, Defendant brought a magazine with pictures of naked men and women for them to view. They looked at the pictures together until K.C.'s mother called Defendant. Defendant told her that they were at Walmart.[2] Another time, Defendant offered to take K.C. to a Girl Scout meeting. Instead of taking her directly to the meeting, Defendant took her to a motel and asked her to "help him" fill a small black vial with ejaculate. He told her that, if she did not help him fill the vial, someone would cut his fingers off. Defendant asked multiple times, and K.C. refused each time. Defendant eventually yielded and drove K.C. to the meeting without proceeding further.

The last encounter between K.C. and Defendant occurred when K.C. was twelve years old. Defendant drove her to his house, and they parked outside. In the car, he showed her a vial and again informed her that he needed her help to fill the vial and keep his fingers from being cut off. This time K.C. said she would help him save his fingers. Defendant took her pants off and performed missionary-style intercourse on her while they were in the car. He ejaculated outside of her vagina and partially filled the vial. When he was finished, he drove K.C. home.

On 18 May 2010, K.C. told the interim counselor at her middle school that Defendant had shown her a video of a young girl performing sexual acts and had touched her inappropriately. K.C. elaborated,

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2. As the State notes in its brief, Defendant erroneously stated on appeal that this incident ended when *K.C.* told her mother that she was at Walmart with Defendant. That is incorrect. The trial transcript indicates that the encounter ended when K.C.'s mother called Defendant, and *he* told her that they were at Walmart.

and the school authorities contacted K.C.'s mother and the local police. The next day, Detective R.E. Bloom appeared before the magistrate and submitted a sworn affidavit and application for a search warrant.

Therein, Detective Bloom asserted that he had responded to a call for service to investigate an allegation of sexual assault. He stated that K.C. had informed another officer of incidents occurring from the time she was eight years old until she was eleven. Detective Bloom also alleged that sexual assaults took place in K.C.'s home, in Defendant's home, and in a Gastonia-based motel. Regarding those places, the affidavit listed either the address or provided a description of the approximate location. The affidavit also stated that Detective Bloom had confirmed K.C.'s statement by collecting evidence that Defendant was at America's Best Motel on 8 May 2010. The affidavit asserted that Defendant had shown K.C. pornographic videos and images in his home. The images were of Defendant having sexual intercourse with an unknown female, who K.C. believed was under ten years old. The affidavit noted that Defendant is a registered sex offender and requested a search warrant for Defendant's home and the magazines, videos, computers, cell phones, and thumb drives located therein. The magistrate issued a search warrant, and police searched Defendant's home and the contraband recovered therefrom between 19 May 2010 and 24 May 2010.

Defendant was charged with four counts of indecent liberties with a child, one count of disseminating obscene material, one count of crime against nature, one count of first-degree statutory sex offense, and one count of first-degree statutory rape. On 6 May 2011, Defendant's counsel filed a motion to suppress the evidence seized during the execution of the search warrant. That motion was denied on 8 September 2011. Defendant's motion to exclude evidence of other crimes, wrongs, or acts was also denied. Items of child pornography and adult pornography were admitted at trial along with the testimony of another person, A.L.,[3] who willingly had sexual intercourse with Defendant when she was fourteen. Defendant was convicted of all the charges and sentenced to imprisonment for no less than 640 months and no more than 788 months.

Discussion

Defendant argues on appeal that the trial court erred in (1) denying his motion to suppress the evidence seized from his house and (2) admitting into evidence certain pornography found in Defendant's home and the testimony of A.L. We find no error.

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3. Initials are used to protect the juvenile's identity.

I. Defendant's Motion to Suppress

In support of his first argument, Defendant claims that (1) the information in the search warrant affidavit was "stale" because as many as three and a half years had passed since Defendant allegedly showed pornography to K.C., (2) the search warrant was based on misleading information, and (3) the search warrant was issued in substantial violation of N.C. Gen. Stat. § 15A-245 (2011). Accordingly, Defendant contends that the evidence found during the search of his home should have been suppressed as "fruit of the poisonous tree." We disagree.

A. Preservation of Appellate Review

[1] As a preliminary matter, we address the State's contention that Defendant did not adequately preserve appellate review of the denial of his motion to suppress because he failed to object at trial. A pretrial motion to suppress is a type of motion *in limine*. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Such a "motion . . . [is] not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *Id.* In order to preserve an issue for appellate review by objection at trial, the appealing party must present "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) (emphasis added).

In the present case, Defendant made a pretrial motion to suppress the evidence seized from his home. That motion was denied. Defendant renewed the motion at trial, and the motion was again denied. Although Defendant's counsel did not state his grounds for the objection when the evidence was offered at trial, it is clear from the context that he was renewing his earlier objections to the evidence for the reasons stated in his motion to suppress:

> [THE STATE]: Would you open State's Exhibit A?
>
> (The [officer-]witness complied)
>
> . . .
>
> [THE STATE]: What's contained in that box?
>
> [THE OFFICER]: There are numerous periodicals of a sexual nature, magazines. There are several, looks like nine DVDs. There are some printed, looks like images printed off of the Internet of a pornographic sexual nature.

> [THE STATE]: Now, you said those are the same items that you saw in the box there in [Defendant's] residence when the box was seized?
>
> [THE OFFICER]: That's correct.
>
> [THE STATE]: Are there any other photographs or items in that box?
>
> [THE OFFICER]: There are some Polaroids, Polaroid photographs, yes. And like I said, the printed — there are some, looks like computer printed images from off of websites of young females.
>
> . . .
>
> [THE STATE]: Your Honor, we would be moving into evidence the contents of that box. . . .
>
> [COUNSEL FOR DEFENDANT]: Of course, you know[] the nature of my objection, Your Honor. . . .
>
> . . .
>
> THE COURT: Do you wish to be heard about any of that, [counsel for Defendant]? I know that you object to all of it, but.
>
> [COUNSEL FOR DEFENDANT]: I do, and I don't wish to be heard about those exhibits being selected or being published.

Based on this exchange it is clear from the context that trial counsel and the trial judge understood that Defendant wished to preserve his earlier objections on the grounds stated therein. Therefore, we hold that this issue was properly preserved for appellate review.[4]

B. Standard of Review and Legal Background

Our review of the denial of a motion to suppress is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support

4. Defendant argues in the alternative that, if this issue was not properly preserved for appellate review, his trial counsel was ineffective. Because we hold that Defendant's trial counsel properly preserved this issue for appeal, we need not address his argument as to ineffective assistance of counsel.

the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

> A valid search warrant application must contain allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched. Although the affidavit is not required to contain all evidentiary details, it should contain those facts material and essential to the case to support the finding of probable cause. This Court has held that affidavits containing only conclusory statements of the affiant's belief that probable cause exists are insufficient to establish probable cause for a search warrant. The clear purpose of these requirements for affidavits . . . is to allow a magistrate or other judicial official to make an independent determination as to whether probable cause exists for the issuance of the warrant under N.C. Gen. Stat. [§] 15A-245(b). [That section] requires that a judicial official may consider only information contained in the affidavit, unless such information appears in the record or upon the face of the warrant.

State v. McHone, 158 N.C. App. 117, 120, 580 S.E.2d 80, 83 (2003) (citation and internal quotation marks omitted).

In preparing an affidavit for this purpose, "[t]he officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties." *State v. Horner*, 310 N.C. 274, 280, 311 S.E.2d 281, 286 (1984). "Whether an applicant has submitted sufficient evidence to establish probable cause to issue a search warrant is a non[ ]technical, common-sense judgment of laymen applying a standard less demanding than those used in more formal legal proceedings." *State v. Ledbetter*, 120 N.C. App. 117, 121, 461 S.E.2d 341, 344 (1995) (citation and internal quotation marks omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

C. Staleness

[2] Appealing the denial of his motion to suppress, Defendant first argues that certain allegations in Detective Bloom's affidavit were stale and did not support a finding of probable cause. Specifically, Defendant points out that there is a three-and-one-half-year gap between the alleged

viewing of the pornography in Defendant's house and the time the affidavit was issued. In addition, Defendant contends that other descriptions of sexual conduct with minors described in the affidavit did not have specific time references and, therefore, failed to support a finding of probable cause. We disagree.

"When evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990).

> Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a "reasonable" time may have elapsed. *The test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued.* Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar[,] but of variables that do not punch a clock.

State v. Lindsey, 58 N.C. App. 564, 565–66, 293 S.E.2d 833, 834 (1982) (citations and internal quotation marks omitted; emphasis added). "[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358 (citation omitted). In addition, our courts have repeatedly held that "young children cannot be expected to be exact regarding times and dates[.]" *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984).

Although K.C was generally unable to provide dates to the attesting officers in this case, we hold that her allegations of inappropriate sexual touching by Defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of Defendant's residence. *See McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358. "Common sense is the ultimate criterion in determining the degree of evaporation of probable cause." *State v. Jones*, 299 N.C. 298, 305, 261 S.E.2d 860, 865 (1980) (citation omitted). "The significance of the length of time between the point probable cause

arose and when the warrant issued depends largely upon the [nature of the property to be seized] and should be contemplated in view of the practical consideration[s] of everyday life." *Id.* (citation omitted). Another variable to consider when determining staleness is the character of the crime. *State v. Witherspoon*, 110 N.C. App. 413, 419, 429 S.E.2d 783, 786 (1993).

In this case, the affidavit set forth that Defendant showed K.C. pornographic videos and images in his home. The images showed Defendant having sexual intercourse with an unknown female, who K.C. believed was under ten years old. The affidavit went on to state that Defendant was a registered sex offender. It then requested a search warrant for Defendant's home and included magazines, videos, computers, cell phones, and thumb drives in the objects to be searched.

Our Supreme Court has determined that, when items to be searched are not inherently incriminating and have enduring utility for the person to be searched, a reasonably prudent magistrate could conclude that the items can be found in the area to be searched. *Jones*, 299 N.C. at 305, 261 S.E.2d at 865. Here, the items sought by the search warrant — magazines, videos, computers, cell phones, hard drives, gaming systems, MP3 players, a camera, a video recorder, thumb drives, and other pictures or documents — were not incriminating in and of themselves and were of enduring utility to Defendant. *See, e.g.*, *id.* (upholding a search warrant when five months had elapsed between the time the witness saw the defendant's hatchet and gloves and the witness spoke to police because, *inter alia*, the items were not incriminating in and of themselves and had utility to the defendant).

There was no reason for the magistrate in this case to conclude that Defendant would have felt the need to dispose of the evidence sought even though acts associated with that evidence were committed years earlier. Indeed, a practical assessment of the information contained in the warrant would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were likely located in Defendant's home even though certain allegations made in the affidavit referred to acts committed years before. *See State v. Pickard*, 178 N.C. App. 330, 336, 631 S.E.2d 203, 208 (2006) (holding that the affidavit provided the magistrate with a substantial basis for concluding that probable cause existed to issue a search warrant when the items sought — computers, computer equipment and accessories, cassette videos or DVDs, video cameras, digital cameras, film cameras, and accessories — were not particularly incriminating and were of enduring utility to the defendant). Accordingly, the information contained in the

search warrant was not stale and the magistrate had sufficient evidence to support a determination of probable cause. Defendant's first argument is overruled.

D. False and Misleading Information

[3] Second, Defendant contends that the search warrant was invalid because Detective Bloom's affidavit was based on false and misleading information. We disagree.

The Fourth Amendment's requirement of a factual showing sufficient to constitute "probable cause" anticipates a truthful presentation of facts. *Franks v. Delawar*e, 438 U.S. 154, 164–65, 57 L. Ed. 2d 667, 678 (1978).

> N.C. Gen. Stat. § 15A-978 provides that a defendant can challenge the "validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony" which showed probable cause for the issuance of the warrant. N.C. [Gen. Stat.] § 15A-978(a)[]. The section defines truthful testimony as testimony which reports in good faith the circumstances relied on to establish probable cause.
>
> A factual showing sufficient to support probable cause requires a truthful showing of facts. Truthful, however, does not mean . . . that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge. . . . Instead, "truthful" means that the information put forth is believed or appropriately accepted by the affiant as true. [Because there is a presumption of validity with respect to the affidavit supporting the search warrant, a] defendant must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit. Only the affiant's veracity is at issue in the evidentiary hearing. Furthermore, a claim . . . is not established by presenting evidence which merely contradicts assertions contained in the affidavit or shows the affidavit[] contains false statements . . . . Rather, the evidence presented must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.

State v. Severn, 130 N.C. App. 319, 322, 502 S.E.2d 882, 884 (1998) (citations, certain internal quotation marks, and ellipses omitted). Further, an inadvertent error by an officer making an affidavit, when he or she did not know it was an error, may be immaterial where the affidavit is still sufficient on its face to support a finding of probable cause. *See State v. Steele*, 18 N.C. App. 126, 196 S.E.2d 379 (1973).

In support of his argument that Detective Bloom's affidavit was based on false and misleading information sufficient to invalidate the search warrant, Defendant first notes that the affidavit does not provide the name or address of the motel where K.C. was taken. However, as our Supreme Court stated in *Wood*, children are not expected to remember exact dates and times. 311 N.C. at 742, 319 S.E.2d at 249. Likewise, the fact that K.C. relayed this information to Detective Bloom without specific details regarding the name of the motel or its address is not fatal.

Second, Defendant points out that Detective Bloom did not speak directly to K.C. when determining the information to be used in the affidavit, relying instead on a report from Officer Jeff Bryant and a video interview of K.C. This point is misplaced.

Probable cause for an affidavit may be based on information relayed from one officer to another if that information was reported while the officer performed his or her duties. *Horner*, 310 N.C. at 280, 311 S.E.2d at 286. The affidavit in this case states that, during a call for service, the school resource officer at K.C.'s middle school advised Officer Bryant of K.C.'s allegations. As "[o]bservations of fellow officers engaged in the same investigation are plainly a reliable basis for a warrant applied for by one of their number[,]" it was proper for Detective Bloom to rely on information from Officer Bryant for a probable cause determination. *See id.*

Third, Defendant asserts that Detective Bloom's affidavit contained nothing about a discrepancy between when K.C. claimed to have been taken to the motel and the date that someone named "Douglas Rayfield" registered at America's Best Value Motel. To the extent that there was such a discrepancy, it was not sufficient to invalidate the search warrant.

As we have already noted,

> in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence.

Wood, 311 N.C. at 742, 319 S.E.2d at 249. In denying Defendant's motion to suppress, the trial court found that Detective Bloom made "honest mistakes and inadvertence" which did not unconstitutionally taint the search warrant. In addition, much of the confusion in the affidavit stemmed from information about the motel name and certain dates. Analyzing the affidavit as a whole, however, Detective Bloom made clear that K.C. was assaulted by Defendant on multiple occasions for three years. It states that (1) Defendant was a good friend of K.C.'s stepfather and (2) that sexual assaults took place in K.C.'s home, Defendant's home, and a nearby motel. Further, the affidavit asserts that K.C. viewed pornographic videos of Defendant and another girl with Defendant in his home. These findings support the trial court's conclusion that probable cause was present to justify a search of Defendant's residence for magazines, videos, computers, hard drives, cameras, and other pictures.

Therefore, to the extent Detective Bloom made mistakes in the affidavit, we conclude that those mistakes did not result from false and misleading information and that the affidavit's remaining content was sufficient to establish probable cause. Accordingly, Defendant's second argument is overruled.

E. The Validity of the Search Warrant Under 15A-245(a)

Section 15A-245(a) provides in pertinent part that:

> [An] issuing official may examine on oath the applicant . . . , but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.

N.C. Gen. Stat. § 15A-245(a) (2011).

The magistrate in this case indicated on the search warrant that, in addition to the affidavit, the application was supported by Detective Bloom's sworn testimony. The magistrate did not indicate, however, that the testimony was reduced to writing or recorded. In its order on the motion to suppress, the trial court found that Detective Bloom's oral testimony was not reduced to writing. Thus, the magistrate violated section 15A-245 by neither recording nor contemporaneously summarizing the oral testimony offered by Detective Bloom.

[4] On appeal, Defendant argues that the trial court erred in denying his motion to suppress because the magistrate substantially violated

section 15A-245, requiring that the evidence obtained from his home be suppressed. Alternatively, he contends that this case should be remanded for further findings of fact and conclusions of law due to the trial court's failure to properly address the nature of the magistrate's violation. Because our analysis of Defendant's argument depends on whether the trial court properly addressed the validity of the search warrant, we address that question first.

i. The Trial Court's Order

In his alternative argument, Defendant contends that we should remand this case for a new hearing followed by complete and proper findings of fact and conclusions of law on grounds the trial court (1) made "incomplete" findings and (2) failed to make any findings or conclusions as to whether the magistrate substantially violated section 15A-245. We are unpersuaded.

a. Findings of Fact

As discussed above, this Court is limited to determining whether a trial court's findings of fact "are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). In this case, the trial court made the following pertinent findings of fact in its order denying Defendant's motion to suppress:

> 3. That on the onset date, May 19th, 2010, Detective Bloom appeared before the magistrate and submitted a sworn application and affidavit[ ]in which, among other things, he asserted his history and training in law enforcement. That he had responded to a call for service at [K.C.'s middle school] by a resource officer. That a 12[-]year-old white female, [K.C.], was allegedly sexually assaulted by one Douglas Dalton Rayfield, on multiple occasions. That Detective Bloom spoke with [K.C.], and that the affidavit submitted to the magistrate contains the statement that she advised that the incidents occurred from the time she was 8[ ]years old until she was 11[ ]years old. That she further explained that [Defendant] was[ ]a good friend of her father. That the affidavit submitted with the application[ ] for the search warrant further advised that sexual assaults took place in her home at [the listed address], and at

the home of [D]efendant, [at the listed address[5]]. That the affidavit also submitted that [K.C.] said that a recent sexual assault took place at a motel in the City of Gastonia, behind an old steakhouse at the intersection of[ ]Highway 321 and Interstate 85.

4. That said affidavit[ ]in support of the search warrant further alleged that on May 19th, 2010, during a child advocacy hearing interview, [K.C.] provided details about the assaults. That the affidavit[ ]in support of the search warrant stated that Detective Bloom had confirmed [K.C.'s] statement by collecting information that confirmed that [Defendant] was at America's Best Motel on May 8th, 2010. That the affidavit further sets forth that at [Defendant's] home [Defendant] showed [K.C.] pornographic videos and images of [Defendant] having intercourse with an unknown female, [who K.C.] believed was around 10[ ] years of age. That the affidavit further set forth that [Defendant] was a registered sex offender. That the affidavit further requested the search warrant for [Defendant's] home at [the listed address],[ ]and that [the warrant] would include magazines, videos, computers, cell phones, hard drives, gaming systems, thumb drives, and the like.

5. That Detective Bloom went to the [m]otel on Highway 321, which was America's Best Value. That the name of this [m]otel had been recently changed. That at some time before that it was a Motel 6, by name.

. . .

7. That there are several hotels . . . off of Interstate 85 and Highway 321. That there was a receipt which Detective Bloom obtained from America's Best Value Inn, which reflected that on May the 8th of 2010, that [Defendant] rented a room, asserting that there would be two people in his party, and that he was leaving at 11:00 a.m. on May the 9th, 2010.

. . .

9. That [K.C.] stated that [Defendant's] [m]otel room was messy with clothes all around. That while there she saw a

5. Street addresses have been redacted to protect K.C.'s identity.

> video of the man that she identified as [Defendant] with a girl [who] she contended was about 10[ ]years of age.
>
> . . .
>
> 13. That [K.C.] made a statement that there had been oral sex with [Defendant] some two weeks after her 9th birthday. That she further testified that there was a sexual encounter in a car wash, and that she was afraid of cameras catching them. That at one point [Defendant] offered her $100 to continue with sex acts.
>
> . . .
>
> 23. That questions about the name of the [m]otel where the victim indicated she was with [Defendant] and confusion regarding whether the name of the [m]otel was Knights Inn or America's Best are explained by the fact that the [m]otel's name had recently changed shortly before Detective Bloom visited the[m]otel, and the fact that [K.C.], who reported being at the hotel, is a minor, whose memory for specifics, such as the name of a hotel, cannot be expected to be on par with an adult.

Given those findings, the court denied Defendant's motion to suppress and concluded as a matter of law "[t]hat the totality of the circumstances surrounding the issuance of the said search warrant supports the magistrate's finding of[ ]probable cause upon the aforesaid affidavit of Detective Bloom."

In his brief, Defendant disputes certain elements of findings of fact 7, 9, 13, and 23. Regarding finding 7, Defendant points out that Detective Bloom's testimony contradicts the Court's finding that *two people* were listed on the receipt from the motel. At the suppression hearing, Detective Bloom testified that the receipt did not indicate how many people were in Defendant's party. Defendant also notes that finding of fact 9 contradicts Detective Bloom's affidavit regarding *where* K.C. saw the video of Defendant having sex with a minor. The finding states that it occurred in the motel room while the affidavit asserts that it occurred in Defendant's home. Defendant also argues that portions of finding of fact 13 — which describes certain sexual acts committed by Defendant — are not relevant to the trial court's determination of probable cause because they occurred too long ago.[6] Lastly, Defendant quibbles with the trial

6. We resolved this issue in our discussion regarding staleness, *supra*, and do not address it further.

court's finding that the confusion regarding the name of the motel was resolved because the motel's name had recently changed from "Knights Inn" to "America's Best Inn," asserting that the motel had in fact changed its name from "Motel 6," as stated in the trial court's fifth finding of fact. These arguments are insufficient to overturn the trial court's conclusion regarding probable cause.

"Probable cause need not be shown by proof beyond a reasonable doubt, but rather [it is shown by] whether it is more probable than not that . . . contraband will be found at a specifically described location." *State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007). While Defendant has correctly identified errors in the trial court's findings of fact, he fails to address the Court's myriad other findings as they relate to its conclusion that probable cause to search Defendant's home was present. As discussed above, Detective Bloom's affidavit — summarized by the trial court in findings of fact 3 and 4 — was sufficient on its own to establish probable cause. Therefore, to the extent the trial court's other findings contain errors, they are not so severe as to undercut the court's conclusion of law that probable cause was present to justify the search. In light of the other evidence cited by the trial court in support of its conclusion that probable cause was present to justify the search of Defendant's home, this argument is overruled.

b. Findings and Conclusions Regarding the Substantiality of the Statutory Violation

Section 15A-974(b) provides that

> [t]he court, in making a determination whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record, pursuant to [section] 15A–977(f).

N.C. Gen. Stat. § 15A–974 (2011). Pursuant to that section, Defendant contends that the trial court erred by failing to make findings and conclusions regarding "the substantiality of the statutory violation." We disagree.

On the nature of the magistrate's statutory violation, the trial court made the following pertinent findings of fact:

> 15. That in presenting his application in writing to the magistrate, Detective Bloom also gave some oral testimony which was not reduced to writing by either Detective Bloom or the magistrate.

> . . .
>
> 36. That the Court finds that the mistakes and factual discrepancies set forth in [the] affidavit were the result of honest mistakes and inadvertence[] and did not take away from the validity of the consideration of the totality of the circumstances relative to the issuance of [the] warrant.

The trial court also concluded as a matter of law:

> 2. That any violation of law regarding the oral testimony of Detective Bloom not being recorded would constitute a statutory violation and not a constitutional violation of [Defendant's] rights under the Fourth and Fourteenth Amendments to the United States Constitution and the North Carolina Constitution.
>
> . . .
>
> 4. That the totality of the circumstances surrounding the issuance of the . . . search warrant supports the magistrate's finding of probable cause upon the aforesaid affidavit of Detective Bloom.

Contrary to Defendant's argument on appeal, the cited authority — section 15A-974(b) — does not require the trial court to make findings of fact and conclusions of law regarding whether a statutory violation was substantial and, therefore, whether the violation would require suppression of the evidence. Instead, the statute simply states that the trial court must make findings of fact and conclusions of law in support of its order on a motion to suppress.

In this case, the court made findings of fact based on Detective Bloom's affidavit. Those findings are discussed above, and we have already determined that they supported its determination that probable cause was present and were therefore sufficient to justify the court's denial of Defendant's motion to suppress. Accordingly, Defendant's alternative argument is overruled.

ii. The Magistrate's Statutory Violation

Defendant also contends that the magistrate's error in failing to record Detective Bloom's testimony was a *substantial violation* of section 15A-245(a), requiring suppression of the evidence under section 15A-974(b), because (1) the error affected Defendant's constitutional right to have a "neutral and detached magistrate determine probable

cause,"[7] (2) Detective Bloom's unrecorded testimony was used by the trial court for certain of its findings of fact in support of its decision to deny Defendant's motion to suppress, (3) Detective Bloom and the magistrate intentionally "chose to ignore [section 15A-245]" because the statute had been in effect for five years and Detective Bloom was a "seasoned" officer, and (4) "failure to enforce the statute [would] doubtless result in future improper searches" as there would be "nothing to prevent an officer's providing self-serving testimony to create a post hoc justification for the search if it proves fruitful." For support, Defendant cites to *McHone*, where we held that a search warrant application maintained "only" by a *conclusory affidavit* constituted a substantial violation of sections 15A-244 and 15A-974. 158 N.C. App. at 122, 580 S.E.2d at 84. We are unpersuaded.

In pertinent part, the text of Detective Bloom's affidavit reads as follows:

> . . .
>
> [T]he Gaston County Police Department responded to a call for service to [K.C.'s middle school].
>
> [The school resource officer] advised Officer . . . Bryant, of the Gaston County Police Department, that 12[-]year[-]old white female, [K.C.], was allegedly [s]exually [a]ssaulted by [Defendant] on multiple occasions. [K.C.] advised that the incidents occurred from the time she was 8 years old until she was 11 years old. She explained that [Defendant] was a good friend of her father. She advised that the sexual assaults took place in her home, [at the listed address] and at the home of Defendant, [at the listed address]. She also advised that a recent sexual assault took place at a motel in the City of Gastonia behind an old steak house at the intersection of Highway 321 and Interstate 85.
>
> On 05/19/2010, during a [c]hild [a]dvocacy [c]enter interview, [K.C.] provided details about the assaults. Affiant confirmed [K.C.'s] statement by collecting information that

7. On this point, Defendant asserts that "[b]y waiving the requirement of a contemporaneous recording of the detective's statement, the magistrate opened the way for the detective to provide after the fact, self-serving testimony at the suppression hearing to correct and fill in discrepancies in and omissions from his affidavit."

> confirmed [Defendant] was at the America's Best Motel on May 8, 2010. [K.C.] also explained that at [Defendant's] home in his bedroom[, he] showed her pornographic videos/images of [himself] having sexual intercourse with an unknown female[, who K.C.] believed was around the age of 10 years old. It has been also confirmed that [Defendant] is a registered [sex o]ffender.
>
> Based on the information in this affidavit, Affiant respectfully requests that a search warrant be issued for the home, vehicles, common areas, and outbuilding for [Defendant] at [the listed address] so that a complete investigation may be conducted and physical evidence may be collected to assist in the investigation of [s]ex [o]ffense.

Generally, an affidavit in an application for a search warrant is deemed sufficient

> if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender.

State v. Vestal, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971), *cert. denied sub nom.*, *Vestal v. North Carolina*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973). "Probable cause cannot be shown[, however,] by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based[.]" *State v. Campbell*, 282 N.C. 125, 130–31, 191 S.E.2d 752, 756 (1972) (citation and internal quotation marks omitted).

The affidavit in this case is not merely conclusory. It includes (1) background of the circumstances of Detective Bloom's involvement in the case, (2) details of where the sexual assaults took place, (3) details of child pornography that was in Defendant's possession and that had been used during the sexual assaults, (4) the assertion that Defendant is a registered sex offender, and (5) the fact that Defendant resided at the house that was the subject of the search warrant. Further, as we have already pointed out, the information provided by Detective Bloom in his affidavit was sufficient — on its own — for the magistrate to properly make a determination that probable cause was present in this case. Accordingly, the magistrate did not substantially violate section 15A-245(a) in failing

to include a record of Detective Bloom's oral testimony, and, therefore, the trial court did not err in denying Defendant's motion to suppress.[8]

II. Adult Pornography and A.L.'s Testimony

In addition to the arguments addressed above, Defendant contends that the trial court erred in admitting into evidence (1) certain portions of the pornography seized from his home and (2) the testimony of A.L. Defendant asserts that both constitute irrelevant, inadmissible character evidence under Rule 404(b) and are substantially more prejudicial than probative under Rule 403. Defendant also asserts that the evidence admitted under 404(b) merely shows his "propensity" or "disposition" to commit sex crimes and, therefore, is inadmissible. We disagree.

"Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). Rule 404(b) is a

> general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception[,] requiring [the exclusion of evidence] if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Rule 404(b) provides that while evidence of "other crimes, wrongs, or acts" is not admissible "to prove the character of a person in order to show that he acted in conformity therewith," such evidence is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment[,] or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011).

> Though this Court has not used the term *de novo* to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries

8. Defendant also contends that "[i]t cannot be gainsaid that [Defendant] was prejudiced by the denial of his motion to suppress." Because we have concluded that the trial court did not err in denying Defendant's motion to suppress, this argument is overruled.

> with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012) (italics added).

A. Adult Pornography

The trial court denied Defendant's motion to exclude the adult pornography found in his home because the pornography constituted "relevant" evidence bearing upon Defendant's motive, intent, and common plan or scheme with respect to the alleged crimes. On appeal, Defendant argues that the trial court erred in admitting the adult pornography on those grounds. Defendant contends that there was no evidence that he ever showed K.C. all of the images seen by the jury, the adult pornography was not relevant to any issue other than Defendant's "propensity" or "disposition" to commit sex crimes against girls, and, therefore, the adult pornography should have been excluded under Rule 404(b).

In *State v. Brown*, __ N.C. App. __, __, 710 S.E.2d 265, 269–70 (2011), *affirmed per curiam*, __ N.C. __, 722 S.E.2d 508 (2012), this Court considered the admissibility of pornography showing incestuous sexual acts, referred to as "Family Letters," in a prosecution for sexual offenses committed by a father against his daughters. Noting that a defendant's possession of general pornography was usually considered inadmissible, we pointed out that the Family Letters material "was of an uncommon and specific type of pornography; the objects of sexual desire aroused by the pornography in evidence were few; and the victim was the clear object of the sexual desire implied by the possession [of that material]." *Id.* at __, 710 S.E.2d at 269.

Here the trial court admitted the pornography over Defendant's motion to exclude and contemporaneously instructed the jury that it could consider the pornography only if it determined that the material was relevant to Defendant's motive or intent to commit the alleged criminal conduct. The pornography was found at Defendant's house after a valid warrant was obtained to search the premises, as discussed above, and there was testimony at trial that Defendant showed K.C. both child pornography and adult pornography. For these reasons, the evidence

was admissible under Rule 404(b) as relevant to Defendant's motive or intent.

Nonetheless, the pornography may still be deemed inadmissible under the Rule 403 balancing test, *i.e.*, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 ("Once the trial court determines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Rule 403.") (citation and internal quotation marks omitted), *disc. review denied and appeal dismissed*, 360 N.C. 653, 637 S.E.2d 192 (2006); *see also* N.C. Gen. Stat. § 8C–1, Rule 403 (2011). This determination "is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001).

Here, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to [D]efendant and was careful to give a proper limiting instruction to the jury." *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998). The trial judge viewed the evidence himself, heard arguments from the attorneys, and ruled on its admissibility as follows:

> Weighing the prejudicial effect of [the pornography], although it is prejudicial to [D]efendant's case, it is not so prejudicial such that the danger of unfair prejudice outweighs the probative value. In conducting the Rule 403 analysis I'll find that this evidence withstands any 403 challenge in that the danger of unfair prejudice does not substantially outweigh the probative value. In exercise of the Court's discretion, however, I am going to limit the number of exhibits that are published to the jury.

At trial, the court limited the number of pornographic magazines that could be viewed by the jury. Moreover, the court gave the appropriate limiting instruction. Indeed, the pornographic evidence admitted in this case corroborated K.C.'s statement that Defendant showed her a video of an adult man having sex with a young girl, as well as pornographic images of both girls and women, and that Defendant suggested K.C. have photos of herself taken. Given the trial judge's careful handling of the process, we conclude that it was not an abuse of discretion for the

trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence and, accordingly, to admit into evidence the pornography found in Defendant's home. Defendant's argument as to this evidence is overruled.

B. A.L.'s Testimony

In addition, Defendant contends that the trial court erred in admitting evidence of past acts of sexual misconduct by Defendant against A.L. Defendant asserts that the evidence was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) and that the probative value, if any, was substantially outweighed by the danger of unfair prejudice under Rule 403. The crux of Defendant's argument is that the acts of sexual misconduct committed against A.L. have nothing to do with K.C.

Defendant filed a motion *in limine* to exclude evidence of past acts of sexual misconduct against A.L. As noted above, a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999). Here, the trial court concluded that the evidence of prior acts was admissible under Rule 404(b) as sufficiently similar and not too remote in time. The State then elicited testimony on direct examination from A.L. about sexual misconduct committed by Defendant. Defendant never objected to the admissibility of A.L.'s testimony.

Indeed, in the context of arguing the admissibility of the pornographic magazines, Defense counsel conceded that A.L.'s testimony was proper 404(b) evidence:

> [COUNSEL FOR DEFENDANT]: . . . . Is there any possibility[ ]based on the evidence in this case that any juror could reasonably believe that if my client did the physical acts that [K.C.] has testified to, that he had some intent other than to arouse his own sexual — satisfy his own sexual gratification, or if he touched her, looking at the indecent liberties, that it was for the purpose of sexual gratification. . . . If the jurors believe that he did [the] acts there's really no possibility that they're going to say, well, he did it but we don't know why he did it, he was maybe conducting research or doing — I mean, there's just not a possibility[] because it goes right with the evidence that has been presented by [K.C.] If she [is to be] believed then the only possible intent was to gratify [Defendant's] sexual desires and his purpose as well.

> THE COURT: Are you stipulating to that fact?
>
> [COUNSEL FOR DEFENDANT]: Well, I'm not stipulating to it, Your Honor, I'm just saying that what other possible conclusion could there be. And the State is already going to get in the testimony of [A.L.] under 404(b) as to the prior conduct. I mean, it just seems like this is unnecessary, it's cumulative, and it's a very weak issue that this is necessary evidence to admit.

In addition, the following exchange occurred immediately prior to A.L.'s testimony:

> [COUNSEL FOR DEFENDANT]: For the record, I would object to the recall of Sergeant Dover. But I also have an issue to address with [A.L.].
>
> THE COURT: Okay. What's that issue?
>
> [COUNSEL FOR DEFENDANT]: That issue, Your Honor, is this. When the Court denied my motion to exclude her 404(b) testimony in that same proceeding the Court granted the motion to keep out the conviction that stemmed from that conduct unless my client testified or unless we opened the door during cross[-]examination. *And what I intend to do when she testifies is not challenge in any way her allegation that there was a sexual act, sexual intercourse, that occurred on August 25th, 2001.* That was the basis for the conviction, I'm not contesting that at all. However, in the materials that were handed over from the State when they interviewed her she's made a new claim[ ]that was never made back during that time frame. And I've read all of the discovery. Now she is saying that in addition to that there was an act where they had sexual intercourse in my client's car. So I do want to challenge that because everything I can see that was not the basis of the conviction. *I'm not contesting in any way shape or form that that act happened, however, I do want to challenge that allegation because I don't think that was part of that case. And I believe by doing so I'm not opening the door to the conviction.*

(Emphasis added).

Unlike the objection to the motion to suppress discussed *supra*, it is not clear from this colloquy that counsel for Defendant was objecting

to the admission of A.L.'s testimony under Rule 404(b). Defense counsel clearly objects to the recall of Sergeant Dover, but does not make a similar objection to A.L.'s testimony. Although counsel for Defendant mentioned Rule 404(b) in his objection, it is clear from the context of this exchange that his objection was to obtain a preliminary ruling that his cross-examination of A.L. would not open the door to evidence of Defendant's conviction by challenging the veracity of the car incident with A.L. As Defendant did not object pursuant to Rule 404(b), such objection is not preserved on appeal. *See State v. Lawrence*, 365 N.C. 506, 517–19, 723 S.E.2d 326, 334 (2012); *see also Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (citation and internal quotation marks omitted) (holding that a defendant cannot "swap horses between courts in order to get a better mount" on appeal). Because Defendant did not argue plain error in the alternative, he may not seek appellate review of this issue.

Assuming *arguendo* that Defendant properly preserved this issue for review, his argument would fail nonetheless. The test for determining the admissibility of evidence of prior conduct is "whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C. Gen. Stat. § 8C-1, Rule 403." *State v. Carpenter*, 179 N.C. App. 79, 84, 632 S.E.2d 538, 541 (citation omitted), *rev'd on other grounds*, 361 N.C. 382, 646 S.E.2d 105 (2007). "The determination of similarity and remoteness is made on a case-by-case basis," with the degree of similarity required being that which would lead the jury to the "reasonable inference that the defendant committed both the prior and present acts." *Id.* (citation and internal quotation marks omitted). Additionally, this Court stated that we have been "markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b)." *State v. Carpenter*, 147 N.C. App. 386, 392, 556 S.E.2d 316, 320 (2001) (citation and internal quotation marks omitted).

The Supreme Court in *Beckelheimer* upheld a trial court's admission of evidence under Rule 404(b) based on "key similarities" between the sex offense for which the defendant was being tried and a prior sex offense.[9] 366 N.C. at 131, 726 S.E.2d at 159. In so holding, the Court noted the trial court's finding that the victim in the charged crime was

9. In Beckelheimer,

> [t]he trial court found that "the age range of [the 404(b) witness] was close to the age range of the alleged victim," a finding supported by the evidence: the victim was an eleven-year-old male cousin of [the]

an eleven–year–old cousin of the defendant, while the 404(b) witness was also a cousin who had been around twelve years old at the time of the prior acts. *Id.* at 131, 726 S.E.2d at 159. Accordingly, the Court "conclude[d] . . . that the similar ages of the victims is more pertinent in [the] case than the age difference between victim and perpetrator." *Id.* at 132, 726 S.E.2d at 160. In addition, the Court upheld the trial court's finding that the location of the occurrence of the acts was similar in that the crime and the 404(b) offense both occurred after the defendant played video games with his victims in his bedroom. *Id.* at 131, 726 S.E.2d at 160. Lastly, the Court emphasized that the crime and the 404(b) offenses had both been "brought about" in the same manner with a similar progression of sexual acts. *Id.* at 131, 726 S.E.2d at 160. Therefore, the Court concluded that the similarities of the victims (*i.e.*, their ages and relationship to the defendant), the similarities of the locations, and the similarities in how the sexual offenses came to occur were sufficient to render the evidence admissible under Rule 404(b). *Id.* at 133, 726 S.E.2d at 160.

Defendant argues that his sexual relationship with A.L. was too remote in time and dissimilar in nature to be admissible under Rule 404. However, A.L was assaulted in the same car as K.C. While A.L. testified that the sex was consensual, A.L was a fourteen-year-old girl at the time of the assault and could not legally consent to sexual intercourse with Defendant. *See* N.C. Gen. Stat. § 14-27.7A (2011). Indeed,

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> defendant, and the witness was also [the] defendant's young male cousin who was around twelve years old at the time of the alleged prior acts. The trial court found similarities in "the location of the occurrence," a finding also supported by the evidence: [the] defendant and the victim spent time playing video games in [the] defendant's bedroom where the alleged abuse occurred, and [the] defendant and the witness also spent time playing video games together and in [the] defendant's bedroom where the alleged abuse occurred. Finally, the trial court found similarities in "how the occurrences were brought about," a finding supported by the evidence: the victim described two incidents during which the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep; he also described an incident during which [the] defendant lay on him pretending to be asleep, then reached inside the victim's pants to touch his genitals, then performed oral sex on the victim. The witness testified to a similar progression of sexual acts, beginning with fondling outside the clothing and proceeding to fondling inside the pants and then to oral sex; he also described how [the] defendant would pretend to be asleep while touching him.

366 N.C. at 131, 726 S.E.2d at 159. The North Carolina Supreme Court concluded that these similarities were sufficient to support the State's theory of *modus operandi*. *Id.*

contrary to the language in Defendant's brief, this encounter was *not* a "teenage romance."[10]

Defendant also argues that the roughly seven-year time period between the two assaults makes the assault of A.L. irrelevant to the assault of K.C. under Rule 404. However, this Court in *State v. Williamson* pointed out that "a ten-year gap between instances of similar sexual misbehavior [does] not render them so remote in time as to negate the existence of a common plan or scheme." 146 N.C. App. 325, 333, 553 S.E.2d 54, 60 (2001), *disc. review denied*, 355 N.C. 222, 560 S.E.2d 366 (2002). Therefore, the seven-year time gap would not negate the existence of a common plan or scheme in this case.

Lastly, we note that Defendant's interactions with A.L. are sufficiently similar to his interactions with K.C. such that A.L.'s testimony is relevant and admissible under Rule 404(b). Both children were young, white, and female. Defendant sexually assaulted each of them in the same car, a silver Hyundai Tiburon. He also took both children to a motel, where they engaged in sexual activity. While there were no pornographic materials or vials used when Defendant sexually assaulted A.L., he did ask both victims to have their own photos or videos made.

For the reasons stated above, Defendant's arguments are overruled, and we find

NO ERROR.

Judges CALABRIA and ELMORE concur.

10. Defendant repeatedly misstated the age difference between A.L. and Defendant in his brief. When A.L. was fourteen, Defendant was actually a twenty-seven-year-old man despite the fact that he told her he was nineteen.

STATE OF NORTH CAROLINA
v.
CRECENCIO FELIX RODELO

No. COA13-609

Filed 7 January 2014

1. Search and Seizure—motion to suppress evidence—cocaine—initial warrantless search—lack of standing

The trial court did not err in a trafficking in cocaine by possession case by denying defendant's motion to suppress evidence based on defendant's lack of standing to contest the initial warrantless search of a warehouse.

2. Drugs—trafficking in cocaine by possession—constructive possession—sufficiency of evidence

The trial court did not err in a trafficking in cocaine by possession case by concluding there was sufficient evidence of constructive possession. There were sufficient incriminating circumstances, beyond defendant's mere presence, to support the trial court's conclusion.

3. Constitutional Law—effective assistance of counsel—failure to request instructions

Defendant did not receive ineffective assistance of counsel in a trafficking in cocaine by possession case based on trial counsel's failure to request instructions on lesser-included offenses. The trial court did not err, much less commit plain error, in failing to give the instructions when the evidence showed that defendant was discovered in close proximity to 21.81 kilograms of cocaine, which was substantially more than the 28 grams required to constitute trafficking.

4. Constitutional Law—effective assistance of counsel—failure to object during State's closing arguments

Defendant did not receive ineffective assistance of counsel in a trafficking in cocaine by possession case based on trial counsel's failure to object to statements made by the prosecutor during closing arguments. The prosecutor's statements were either reasonable inferences drawn from the evidence or were not so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.

STATE v. RODELO

[231 N.C. App. 660 (2014)]

Appeal by Defendant from judgment entered 7 December 2012 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 21 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General John R. Green, Jr., for the State.

Unti & Lumsden, LLP, by Margaret C. Lumsden, for Defendant.

DILLON, Judge.

Crecencio Felix Rodelo ("Defendant") appeals from a judgment convicting him of trafficking in cocaine by possession, challenging (1) the trial court's denial of his motion to suppress evidence, (2) the sufficiency of the evidence to support his constructive possession of the cocaine, and (3) trial counsel's failure to request instructions on lesser included offenses or to object to statements made by the prosecutor during closing arguments, contending these failures amounted to ineffective assistance of counsel. We find no error.

The evidence of record tends to show the following: Based on information from a confidential informant regarding the delivery of a shipment of cocaine, agents from the Randolph County Sheriff's Office and from the Drug Enforcement Agency ("DEA") conducted surveillance on a particular warehouse in Randolph County. At approximately 11:00 P.M. on 30 November 2011, agents saw a tractor-trailer, driving without headlights, pull up, release the trailer, and pull into a garage bay of the warehouse. The agents approached the front and rear entrances to the warehouse and heard metallic "clanging" noises inside. One agent knocked on the front door, shouting "Policia." The noises stopped, and the back door to the warehouse opened suddenly. A man, later identified as Nathan Tobias-Tristan, stepped out. Tobias-Tristan told the agents who were stationed outside the rear entrance that he worked in the warehouse, that a friend of his was inside; that there were no illegal drugs inside; and that he consented to a search. Inside the warehouse, agents saw no one in the open, so they threatened to loose a dog, after which Defendant came out of the sleeper area of the tractor-trailer.

The agents discovered a hidden compartment in the tractor-trailer, containing numerous, tightly-wrapped packages, which the agents believed to contain cocaine. There was a chemical smell of cocaine in the warehouse and no indication of any kind of legitimate business. "[S]mall wrappings" were "all over" the tractor-trailer, as well as in the

open area of the Honda SUV parked next to the tractor-trailer. Defendant took one of the agents aside, out of the view of Tobias-Tristan, and told the agent that money was hidden in the tractor-trailer. Two agents went to the Sheriff's office to prepare a search warrant.

Upon searching the warehouse, police discovered $955,000.00 in cash in the tightly-wrapped packages in the tractor-trailer, as Defendant disclosed. They also found cocaine in a Honda Pilot, located in close proximity to the tractor-trailer. The Honda Pilot contained a hidden compartment, but the bundles of cocaine were in plain view. Each bundle weighed approximately one kilogram, the total net weight being 21.81 kilograms. Defendant was convicted of trafficking in cocaine by possession and sentenced to 175 to 219 months incarceration. From this judgment, Defendant appeals.

I: Motion to Suppress

[1] In Defendant's first argument, he contends the trial court erred by denying his motion to suppress evidence based on Defendant's lack of standing to contest the initial warrantless search of the warehouse. We disagree.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citation and quotation marks omitted).

"Before defendant can assert the protection afforded by the Fourth Amendment, however, he must demonstrate that any rights alleged to have been violated were his rights, not someone else's." *State v. Ysut Mlo*, 335 N.C. 353, 377, 440 S.E.2d 98, 110, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994). "Standing [to assert this protection] requires both an ownership or possessory interest and a reasonable expectation of privacy." *State v. Swift*, 105 N.C. App. 550, 556, 414 S.E.2d 65, 68-69 (1992). However, "[t]he burden of showing this ownership or possessory interest is on the person who claims that his rights have been infringed." *Id.* When a defendant neither asserts "a property nor a possessory interest [in the premise searched]," nor makes a showing of any other "circumstances giving rise to a reasonable expectation of privacy in the premises searched[,] . . . defendant has failed to establish his standing to object." *State v. Jones*, 299 N.C. 298, 306, 261 S.E.2d 860, 865 (1980).

In this case, the trial court found, *inter alia*, that Tristan-Tobias informed one of the officers that he just worked at the warehouse; that

there was someone else inside who was his friend; and that he consented to a search of the warehouse. The trial court further found that no evidence was presented that connected Defendant with the warehouse except his presence. Based on its findings, the trial court concluded:

> The defendant has failed to show that he has any standing to challenge Nathan Tristan-Tobias' consent to search the warehouse in question as the defendant has failed to show any reasonable expectation of privacy in the contents of the warehouse. Moreover, the Court concludes as a matter of law that Nathan Tristan-Tobias was reasonably, apparently entitled to give consent to search the premises at Warehouse Number 8 under the facts set out above. The Motion to Suppress is denied.

We believe the record supports the trial court's findings that Defendant presented no evidence of his "ownership or possessory interest" or of a "reasonable expectation of privacy." *Swift*, 105 N.C. App. at 556, 414 S.E.2d at 68-69. Accordingly, we believe the trial court did not err by concluding that Defendant failed to meet his burden of establishing standing. Moreover, assuming *arguendo* Defendant had standing to contest the search, we do not believe the trial court erred by concluding that it was reasonable for the agents to assume that Tristan-Tobias had the authority to give consent for a search of the warehouse, and the police later secured a search warrant based on probable cause.[1] *State v. Toney*, 187 N.C. App. 465, 469, 653 S.E.2d 187, 190 (2007) (stating, "[i]n the absence of actual authority, a search may still be proper if an officer obtains consent from a third party whom he reasonably believes has authority to consent") (citing *Illinois v. Rodriguez*, 497 U.S. 177, 111 L. Ed. 2d 148 (1990)).

II: Motion to Dismiss

[2] In Defendant's second argument on appeal, he contends the trial court erred by denying his motion to dismiss for lack of substantial evidence of Defendant's constructive possession of the contraband. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is

1. The trial court made a number of findings to establish that the agents acted on a reasonable belief that Tristan-Tobias had apparent authority to consent to the search.

whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (quotation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted).

Trafficking in cocaine by possession has two elements: (1) knowing possession of cocaine, and (2) the cocaine weighing 28 grams or more. *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873 (1991); *see also* N.C. Gen. Stat. § 90-95(h)(3)(a). "It is well established in North Carolina that possession of a controlled substance may be either actual or constructive." *State v. Jenkins*, 167 N.C. App. 696, 700, 606 S.E.2d 430, 433 (2005) (citation and quotation marks omitted). Constructive possession is not required to be exclusive: "Proof of nonexclusive, constructive possession is sufficient." *State v. McNeil*, 359 N.C. 800, 809, 617 S.E.2d 271, 277 (2005) (citation and quotation marks omitted). "A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it." *Jenkins*, 167 N.C. App. at 700, 606 S.E.2d at 433 (2005) (citation and quotation marks omitted).

> As the terms "intent" and "capability" suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury. . . . The fact that a person is present in a [vehicle] where drugs are located, nothing else appearing, does not mean that person has constructive possession of the drugs. . . . There must be evidence of other incriminating circumstances to support constructive possession.

State v. James, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citations omitted). "Where [contraband is] found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Butler*, 356 N.C. 141, 567 S.E.2d 137, 140 (2002). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the controlled substance. *State v. Peek*, 89 N.C. App. 123, 365 S.E.2d 320 (1988).

In this case, Defendant was neither in actual, physical possession of the controlled substance, nor did he have exclusive control of the warehouse. Therefore, to support a charge of trafficking by possession, the State was required to submit substantial evidence that Defendant constructively possessed the cocaine in this case. Defendant contends on appeal that the State did not submit substantial evidence of his constructive possession of the cocaine. In support of his position, Defendant cites *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976), for the proposition that the mere presence of a defendant near the location of the contraband is not sufficient to prove control and intent. In *Weems*, we stated that "mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession[,]" and further that "the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs." *Id.* at 571, 230 S.E.2d at 194 (citations and quotation marks omitted). In *Weems*, the police "placed a certain automobile under surveillance[,]" "saw three men get into the automobile and drive

away[,]" and "followed and shortly thereafter stopped the car." *Id.* The defendant was a passenger in the right front seat, and the driver was the registered owner of the automobile. *Id.* The third man was in a passenger in the back seat. "Packets of heroin were found hidden in three different locations in the car, two of which were in the front seat area and one in the back seat area." *Id.* The defendant was in close proximity to the heroin hidden in the front seat area, but "[t]here was no evidence [the] defendant owned or controlled the car[,] [and] [t]here was no evidence he had been in the car at any time other than during the short period which elapsed between the time the officers saw the three men get in the car and the time they stopped and searched it." Moreover, there "was no evidence of any circumstances indicating that defendant knew of the presence of the drugs hidden in the car." *Id.* at 571, 230 S.E.2d at 194-95. The *Weems* Court held, on these facts, that because there was "no evidence of any circumstance connecting the defendant to the drugs in any manner whatsoever other than the showing of his mere presence for a brief period in the car as a passenger[,]" there was not substantial evidence of the defendant's constructive possession of the heroin. *Id.* at 571, 230 S.E.2d at 195.

We believe *Weems* is distinguishable from the case *sub judice*, because, here, the State's case rests on more than Defendant's mere proximity to the controlled substance. Defendant hid from the agents when they first entered the warehouse. He was discovered alone in the tractor-trailer where the money was hidden. No one else was discovered in the warehouse. The cocaine was discovered in a Honda Pilot parked, with its doors open, in close proximity to the tractor-trailer containing the cash. The cash and the cocaine in this case were packaged in a similar fashion. "[S]mall wrappings" were "all over" the tractor-trailer, in which Defendant was hiding, as well as in the open area of the Honda SUV parked close to the tractor-trailer. Defendant admitted knowing where the money was hidden. The entire warehouse had a chemical smell of cocaine. In addition, when the police were questioning Tristan-Tobias and Defendant together, Defendant motioned to one of the agents "that he wanted to talk to [the agent]" out of the view of Tristan-Tobias, from which a jury could infer that Defendant knew and planned to reveal something, which Tristan-Tobias did not know, or that Defendant was guilty of a crime and was seeking leniency.

We believe the evidence in this case, *when viewed in the light most favorable to the State*, supports the trial court's conclusion that Defendant was in constructive possession of the cocaine. In other words, there were sufficient incriminating circumstances – beyond Defendant's

mere presence – to support the trial court's conclusion. Accordingly, Defendant's argument is overruled.

III: Ineffective Assistance of Counsel

In Defendant's third argument, he contends he received ineffective assistance of counsel when his attorney failed to ask for an instruction on the lesser included offense of and failed to object to the State's allegedly egregious statements in closing arguments.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006) (citations and quotation marks omitted). "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Defendant contends he was provided ineffective assistance of counsel in this case for two reasons: (1) trial counsel failed to request that the jury be instructed on conspiracy to traffic in cocaine and the lesser included offense of possession of cocaine; and (2) trial counsel failed to object to allegedly egregious, improper comments by the State during its closing argument. We address each argument in turn.

A: Instruction on Lesser Included Offenses

[3] First, Defendant contends his trial counsel rendered ineffective assistance by failing to request a jury instruction on conspiracy to traffic in cocaine and the lesser included offense of possession of cocaine. We disagree.

We note that in his brief, Defendant refers to the crime of conspiracy to traffic in cocaine as a lesser included offense of trafficking in cocaine. However, conspiracy to traffic in cocaine is not a lesser included offense of trafficking in cocaine, because the requirement of an agreement, while necessary to sustain a conviction for conspiracy, is not a necessary element of trafficking in cocaine by possession. *State v. Kemmerlin*, 356 N.C. 446, 476, 573 S.E.2d 870, 891 (2002) (stating that "conspiracy is a separate offense from the completed crime that normally does not merge into the substantive offense"). In this case, since the indictment does not contain an allegation of an agreement, it would have been error for the trial court to instruct the jury on conspiracy. Accordingly, we

address Defendant's argument as it relates to the lesser included offense of possession of cocaine.

Here, since Defendant failed to object to the omission of a lesser-included offense jury instruction at trial or to request such an instruction, we must review the instructions under the plain error standard. *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 315 (2002). Plain error is "a *fundamental error*, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted) (emphasis in original). Under plain error analysis, a defendant is entitled to reversal "only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

"[A] lesser included offense instruction is required if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations and quotation marks omitted). "Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

The key difference between the crime of trafficking in cocaine by possession and the lesser-included offense of felony possession of cocaine is weight; that is, trafficking by possession requires evidence of 28 grams or more of cocaine. *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873 (1991). Here, we do not believe the trial court committed plain error in failing to instruct the jury on conspiracy to traffic in cocaine and the lesser included offense of simple possession of cocaine. The evidence shows that Defendant was discovered in close proximity to 21.81 kilograms of cocaine, which is substantially more than the 28 grams required to constitute trafficking. Defendant offered no evidence that he was in possession of only less than 28 grams of cocaine. *See State v. King*, 99 N.C. App. 283, 290, 393 S.E.2d 152, 156 (1990). Accordingly, we conclude the trial court did not err, much less commit plain error, in failing to give these instructions.

B: Failure to Object to Remarks

[4] Defendant lastly argues he was provided ineffective assistance of counsel because trial counsel failed to object to allegedly

egregious, improper comments by the State during its closing argument. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). Our Supreme Court has stated:

> We have frequently held that counsel must be allowed wide latitude in jury arguments in hotly contested cases. Counsel may argue the facts in evidence and all reasonable inferences that may be drawn therefrom together with the relevant law in presenting the case.

State v. Anderson, 322 N.C. 22, 37, 366 S.E.2d 459, 468, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988).

In this case, Defendant argues that his trial counsel's failure to object to three statements made by the prosecutor during closing arguments constituted ineffective assistance of counsel: (1) the prosecutor's statement that Defendant was "exchanging money and drugs, from one vehicle to another," a proposition which was not established at trial and which would have been consistent with a charge of trafficking by transportation; (2) the prosecutor's statement that Defendant was "trafficking in cocaine and narcotics," when there was no evidence that Defendant also trafficked in narcotics; and (3) the prosecutor's characterization of the business as a place where drugs and money were exchanged, arguing in his brief that "[t]he idea that the business was involved only in trafficking in cocaine and narcotics has no basis in the evidence and is not supported by an inference from the evidence."

We believe these statements by the prosecutor, to which trial counsel failed to object, and which Defendant has made the basis of his ineffective assistance of counsel claim, were either reasonable inferences drawn from the evidence, or were not so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. The prosecutor's statement that Defendant was exchanging drugs and money from one vehicle to another may be reasonable inferred from $955,000.00 in cash in one vehicle and 21.81 kilograms of cocaine in a different vehicle parked, with its doors open, in close proximity. The characterization and description of the warehouse as a being a place for exchange of drugs and money could be reasonably inferred by the rural location of the warehouse close to major highways, the lack of a

business sign or descriptor or evidence of any other business being conducted therein, and the fact that a tractor-trailer containing $955,000.00 in cash pulled into the warehouse to join a car containing 21.81 kilograms of cocaine. Finally, referring to "narcotics," we do not believe, standing alone, was so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. As such, Defendant's argument that trial counsel provided ineffective assistance of counsel by failing to object to these three statements during the prosecutor's closing argument must necessarily fail.

We conclude Defendant had a fair trial, free from error.

NO ERROR.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA
v.
TRAVIS MELTON SHERMAN, DEFENDANT

No. COA13-811

Filed 7 January 2014

Jury—challenges for cause—denied—no error

The trial court did not err in a first-degree murder case by failing to allow defendant's for-cause challenges to two prospective jurors. The court's denial of the for-cause challenge to Mr. Antonelli was logically supported by his response that he was willing to follow the judge's instructions. Further, based on Mr. Brunstetter's testimony, the trial court properly denied the challenge because Mr. Brunstetter could render a fair verdict despite his concerns about the length of the trial.

Appeal by defendant from judgment entered 16 August 2012 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 9 December 2013.

Roy Cooper, Attorney General, by Jonathan P. Babb, Special Deputy Attorney General, for the State.

Glover & Petersen, P.A., by James R. Glover and Ann B. Petersen, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Travis Melton Sherman was charged with the murder of Kenneth Edward Ring in violation of N.C.G.S. § 14-17. A jury found defendant guilty of first-degree murder, and judgment was entered on the verdict sentencing him to life imprisonment without parole. He appeals.

The facts relevant to the sole issue presented on appeal involve two of defendant's for-cause challenges to prospective jurors. First, defendant moved to excuse prospective juror Mark Antonelli for cause because Mr. Antonelli said he would form opinions during the trial. The trial judge, after questioning Mr. Antonelli, denied defendant's motion, and as a result, defendant used a peremptory challenge to excuse Mr. Antonelli.

Next, defendant moved to excuse prospective juror Timothy Brunstetter for cause because he had orders from the United States Marine Corps to report to Quantico, Virginia, before the projected end of the trial. The trial judge denied this motion, and defendant used his sixth and final peremptory challenge to excuse Mr. Brunstetter.

After defendant used all six of his peremptory challenges, he renewed his motion to remove Mr. Antonelli and Mr. Brunstetter for cause. The trial judge again denied both motions, and defendant asked for additional peremptory challenges. The court refused to give defendant additional peremptory challenges. Later, defendant renewed his request for additional peremptory challenges so he could use one to excuse a prospective juror. The judge again denied the request for additional peremptory challenges. Defendant appeals.

On appeal defendant argues only one issue. He maintains that the trial court's failure to allow his for-cause challenges to prospective jurors Mr. Antonelli and Mr. Brunstetter was prejudicial error that requires a new trial. We disagree.

For a defendant to seek reversal of a judgment based on a trial court's refusal to allow his for-cause challenges, the defendant must comply with N.C.G.S. § 15A-1214(h). Compliance with N.C.G.S. § 15A-1214(h) is mandatory and is the only way to preserve for appellate review the denial of a for-cause challenge. *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986). Section 15A-1214 requires that

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C. Gen. Stat. § 15A-1214(h)–(i) (2011).

A review of the transcript reveals that defendant complied with N.C.G.S. § 15A-1214(h). He moved to excuse Mr. Antonelli for cause, and the court denied that motion. Defendant then used a peremptory challenge to excuse Mr. Antonelli. Defendant also moved to excuse Mr. Brunstetter for cause, and the court denied that motion. As a result, defendant used his final peremptory challenge to excuse Mr. Brunstetter. After defendant used his final peremptory challenge, he renewed his motions to excuse Mr. Antonelli and Mr. Brunstetter for cause, and the court denied both motions. Therefore, defendant has complied with the provisions of N.C.G.S. § 15A-1214(h).

N.C.G.S. § 15A-1212 lists the grounds for challenges for cause to a prospective juror. "We review a trial court's ruling on a challenge for cause for abuse of discretion." *State v. Lasiter*, 361 N.C. 299, 301, 643 S.E.2d 909, 911 (2007). A trial court abuses its discretion when its ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1998). When we review a trial judge's ruling we consider only whether it is supported by the record, not whether we agree with the ruling. *Lasiter*, 361 N.C. at 302, 643 S.E.2d at 911. This is a deferential standard of review because a trial judge has the advantage of interacting with a juror. *Id.*

Defendant argues that Mr. Antonelli should have been excused for cause because he responded that he would form opinions during the trial, which would substantially impair his ability to follow and apply the law. Defendant fails to state the statutory ground upon which he is relying for his for-cause challenge, but, for two reasons, it is implied that he is relying on N.C.G.S. § 15A-1212(8), which allows a for-cause challenge when, "[a]s a matter of conscience, . . . [a juror] would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C. Gen. Stat. § 15A-1212(8) (2011). First, defendant argues that forming opinions during trial would impair Mr. Antonelli's ability to apply the law of North Carolina. Second, defendant cites *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), in support of his argument, which the General Assembly codified at N.C.G.S. § 15A-1212(8). N.C. Gen. Stat. § 15A-1212 official commentary (2011). Therefore, while defendant fails to state that he is relying on N.C.G.S. § 15A-1212(8), we infer he is relying on N.C.G.S. § 15A-1212(8) based on his argument.

A review of the transcript reveals the following relevant exchanges:

> MR. DOLAN: Let me ask you this: . . . Can you be sure that you would wait until all of the evidence was presented before you came and started to make any decision in this case?
>
> [MR. ANTONELLI]: I don't think I could guarantee that, but I think I would be able to, but I couldn't guarantee it.
>
> MR. DOLAN: What do you mean you don't think you [can] guarantee it?
>
> [MR. ANTONELLI]: Well, because you form opinions as it goes on and it changes.
>
> MR. DOLAN: And are you saying that you think you would form opinions as the case went on?
>
> [MR. ANTONELLI]: Probably.
>
> . . . .
>
> MR. DOLAN: . . . Are you saying you don't think that you can wait, that you're probably going to form opinions along the way?
>
> [MR. ANTONELLI]: Most likely.

MR. DOLAN: I would move for cause, your Honor.

. . . .

THE COURT: Yes.

Mr. Antonelli, let me follow-up with just a question for you. You've already heard me instruct several times to that one of the rules you have to follow is to [sic] not form or express any opinions about the outcome of this case, and there are a number of important steps that a case must go through. There is the evidence, there is the arguments of counsel, there is my instructions on the law, and then there's deliberation. What we require of jurors is the ability to keep an open mind and not form or express opinions until they get into the jury deliberation room, engage in deliberation with their fellow jurors, consider all of the things I've just described. Do you believe that you could fulfill that duty as a juror?

[MR. ANTONELLI]: Yes, but I believe I would still form an opinion but can still be open-minded.

THE COURT: In the event that you were instructed on the law or persuaded by an argument or persuaded by evidence later in the trial that your opinion was perhaps in error, would you be able to set aside any opinion that you had formed and listen to either of the evidence or the instructions or the argument or the deliberation in views of your fellow jurors? Would you be able to set aside any opinion that you had formed and render a verdict according to the instructions, the law, and the argument and the evidence?

[MR. ANTONELLI]: I believe so. I can't guarantee that, but I believe so.

THE COURT: And when you say you can't guarantee that, what do you mean by that?

[MR. ANTONELLI]: I've never been through this so I don't know how my opinion is going to form . . .

. . . .

THE COURT: Are you willing to follow my instructions to keep an open mind throughout this case?

> [MR. ANTONELLI]: Yes.
>
> THE COURT: I'm going to deny the motion for cause at this time.
>
> MR. DOLAN: I just want to be clear, Mr. Antonelli, and I'm not trying to pick on you. Is it your position that you will form an opinion as the case progresses?
>
> [MR. ANTONELLI]: I would probably say most likely, yeah, I would form an opinion as it was going on, but I can't guarantee that I definitely will.

The above-quoted portion of voir dire demonstrates that the trial court did not abuse its discretion when disallowing the for-cause challenge. The trial judge was in the best position to observe Mr. Antonelli and to weigh and decide the credibility of his responses. The judge's denial of the for-cause challenge to Mr. Antonelli is logically supported by his response that he was willing to follow the judge's instructions. Therefore, the trial court did not err when disallowing defendant's for-cause challenge to Mr. Antonelli.

Next, defendant argues, without citing any statutory authority or case law, that the trial court erred when it denied his for-cause challenge to Mr. Brunstetter because he was a Marine with orders to report to Quantico, Virginia, before the projected end of the trial. We assume that defendant is relying on the catch-all provision of N.C.G.S. § 15A-1212 for his challenge, which allows a for-cause challenge when a juror "[f]or any other cause is unable to render a fair and impartial verdict." N.C. Gen. Stat. § 1212(9).

Our Supreme Court considered whether a prospective juror could render a fair verdict because he was concerned about the estimated time of the trial in *State v. Reed*, 355 N.C. 150, 160, 558 S.E.2d 167, 174 (2002), *appeal after remand*, 162 N.C. App. 360, 590 S.E.2d 477 (2004). The Court concluded that the trial court did not abuse its discretion when it denied the for-cause challenge. *Id.* In reaching this conclusion, the Court noted that trial judges routinely decide whether to excuse a prospective juror because of concerns about the length of a trial. *Id.* Also, in *Reed*, despite the estimated length of the trial, the prospective juror stated that he could be fair to both sides. *Id.*

In this case, the trial court did not abuse its discretion in refusing to allow the for-cause challenge. Mr. Brunstetter twice asserted that despite his orders to report to Quantico, Virginia, he could focus on the trial if

he was selected to be a juror. Also, the trial court was able to observe Mr. Brunstetter when he made these statements. Therefore, based on Mr. Brunstetter's testimony, the trial court properly denied the challenge because Mr. Brunstetter could render a fair verdict despite his concerns about the length of the trial.

No Error.

Judges ERVIN and MCCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
EMANUEL EDWARD SNELLING, JR.

No. COA13-518

Filed 7 January 2014

1. Robbery—with dangerous weapon—jury instruction—presence of a firearm—proper clarification

The trial court did not err in a robbery with a dangerous weapon case in its answer to a jury question about whether the State must prove the actual presence of a firearm on the charge. The trial court's answer properly clarified that the jury must find either that 1) defendant actually possessed a firearm; or 2) victim reasonably believed that defendant possessed a firearm, in which case the jury could infer that the object was a firearm.

2. Sentencing—prior record level—defendant's admission—statutory procedures—inappropriate

The trial court did not err by sentencing defendant as a prior record level III. The trial court did not fail to comply with N.C.G.S. § 15A-1022.1 because within the context of defendant's sentencing hearing, the procedures specified by N.C.G.S. § 15A-1022.1 would have been inappropriate.

3. Sentencing—probation point—no notice of intent—notice not waived

The trial court erred by including a probation point in its sentencing of defendant as a prior record level III. The trial court never determined whether the statutory requirements of N.C.G.S.

§ 15A-1340.16(a6) were met as there was no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point and the record did not indicate that defendant waived his right to receive such notice.

Appeal by defendant from judgment entered 23 August 2012 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 20 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth N. Strickland, for the State

Attorney Anna S. Lucas, for defendant.

Elmore, Judge.

On 23 August 2012, a jury found Emanuel Edward Snelling, Jr. (defendant), guilty of larceny from the person, robbery with a dangerous weapon, and second degree kidnapping. The trial court sentenced defendant as a prior record level III offender (PRL III) to consecutive terms of active imprisonment of 26 to 41 months (second degree kidnapping) and 84 to 110 months (robbery with a dangerous weapon), with 6 to 8 months (larceny from the person) to be served concurrently. Defendant now appeals and raises as error the trial court's: 1.) failure to answer a jury question and 2.) determination that he was a PRL III. After careful consideration, we conclude that there was no trial error as to the jury question, but we vacate the sentence of the trial court and remand for a new sentencing hearing.

I. Facts

During the deliberation phase of trial, the jury indicated that it had a question about the robbery with a dangerous weapon charge. Initially, the trial court instructed the jury on the sixth and seventh elements of robbery with a dangerous weapon as follows:

> Sixth, that the defendant had a firearm in his possession at the time he obtained the property, or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant's conduct . . . seventh, that the defendant obtained the property by endangering or threatening the life of [victim] with a pistol or firearm.

Thereafter, the trial court realized that the initial instruction was incomplete and told the jury:

> If you'll turn back to the robbery with a firearm, the sixth element, doesn't have the ending language on it and it should read: In – let's see. Read me -- read it again. Sixth, that the defendant had a firearm in his possession at the time he obtained the property or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant's conduct represented it to be. It should have "be" at the end. I've learned there aren't any English majors on the Pattern Jury Instructions committee. Anybody have any questions about that remaining language? Okay. Thank you.

A short time later, the jury posed this question to the trial court: "does the [S]tate have to prove physical presence of a pistol for the seventh bullet of robbery with a firearm or is it simply that she had to believe the presence of a pistol and feel threatened?" Over defendant's objection, the trial court responded:

> TRIAL COURT: When I read the instruction for number six, that the defendant had a firearm in his possession at the time he obtained the property or that he was reasonably or reasonably appeared to the victim that a firearm was being used, in which case you *may infer that the said instrument was what the defendant's conduct represented it to be. That carries over into any reference to a pistol in the instructions*, so number seven, when it refers to a pistol, you can take it in context of the fact that the statement about a firearm and the representation of a firearm from number six. Okay, six. Does that answer the question?
>
> JUROR NO. 6: I believe so.

(Emphasis added). Thereafter, the jury continued deliberating and reached a unanimous verdict of guilty as to all charges. At sentencing, the parties stipulated that defendant had 6 prior record level points and was thus a PRL III. It is also undisputed that 1 of the 6 points was assigned to defendant because he was on probation (the probation point) at the time these offenses were committed. At no time did the trial court: 1.) advise defendant of his rights to prove mitigating factors and have a jury decide the existence of the probation point; or 2.) determine

whether written notice was given to defendant by the State of its intent to seek the probation point.

II. Analysis

a.) Answer to Jury Question

[1] Defendant first argues that the trial court erred in its answer to a jury question about whether the State must prove the actual presence of a firearm on the charge of robbery with a dangerous weapon. We disagree.

> On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be 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. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006) (citations and quotation marks omitted). The trial court has the duty to "declare and explain the law arising on the evidence relating to each substantial feature of the case." *State v. Hockett*, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983) (citation and quotation omitted).

In support of his argument that the trial court failed to answer the jury's question, defendant relies on *Hockett*, which also involved a robbery with a dangerous weapon charge. *Id.* In *Hockett*, the jury asked the trial court during its deliberation if "the threat of harm or force with a deadly weapon [is] the same as actually having or using a weapon?" *Id.* Instead of answering the jury's question or reviewing the elements of the charge, the trial court instructed the jury to continue its deliberation. *Id.* at 801-02, 309 S.E.2d at 252-53. Our Supreme Court ruled that because "the jury did not understand . . . how the presence or absence of a gun would affect the degree of guilt[,]" the trial court's failure to answer the jury's question of law was prejudicial error. *Id.* at 802, 309 S.E. 2d at 253.

Defendant's reliance on *Hockett* is misplaced. Unlike in *Hockett*, the trial court in the present case answered the jury's legal question, and the jury indicated that it understood the trial court's answer. The

trial court told the jury to interpret element numbers six and seven of the robbery with a dangerous weapon charge in tandem rather than as mutually exclusive requirements. Specifically, the trial court's answer properly clarified that the jury must find either that 1.) defendant actually possessed a firearm; or 2.) victim reasonably believed that defendant possessed a firearm, in which case the jury could infer that the object was a firearm. *See State v. Lee*, 128 N.C. App. 506, 510, 495 S.E.2d 373, 376 (1998) ("The State need only prove that the defendant represented that he had a firearm and that circumstances led the victim reasonably to believe that the defendant had a firearm and might use it."); *see also State v. Bartley*, 156 N.C. App. 490, 496, 577 S.E.2d 319, 323 (2003) ("Proof of armed robbery requires that the victim reasonably believed that the defendant possessed . . . a firearm in the perpetration of the crime[;]" *State v. Fleming*, 148 N.C. App. 16, 22, 557 S.E.2d 560, 564 (2001) ("If there is some evidence that the implement used was not a firearm . . . a permissive inference[] [permits] but does not require the jury to infer that the instrument used was in fact a firearm[.]"). Thus, the trial court did not err in its answer to the jury.

b.) Sentencing Procedure Pursuant to N.C. Gen. Stat. 15A-1022.1

[2] Defendant also argues that the trial court erred in sentencing defendant as a PRL III because it failed to comply with N.C. Gen. Stat. § 15A-1022.1 (2011). We disagree.

"[We review alleged sentencing errors for] 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)). However, "[t]he determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted). The PRL for a felony offender during sentencing is determined by "the sum of the points assigned to each of the offender's prior convictions[.]" N.C. Gen. Stat. § 15A-1340.14 (2011). A PRL II offender has between 2-5 points, whereas a PRL III offender has at a minimum of 6 and no more than 9 points. *Id.* A sentencing error that improperly increases a defendant's PRL is prejudicial. *State v. Hanton*, 175 N.C. App. 250, 260, 623 S.E.2d 600, 607 (2006).

Under N.C. Gen. Stat § 15A-1340.14 (b)(7) (2011), a defendant shall be assigned one point "[i]f the offense was committed while the offender was on supervised or unsupervised probation[.]" "[T]he jury shall determine whether the point should be assessed[,]" unless the defendant

admits to it. N.C. Gen. Stat. § 15A-1340.16 (2011). In such cases, the point will be treated as though it was found by the jury. *Id.* These admissions are generally constrained by the procedures set out in N.C. Gen. Stat. 15A-1022.1, which mandates that the trial court

> address the defendant personally and advise the defendant that: (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

N.C. Gen. § 15A-1022.1 (2011). However, these procedural requirements are not mandatory when "the context clearly indicates that they are inappropriate." *Id.*

In *State v. Marlow*, the defendant was sentenced at a PRL II. *State v. Marlow*, ___ N.C. App. ___, ___, 747 S.E.2d 741, 748 (2013). One of his points was determined pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) because of a conviction while he was on probation. *Id.* Even though the trial court did not make any of the inquiries mandated by N.C. Gen. Stat. § 15A-1022.1, this Court held that "conducting a statutorily mandated colloquy with [the defendant] . . . would have been inappropriate and unnecessary" where: 1.) the defendant stipulated to his prior record level; 2.) the defendant's counsel could have "inform[ed] [the defendant] of the repercussions of conceding certain prior offenses[;]" 3.) the "defendant had the opportunity to interject had he not known such repercussions[;]" and 4.) the additional point was a mere "routine determination" by the trial court based on the circumstances. *Id.* at ___, 747 S.E.2d at 747-48.

Similarly, in the case at bar, it is uncontested that defendant stipulated to being on probation when he committed larceny from the person, robbery with a dangerous weapon, and second degree kidnapping. The prosecutor and defendant's counsel signed the prior record level worksheet "agree[ing] with the defendant's prior record level[.]" At sentencing, defendant stipulated that he was a PRL III: two points for a Class H Felony conviction, three points for three class one misdemeanors, and one probation point. Defendant admitted at trial that he was on probation at the time these offenses occurred, and his attorney also alluded to defendant's probation during sentencing. Moreover, the trial court spoke at sentencing, without resistance from defendant, about his having "just been placed on probation" when he committed these offenses. Thus, the trial court ruled that defendant's PRL was stipulated

by the parties resulting in six prior record points at a PRL III. Despite defendant's numerous opportunities to oppose the finding of the probation point, he did not. Under the circumstances, the determination of defendant's probation point was routine and a non-issue. Accordingly, we hold that within the context of defendant's sentencing hearing, the procedures specified by N.C. Gen. Stat. § 15A-1022.1 would have been inappropriate. *See Marlow*, *supra*.

c.) Sentencing Procedure Pursuant to N.C. Gen. Stat. § 15A-1340.16(a6)

[3] In his final argument on appeal, defendant avers that the trial court erred in sentencing defendant as a PRL III because it failed to comply with N.C. Gen. Stat § 15A-1340.16(a6). We agree.

N.C. Gen. Stat. § 15A-1340.16(a6) requires the State

> to provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2011). The statute is clear that unless defendant waives the right to such notice, the State must provide defendant with advanced written notice of its intent to establish: 1.) any of the twenty aggravating factors listed in N.C. Gen. Stat. § 15A-1340.16(d); or 2.) a probation point pursuant to N.C. Gen. Stat. 15A-1340.14(b)(7). *Id.* The trial court shall determine if the State provided defendant with sufficient notice or whether defendant waived his right to such notice. N.C. Gen. Stat. § 15A-1022.1 (2011).

Here, the trial court never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point. Moreover, the record does not indicate that defendant waived his right to receive such notice. Thus, the trial court erred by including the probation point in its sentencing of defendant as a PRL III. This error was prejudicial because the probation point raised defendant's PRL from a PRL II to a PRL III. *See Hanton*, *supra*.

III. Conclusion

In sum, the trial court did not err in its answer to a jury question about whether the State must prove the actual presence of a firearm on the charge of robbery with a dangerous weapon. Similarly, the trial court did not err in failing to conduct a statutorily mandated colloquy with defendant pursuant to N.C. Gen. Stat § 15A-1022.1. However, the trial court committed prejudicial error by including the probation point in sentencing defendant as a PRL III without determining if the State provided sufficient notice of its intent to seek the probation point or whether defendant waived such statutory requirements per N.C. Gen. Stat. § 15A-1340.16(a6). As such, we vacate defendant's sentence and remand to the trial court for resentencing in accordance with this opinion.

Remanded for new sentencing hearing.

Judges McCULLOUGH and DAVIS concur.

STATE OF NORTH CAROLINA
v.
LARRY STUBBS

NO. COA13-174

Filed 7 January 2014

Constitutional Law—1973 sentence of life with the possibility of parole—not cruel and unusual

Defendant's 1973 sentence of life imprisonment with the possibility of parole for second-degree burglary was reinstated after he was paroled in 2008 and convicted of impaired driving in 2010. Although defendant argued that the original sentence was excessive under evolving standards of decency and the Eighth Amendment, the sentence was severe but not cruel or unusual in the constitutional sense because it allowed for the realistic opportunity to obtain release before the end of his life. The trial court erred by concluding that defendant's life sentence violated the prohibitions of the Eighth Amendment to the United States Constitution and the case was remanded for reinstatement of the original sentence.

Judge STEPHENS concurs by separate opinion.

Judge DILLON concurs by separate opinion.

Appeal by the State from judgment entered 5 December 2012 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Sarah Jessica Farber for defendant-appellee.

BRYANT, Judge.

Where the trial court erred in concluding that defendant's sentence of life in prison with the possibility of parole was a violation of the Eighth Amendment, we reverse and remand the trial court order modifying defendant's original sentence.

On 7 May 1973, a complaint and warrant for arrest was issued against seventeen-year-old defendant Larry Connell Stubbs in Cumberland County.

> [The complainant alleged that on that day, defendant] unlawfully, willfully, and feloniously and burglariously [sic] did break and enter, at or about the hour of two o'clock AM in the night . . . the dwelling house of [the victim] located at 6697 Amanda Circle, Fayetteville, N.C. and then and there actually occupied by the said [victim], with the felonious intent [defendant], [sic] the goods and chattels of the said [victim], in the said dwelling house then and there being, then and there feloniously and burglariously [sic] to steal and carry away, said items stolen and carried away, one table lamp, one General Electric Record Player; one Magnus Electric Organ; One Portable General Electric 19" television set; . . . one man's suit color black, the personal property of [the victim], and valued at $394.00.

In addition to first-degree burglary and felonious larceny, defendant was charged with and later indicted on the charge of rape. On 6 August 1973, defendant pled guilty to second-degree burglary and assault with intent to commit rape. The State dismissed the charge of felonious larceny.

On the charge of second-degree burglary, the trial court accepted defendant's plea, entered judgment, and sentenced defendant to an active term for "his natural life."[1] On the charge of assault with intent to commit rape, the trial court sentenced defendant to an active term of fifteen years to run concurrently with his life sentence.

On 11 May 2011, defendant filed a pro se motion for appropriate relief (MAR) in the Cumberland County Superior Court asking that his sentence of life in prison on the charge of second-degree burglary be set aside, that he be resentenced, and after awarding time served as credit toward the new sentence, that he be released from prison. As a statutory basis for the relief requested, defendant cited N.C. Gen. Stat. § 15A-1415(b)(7), "Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time", and G.S. § 15A-1340.17, "Punishment limits for each class of offense and prior record level" pursuant to the Structured Sentencing Act codified at §§ 15A-1340.10, *et seq*. Defendant's contention was that his original sentence was grossly disproportionate to the maximum sentence he could receive for the same crime if sentenced today. Sentenced to an active term for his natural life for second-degree burglary, defendant maintained that if he had been sentenced under the Structured Sentencing Act, effective 1 October 1994, his term would have been between twenty-nine and forty-four months. "Because there has been a 'significant change' in the law," defendant asserted that his life sentence should now be considered cruel and unusual punishment. Defendant petitioned the Superior Court to resentence him based on "evolving standards of decency under the Eighth Amendment of the United States Constitution which prohibits cruel and unusual punishment being inflicted[,] as does [] Article I, section 27 of the North Carolina Constitution." Defendant also petitioned to proceed *in forma pauperis*.

On 10 October 2011, Senior Resident Superior Court Judge Gregory A. Weeks filed an order in which he concluded that defendant's "Motion for Appropriate Relief [was] not frivolous, [had] merit, that a summary disposition [was] inappropriate, and that a hearing [was] necessary." The court appointed the Office of North Carolina Prisoner Legal Services to represent defendant.

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1. Pursuant to N.C. Gen. Stat. § 148-58, effective in 1973, "Time of eligibility of prisoners to have cases considered," "any prisoner serving sentence for life shall be eligible [to have their cases considered for parole] when he has served 10 years of his sentence." N.C. Gen. Stat. § 148-58 (1973) (amended in 1973, effective 1 July 1974, to provide that the period a prisoner sentenced to life imprisonment must serve before being eligible for parole would be changed from ten to twenty years) (repealed 1977).

On 13 August 2012, the State filed its Memorandum Opposing Defendant's Motion for Appropriate Relief. In its memorandum, the State addressed defendant's motion as a request for retroactive application of the Structured Sentencing Act and a challenge to his life sentence pursuant to the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution. The State maintained that defendant was not entitled to the relief sought: the Structured Sentencing Act was applicable to criminal offenses occurring on or after 1 October 1994; and "[t]o the extent that [] Defendant's argument challenges his sentence pursuant to the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution," Eighth Amendment jurisprudence proscribes a different analysis than the one proposed by defendant. The State further asserted that our State Appellate Courts have rejected arguments similar to the one defendant presented.

On 15 August 2012, defendant, through appointed counsel, filed a Memorandum Supporting Defendant's Motion for Appropriate Relief. Acknowledging our North Carolina Supreme Court's holding which declined to retroactively apply the sentencing provisions codified under the Structured Sentencing Act, *see State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012), defendant asserted that he was entitled to relief "because his sentence of Life Imprisonment for his conviction of Second Degree Burglary in 1973 is unconstitutionally excessive under evolving standards of decency and the Eighth Amendment to the United States Constitution . . . and Article I, Section 27 of the North Carolina Constitution." Defendant asserted that "[t]o gauge evolving standards of decency, the [United States] Supreme Court looks to legislative changes and enactments." Defendant also asserted that "[t]he [Structured Sentencing Act] is the most current expression of North Carolina's assessment of appropriate and humane sentences, and [] is an objective index of sentence proportionality for Eighth Amendment analysis purposes." "As of today, Defendant has served **nearly forty years** in prison for his Second Degree Burglary conviction. This is nearly ten times the length of time that any defendant could be ordered to serve today." Defendant contended that his sentence was excessive, that it violated the United States Constitution and the North Carolina Constitution "making it necessary to vacate Defendant's life sentence and to resentence him to a term of years that is not disproportionate, cruel, or unusual."

Following a 13 August 2012 hearing, the trial court on 5 December 2012 entered an order in which it found that on 6 August 1973, defendant

pled guilty to second-degree burglary and assault with intent to commit rape. Defendant had been sentenced to life in prison for second-degree burglary along with a concurrent sentence of fifteen years imprisonment for assault with intent to commit rape. Defendant completed his sentence for assault with intent to commit rape in 1983 and was currently incarcerated solely for his second-degree burglary conviction. "As of 30 November 2012, [defendant] has been in the custody of the North Carolina Department of Public Safety for this crime for more than thirty-six years." The court found that defendant was paroled in December 2008 and that while on parole, he was charged with and convicted of driving while impaired. Subsequent to his conviction, defendant's parole status was revoked, and he was returned to incarceration. The trial court concluded that under "evolving standards, [defendant's] sentence violated the Eighth Amendment and is invalid as a matter of law." The trial court granted defendant's motion for appropriate relief and vacated the judgment entered 6 August 1973 as to the second-degree burglary conviction, resentencing defendant to a term of thirty years. Defendant was given credit for 13,652 days spent in confinement. The trial court further ordered that the North Carolina Department of Public Safety Division of Adult Correction release defendant immediately.

The State filed with this Court petitions for a writ of certiorari to review the 5 December 2012 trial court order and a writ of supersedeas to stay imposition of the trial court's order pending appeal. Both petitions were granted.[2]

On appeal, the State brings forth the issue of whether the Superior Court erred by ruling that defendant's 1973 sentence of life imprisonment

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2. We acknowledge with appreciation the responsiveness of the State and defense counsel in providing this Court with memoranda of additional authority regarding a question presented by this Court at oral argument reflecting on our jurisdiction to hear this appeal. We also note that because one panel of this Court has previously decided the jurisdictional issue by granting the State's petition for a writ of certiorari to hear the appeal, we cannot overrule that decision. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case. Thus the second panel in the instant case had no authority to exercise its discretion [against] reviewing the trial court's order when a preceding panel had earlier decided to the contrary."). However, separate concurring opinions further address the issue of jurisdiction to hear this appeal.

with the possibility of parole for a second-degree burglary conviction is now in violation of the Eighth Amendment to the United States Constitution, vacating defendant's 1973 judgment, and resentencing him. The State argues on appeal that (A) the trial court lacked jurisdiction over the original judgment and (B) that it incorrectly interpreted the precedent of the Supreme Court of the United States.

"Our review of a trial court's ruling on a defendant's MAR is 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Peterson*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, (No. COA12-1047) (2013) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

A

The State argues that the trial court lacked jurisdiction over the original judgment. Specifically, the State contends that defendant's motion for appropriate relief was made pursuant to N.C. Gen. Stat. § 15A-1415 but that no provision of section 15A-1415 granted the trial court jurisdiction to modify the original sentence. We disagree.

A trial court loses jurisdiction to modify a defendant's sentence, "subject to limited exceptions, after the adjournment of the session of court in which [the] defendant receive[s] this sentence[,] [a]lthough a trial court may properly modify a sentence after the trial term upon submission of a [Motion for Appropriate Relief (MAR)][.]" *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 495 (citations omitted). Section 15A-1415 of the North Carolina General Statutes lists "the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment[.]" N.C. Gen. Stat. § 15A-1415(b) (2011).

At the 13 August 2012 hearing on defendant's MAR, defendant contended that he was entitled to relief pursuant to N.C. Gen. Stat. § 15A-1415(b)(8). In its 5 December 2012 order, the trial court concluded that its authority over the 6 August 1973 judgment was allowed pursuant to N.C.G.S. § 15A-1415(b)(4) & (b)(8).

Pursuant to General Statutes, section 15A-1415, a defendant may assert by MAR made more than ten days after entry of judgment the following grounds:

> (4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

. . .

> (8) The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise invalid as a matter of law.

N.C.G.S. § 15A-1415(b)(4) & (b)(8).

The gravamen of the argument presented in defendant's MAR submitted to the trial court is that because "his sentence of Life Imprisonment for his conviction of Second Degree Burglary in 1973 is unconstitutionally excessive under evolving standards of decency and the Eighth Amendment to the United States Constitution . . . and Article I, Section 27 of the North Carolina Constitution," the trial court had jurisdiction over the 6 August 1973 judgment to consider whether defendant's sentence was "invalid as a matter of law." N.C.G.S. § 15A-1415(b)(8); *see also* N.C.G.S. § 15A-1415(b)(4). We agree and therefore, overrule the State's challenge to the trial court's jurisdiction.

B

The State further contends that the trial court misapplied United States Supreme Court precedent, applying the wrong test to determine whether an Eighth Amendment violation has occurred. We agree in part.

The Eighth Amendment to the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[,]" U.S. Const. amend. VIII, and is made applicable to the States by the Fourteenth Amendment, *id.* amend. XIV. The Constitution of North Carolina similarly states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. Const. art. I, § 27. Despite the difference between the two constitutions, one prohibiting "cruel and unusual punishments," the other "cruel or unusual punishments," "[our North Carolina Supreme Court] historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998) (citations omitted), *superseded by statute on other grounds as stated in In re J.L.W.*, 136 N.C. App. 596, 525 S.E.2d 500 (2000).

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . [T]he words of the Amendment are not

precise, and [] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01, 2 L. Ed. 2d 630, 642 (1958) (citation omitted). "The [Eighth] Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . , against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102-03, 50 L. Ed. 2d 251, 259 (1976) (citation and quotations omitted).

In *Estelle v. Gamble*, the United States Supreme Court observed that when the Court initially applied the Eighth Amendment, the challenged punishments regarded methods of execution. *Id.* at 102, 50 L. Ed. 2d at 258. However, "the Amendment proscribes more than physically barbarous punishments." *Id.* at 102, 50 L. Ed. 2d 259.

> To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Graham v. Florida, 560 U.S. ___, ___, 176 L. Ed. 2d 825, 835 (2010) (citations, quotations, and bracket omitted).

> [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense. Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. The Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.

Kennedy v. Louisiana, 554 U.S. 407, ___, 171 L. Ed. 2d 525, 538 (citations and quotations omitted) *opinion modified on denial of reh'g*, 554 U.S. 945, 171 L. Ed. 2d 932 (2008).

> The concept of proportionality is central to the Eighth Amendment. . . .
>
> The Court's cases addressing the proportionality of sentences fall within two general classifications. The first

> involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

Graham, 560 U.S. at ___, 176 L. Ed. 2d at 835-36.

As to the first classification, in which the Court considers whether a term-of-years sentence is unconstitutionally excessive given the circumstances of a case, the Court noted that "it has been difficult for [challengers] to establish a lack of proportionality." *Id.* at ___, 176 L. Ed. 2d at 836. Referring to *Harmelin v. Michigan*, 501 U.S. 957, 115 L. Ed. 2d 836 (1991), as a leading case on the review of Eighth Amendment challenges to term-of-years sentences as disproportionate, Justice Kennedy delivering the opinion of the *Graham* Court acknowledged his concurring opinion in *Harmelin*: "[T]he Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' " *Graham*, 560 U.S. at ___, 176 L. Ed. 2d at 836 (quoting *Harmelin*, 501 U.S. at 997, 1000–1001, 115 L. Ed. 2d at 836 (Kennedy, J., concurring in part and concurring in judgment)). *Accord Rummel v. Estelle*, 445 U.S. 263, 288, 63 L. Ed. 2d 382 (1980) (Powell, J., dissenting (The scope of the Cruel and Unusual Punishments Clause extends . . . to punishments that are grossly disproportionate. Disproportionality analysis . . . focuses on whether, a person deserves such punishment . . . . A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice. The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sentence is challenged.")).

In *Harmelin*, 501 U.S. 957, 115 L. Ed. 2d 836, the defendant challenged his sentence of life in prison without possibility of parole on the grounds that it was "significantly" disproportionate to his crime, possession of 650 or more grams of cocaine. The defendant further argued that because the sentence was mandatory upon conviction, it amounted to cruel and unusual punishment as it precluded consideration of individual mitigating circumstances. *Id.* at 961, 115 L. Ed. 2d at 843 n.1. In an opinion delivered by Justice Scalia, a majority of the Court held that the sentence was not cruel and unusual punishment solely because it was mandatory upon conviction. In addressing the defendant's alternative

argument, that his sentence of life in prison without possibility of parole was significantly disproportionate to his crime of possessing 650 or more grams of cocaine, a majority of the Court concluded that the defendant's sentence did not run afoul of the Eighth Amendment; however, the Court revealed varied views as to whether the Eighth Amendment includes a protection against disproportionate sentencing and if so, to what extent. *See also Ewing v. California*, 538 U.S. ___, 155 L. Ed. 2d 108 (2003) (holding that the defendant's sentence of twenty-five years to life for felony grand theft under California's "three strikes and you're out" law did not violate the Eighth Amendment's prohibition on cruel and unusual punishments). *Cf. Solem v. Helm*, 463 U.S. 277, 77 L. Ed. 2d 637 (1983) (holding that South Dakota's sentence of life without possibility of parole for uttering a "no account" check after the defendant had previously been convicted of six non-violent felonies was disproportionate to his crime and prohibited by the Eighth Amendment).

We return our attention to *Graham v. Florida* which sets out the second classification of Eighth Amendment proportionality challenges as "implement[ing] the proportionality standard by certain categorical restrictions on the death penalty." *Graham*, 560 U.S. at ___, 176 L. Ed. 2d at 836. But, rather than a challenge to a capital sentence, the *Graham* Court was presented with a categorical challenge to a term-of-years sentence: whether the imposition of life in prison without the possibility of parole for a nonhomicide crime committed by a sixteen-year-old juvenile offender violated the Eighth Amendment. In its reasoning, the Court made the following observation:

> [L]ife without parole is the second most severe penalty permitted by law. . . . [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.

Id. at ____, 176 L. Ed. 2d at 842. The Court concluded that the severity of a sentence imposing life without parole for a person who was a juvenile at the time his nonhomicide offense was committed is a sentencing practice that is cruel and unusual. *Id.* at ___, 176 L. Ed. 2d at 845. However, the Court went on to note that this sentencing preclusion may not lessen the duration of a sentence.

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [the] defendant[] . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. *It bears emphasis . . . that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.*

Id. at ___, 176 L. Ed. 2d at 845-46 (emphasis added).

As a means of obtaining release from incarceration, our North Carolina General Assembly has created by statute a Post-Release Supervision and Parole Commission. N.C. Gen. Stat. § 143B-720 (2011). With the exception of those sentenced under the Structured Sentencing Act, the Commission has "authority to grant paroles . . . to persons held by virtue of any final order or judgment of any court of this State . . . ." *Id.* § 143B-720(a). Furthermore, the Commission is to assist the Governor and perform such services as the Governor may require in exercising his executive clemency powers. *Id.* We note that in *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012), a case reviewing the retroactive application of a less severe sentencing statute, our Supreme Court also drew attention to the powers of the Post-Release Supervision and Parole Commission.

> In 2005, 2007, 2009, and 2011, the General Assembly directed the Post–Release Supervision and Parole Commission to determine whether inmates sentenced under *previous sentencing standards* have served more time in custody than they would have served if they had received the maximum sentence under the SSA. [Defendant's sentence appears to fall within the purview of this directive.]. . . In addition, wholly independent of the Commission's grant of authority, the state constitution empowers the Governor to "grant reprieves, commutations, and pardons, after conviction, for all offenses ... upon such conditions as he may think proper." N.C. Const. art. III, § 5(6).

Id. at 448, 722 S.E.2d at 496 n.1 (emphasis added).[3]

The *Whitehead* Court considered a trial court order granting a defendant's MAR requesting that his life sentence imposed following a guilty plea entered 29 July 1994 and imposed pursuant to the Fair Sentencing Act for a homicide occurring 25 August 1993 be modified by retroactively applying the sentencing provisions of the Structured Sentencing Act applicable to offenses committed on or after 1 October 1994. *Id.* Vacating and remanding the judgment and order of the trial court, our Supreme Court stated that "[c]riminal sentences may be invalidated for cognizable legal error demonstrated in appropriate proceedings. But, in the absence of legal error, it is not the role of the judiciary to engage in discretionary sentence reduction." *Id.* at 448, 722 S.E.2d at 496.

In the matter before us, we note that on 7 May 1973, the date of the offense for which defendant was charged with committing the offense of second-degree burglary, he was seventeen years old.[4] On 6 August 1973, the date defendant pled guilty to second-degree burglary, defendant was eighteen. Defendant was sentenced to incarceration for "his natural life." Pursuant to our General Statutes in effect at that time, any prisoner serving a life sentence was eligible to have his case considered for parole after serving ten years of his sentence. N.C.G.S. § 148-58. The record is not clear how often defendant was considered for parole. However, after serving over thirty-five years, defendant was paroled in December 2008. In 2010, defendant was convicted of driving while impaired. He was sentenced and served 120 days in jail. Thereafter, his parole was revoked and his life sentence reinstated.

"[L]ife imprisonment with possibility of parole is [] unique in that it is the third most severe [punishment]." *Harmelin*, 501 U.S. at 996, 115 L. Ed. 2d at 865. Nevertheless, in the body of case law involving those who commit nonhomicide criminal offenses even as juveniles, sentences allowing for the "realistic opportunity to obtain release before the end of [a life] term" do not violate the prohibitions of the Eighth Amendment. *Graham*, 560 U.S. at ___, 176 L. Ed. 2d at 850. Defendant's sentence

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3. While this quote from *Whitehead*, 365 N.C. at 448, 722 S.E.2d at 496 n.1, is a footnote, we think it is relevant to the instant case wherein defendant, like the defendant in *Whitehead*, was sentenced under a "previous sentencing standard," and defendant would have fallen within the directives of the Parole Commission.

4. At the time of his offense, North Carolina General Statutes, Chapter 7A, Article 23, entitled "Jurisdiction and Procedure Applicable to Children," defined "Child" as "any person who has not reached his sixteenth birthday." N.C. Gen. Stat. § 7A-278(1) (1973). As defendant was seventeen at the time of his offense, he did not come within the aegis of the Chapter 7A, Article 23.

allows for the realistic opportunity to obtain release before the end of his life. In fact, defendant was placed on parole in December 2008 prior to his 2010 conviction for the offense of driving while impaired, which led to the revocation of his parole and reinstatement of his life sentence. As our Supreme Court has not indicated a preference for discretionary sentence reduction, *see Whitehead*, 365 N.C. at 448, 722 S.E.2d at 496 ("[I]t is not the role of the judiciary to engage in discretionary sentence reduction."), and our General Assembly has directed the Post–Release Supervision and Parole Commission to review matters of proportionality, *see* N.C.G.S. § 143B-720; *Whitehead*, 365 N.C. at 449, 722 S.E.2d at 496 n.1, we hold that the trial court erred in concluding defendant's life sentence violated the prohibitions of the Eighth Amendment to the United States Constitution. *See Rummel v. Estelle*, 445 U.S. 263, 283-84, 63 L. Ed. 2d 382, 397 (1980) ("Perhaps . . . time works changes upon the Eighth Amendment, bringing into existence new conditions and purposes. We all, of course, would like to think that we are moving down the road toward human decency. Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies. Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any nationwide trend toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the [] courts." (citations and quotations omitted)). It should be stated that by all accounts based on today's sentencing standards, defendant's sentence cannot be viewed as anything but severe. Since 1973 at the age of eighteen, defendant has been incarcerated for all but less than two years. There is no record of an appeal from the 1973 conviction, and the record before us does not provide details of the circumstances which led to defendant's arrest or the injury to the victim. Regardless, we must address only what is, as opposed to what is not, before us. Upon review of the arguments presented and cases cited, defendant's outstanding sentence of life in prison with possibility of parole for second-degree burglary, though severe, is not cruel or unusual in the constitutional sense. *See Green*, 348 N.C. at 603, 502 S.E.2d at 828. Accordingly, we reverse the Superior Court's 5 December order modifying defendant's original sentence and remand to the trial court for reinstatement of the original 6 August 1973 judgment and commitment.

Reversed and remanded.

Judge STEPHENS concurs by separate opinion.

Judge DILLON concurs by separate opinion.

STEPHENS, Judge, concurs.

Because I believe that this Court is bound *in this case* by the decision of this Court's petition panel regarding jurisdiction, I concur with the majority opinion. However, because the petition panel's ruling on jurisdiction was erroneous and violated our precedent, I write separately.

In support of its determination that this panel is bound by the decision of a petition panel of this Court that we have subject matter jurisdiction to grant the State's petition for writ of *certiorari*, the majority cites our Supreme Court's opinion in *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case."); *see also* Restatement (Second) of Judgments § 11, cmt. c (1982) ("Whether a court whose jurisdiction has been invoked has subject matter jurisdiction of the action is a legal question that may be raised by a party to the action or by the court itself. When the question is duly raised, the court has the authority to decide it. *A decision of the question is governed by the rules of res judicata and hence ordinarily may not be relitigated in a subsequent action.* Thus, a court has authority to determine its own authority, or as it is sometimes put, " 'jurisdiction to determine its jurisdiction.' ") (citation omitted; emphasis added).

However, I would note that the decision of the petition panel to grant *certiorari* in this matter directly violated the precedent set forth in a previous published opinion of this Court on the same issue. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). In *State v. Starkey*, immediately after entering judgment on a jury's verdict, the trial court entered an order *sua sponte* granting its own motion for appropriate relief ("MAR") regarding the defendant's sentence. 177 N.C. App. 264, 266, 628 S.E.2d 424, 425, *cert. denied*, __ N.C. __, 636 S.E.2d 196 (2006). The trial court found that the defendant's sentence violated "his rights under the Eighth and Fourteenth Amendments to the United States Constitution." *Id.* On appeal in *Starkey*, we considered two issues: "(I) whether the State has a right to appeal from the entry of [an] order

granting the trial court's motion for appropriate relief; and (II) whether this Court [could] grant the State's [p]etition for [w]rit of [*c*]*ertiorari*.") *Id.* (italics added).

As noted in that case, "the right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *Id.* (citation, internal quotation marks, and brackets omitted). Two sections of our General Statutes touch on the State's possible right of appeal here: that discussing appeals by the State in general and those covering appeals from MARs specifically. My careful review, along with a plain reading of *Starkey*, reveals no authority for the State's purported appeal or petition for writ of *certiorari* here.

As for the State's right to appeal generally, our General Statutes provide:

> (a) Unless the rule against double jeopardy prohibits further prosecution, *the State may appeal*[1] *from the superior court to the appellate division:*
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.
>
> (3) When the State alleges that the sentence imposed:
>
> a. Results from an incorrect determination of the defendant's prior record level under [section] 15A-1340.14 or the defendant's prior conviction level under [section] 15A-1340.21;

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1. As this Court has noted,

> [a]ppeal is defined in [section] 15A-101(0.1): "Appeal. — When used in a general context, the term 'appeal' also includes appellate review upon writ of *certiorari*." Applying this definition to [section] 15A-1445, we hold the word "appeal" in the statute includes "appellate review upon writ of *certiorari*." Otherwise, the legislature would have used such language as "the [S]tate shall have a right of appeal." By way of contrast, the legislature in setting out when a defendant may appeal, uses the phrase "is entitled to appeal as a matter of right." N.C. Gen. Stat. [§] 15A-1444(a).

State v. Ward, 46 N.C. App. 200, 204, 264 S.E.2d 737, 740 (1980) (italics added).

> b. Contains a type of sentence disposition that is not authorized by [section] 15A-1340.17 or [section] 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
>
> c. Contains a term of imprisonment that is for a duration not authorized by [section] 15A-1340.17 or [section] 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> d. Imposes an intermediate punishment pursuant to [section] 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.
>
> (b) The State may appeal an order by the superior court granting a motion to suppress as provided in [section] 15A-979.

N.C. Gen. Stat. § 15A-1445 (2011) (emphasis added). As observed in *Starkey*, an appeal from the grant of a defendant's MAR as occurred here implicates none of these conditions:

> The relief granted by the trial court might be considered to have effectively dismissed [the] defendant's charge of having attained the status of an habitual felon or imposed an unauthorized prison term in light of [the] defendant's status as an habitual felon. However, it is the underlying judgment and not the order granting this relief from which the State must have the right to take an appeal. The State does not argue and we do not find that the underlying judgment dismisses a charge against defendant or that the term of imprisonment imposed was not authorized. The State therefore has no right to appeal from the underlying judgment and this appeal is not one "regularly taken." This appeal must be dismissed.

Starkey, 177 N.C. App. at 267, 628 S.E.2d at 426 (citation omitted).

The mention of an appeal "regularly taken" refers to subsection 15A-1422(b) of our General Statutes, which covers motions for appropriate relief: "The grant or denial of relief sought pursuant to [section] 15A-1414 is subject to appellate review only in an appeal regularly taken." N.C. Gen. Stat. § 15A-1422(b) (2011). In turn, section 15A-1414

covers errors which may be asserted in MARs filed within ten days following entry of a judgment upon conviction, N.C. Gen. Stat. § 15A-1414 (2011), while section 15A-1415(b) specifies the "[g]rounds for appropriate relief which may be asserted by [a] defendant" outside that ten-day time period. N.C. Gen. Stat. § 15A-1415(b) (2011). Because Defendant here filed his MAR more than ten days after entry of judgment upon his convictions, section 15A-1422(c) applies to the matter before us:[2]

> The court's ruling on a motion for appropriate relief pursuant to [section] 15A-1415 is subject to review:
>
> (1) If the time for appeal from the conviction has not expired, by appeal.
>
> (2) If an appeal is pending when the ruling is entered, in that appeal.
>
> (3) *If the time for appeal has expired and no appeal is pending, by writ of certiorari.*

N.C. Gen. Stat. § 15A-1422(c) (emphasis added). Here, the time for appeal had long passed, and there was no appeal pending when the MAR was ruled upon, rendering subsections (1) and (2) inapplicable.

As for the availability of appellate review via writ of *certiorari*, this Court in *Starkey* held:

> Review by this Court pursuant to a [p]etition for [w]rit of [*c*]*ertiorari* is governed by Rule 21 of the North Carolina Rules of Appellate Procedure. Pursuant to Rule 21, this Court is limited to issuing a writ of *certiorari*:
>
> to permit review of the judgments and orders of trial tribunals when [1] the right to prosecute an appeal has been lost by failure to take timely action, or [2] when no right of appeal from an interlocutory order exists, or [3] for review pursuant to [section] 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.
>
> The State recognizes that its petition does not satisfy any of the conditions of Rule 21 and asks this Court to invoke

2. Nothing in *Starkey* or the relevant statutes suggests that the timing of the filing of an MAR (*i.e.*, within or outside the ten-day period) would have any effect on the reasoning of the Court in dismissing the State's purported appeal. Neither section 15A-1414 nor section 15A-1415 would permit the appeal by the State in the case before us.

> Rule 2 of the North Carolina Rules of Appellate Procedure and review the trial court's order.

Starkey, 177 N.C. App. at 268, 628 S.E.2d at 426 (citation and internal quotation marks omitted; italics added). This Court declined "the State's request to invoke Rule 2 and den[ied] the State's [p]etition for [w]rit of [*c*]*ertiorari*." *Id.*[3] (italics added). As noted *supra* and as was the case in *Starkey*, none of the circumstances permitting this Court to grant a writ of *certiorari* are presented in the matter before us.

The order entered by this Court on 13 December 2012 cites three authorities which purportedly give this Court jurisdiction to grant the State's petition: N.C. Const. art. IV, § 12(2), N.C. Gen. Stat. § 7A-32(c) (2011), and *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012). However, none of those authorities actually support the conclusion that this Court has subject matter jurisdiction in the State's appeal.

The cited constitutional provision merely states that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). In turn, section 7A-32(c) provides:

> The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. *The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.*

N.C. Gen. Stat. § 7A-32(c) (emphasis added). The 13 December 2012 order states that this Court has jurisdiction to grant the State's petition in order "to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]" *Id.* However, the plain

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3. Although the language used by this Court in *Starkey* suggests that the panel *could* have invoked Rule 2 and granted the petition, Rule 21 is jurisdictional, see N.C. Gen. Stat. § 7A-32(c) (2011), and thus cannot be obviated by invocation of Rule 2. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (noting that "in the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2").

language of the statute states that this jurisdiction is circumscribed by "statute[,] *rule of the Supreme Court*, . . . [*or*] *the common law*." *Id.* (emphasis added). There is no statute or common law principle giving us jurisdiction to grant the State's petition. Further, as discussed *supra*, Rule 21 of our Rules of Appellate Procedure, set forth by our Supreme Court, does not permit this Court to grant petitions of *certiorari* in the circumstances presented here.

Finally, *Whitehead* is inapposite. That opinion was issued by our Supreme Court which, in contrast to the purely statutory and rule-based jurisdiction and power of this Court, has independent constitutional " 'jurisdiction to review upon appeal any decision of the courts below.' " 365 N.C. at 445, 722 S.E.2d at 494 (quoting N.C. Const. art. IV, § 12(1) ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference.")). The Supreme Court stated that it "will not hesitate to exercise *its* rarely used *general supervisory authority* when necessary . . . ." *Id.* at 446, 722 S.E.2d at 494 (citation and internal quotation marks omitted; emphasis added). I find it telling that the Supreme Court, exercising *its* constitutional general supervisory authority, allowed the State's petition for writ of *certiorari* in *Whitehead* to review the identical issue as is raised in the case at bar, with *no* prior review by this Court. This suggests that the State's procedure in *Whitehead*, to wit, seeking review of the trial court's MAR decision via petition for writ of *certiorari* directly to the Supreme Court, is the proper route for this appeal.

In sum, this Court's published opinion in *Starkey* is binding precedent which mandates that we dismiss the State's purported appeal and deny its petition for writ of *certiorari*. *See In re Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. This Court lacks jurisdiction to review the State's arguments by direct appeal, writ of *certiorari*, or any other procedure. Accordingly, while I am compelled by the law of this case to concur with the majority opinion that we are bound by the decision of the petition panel to reach the merits of the State's arguments, I would urge our Supreme Court, which is not so bound, to review the jurisdictional basis for this Court's decision.

DILLON, Judge, concurring in separate opinion.

I agree with the majority opinion. However, I write to address the jurisdiction question raised by the parties and discussed in footnote 3 of the majority opinion. I believe that the "law of the case" principle, referenced in that footnote, generally compels a panel of this Court to follow

the decisions of another panel made in the same case. However, I do not believe a panel is compelled to follow the "law of the case" where the issue concerns subject matter jurisdiction. *See McAllister v. Cone Mills Corporation*, 88 N.C. App. 577, 364 S.E.2d 186 (1988). In *McAllister* we held that a superior court judge had the authority to determine whether it had subject matter jurisdiction to consider a matter after another superior court judge, in a prior hearing, had denied a motion to dismiss the matter based on lack of subject matter jurisdiction, stating that "[i]f a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *Id.* at 579, 364 S.E.2d at 188. Therefore, I believe we are compelled to make a determination whether the panel of this Court which granted the State's petition for writ of certiorari – which is the basis for our panel's jurisdiction - had the authority to do so.

The North Carolina Constitution states that this Court has appellate jurisdiction "as the General Assembly may prescribe." N.C. Const. Article IV, Section 12(2). Our General Assembly has prescribed that this Court has jurisdiction "to issue . . . prerogative writs, including . . . certiorari . . . to supervise and control the proceedings of any of the trial courts. . . ." N.C. Gen. Stat. § 7A-32(c) (2011).[1] The General Assembly further has prescribed that the "practice and procedure" by which this Court exercises its jurisdiction to issue writs of certiorari is provided, in part, by "rule of the Supreme Court." *Id.* The Supreme Court has enacted the Rules of Appellate Procedure, which includes Rule 21, providing that writs of certiorari may be issued by either this Court or the Supreme Court in three specific circumstances, none of which applies to the State's appeal in this case.

Defendant argues that the subject matter jurisdiction of this Court to issue writs of certiorari is limited to the three circumstances listed in Rule 21. The State argues that Rule 21 is not intended to limit the subject matter jurisdiction of this Court but is simply a "rule" establishing a "practice and procedure," and that Rule 2 – which allows this Court to "suspend or vary the requirements of any of these rules" – provides an avenue by which this Court may exercise the jurisdiction granted by the General Assembly in N.C. Gen. Stat. § 7A-32 to issue writs of certiorari for matters not stated in Rule 21. There is language in decisions of this

1. This language employed by the General Assembly is similar to the language in our Constitution defining the jurisdictional limits of our Supreme Court, which includes the authority of "general supervision and control over the proceedings of the other courts." N.C. Const. art. IV, § 12(1).

Court which *suggests* that our authority to grant writs of certiorari is limited to the three circumstances described in Rule 21. *See*, *e.g.*, *State v. Pimental*, 153 N.C. App. 69, 77, 568 S.E.2d 867, 872 (2002) (*dismissing* a petition for writ of certiorari, stating that since the appeal was not within the scope of Rule 21, this Court "does not have the authority to issue a writ of certiorari"). However, there is language in other decisions which *suggests* that this Court may invoke Rule 2 to consider writs of certiorari in circumstances not covered by Rule 21. *See*, *e.g.*, *State v. Starkey*, 177 N.C. App. 264, 268, 628 S.E.2d 424, 426 (2006) (*denying* a petition for writ of certiorari by refusing to invoke Rule 2).

I believe that our approach in *Starkey* – suggesting that our subject matter jurisdiction to issue writs of certiorari is not limited to the circumstances contained in Rule 21 – is correct. Our Supreme Court and this Court has recognized the authority of our appellate courts to issue writs of certiorari in circumstances not contained in Rule 21. *See*, *e.g.*, *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987) (holding that a defendant may obtain appellate review through a writ of certiorari to challenge the procedures followed in accepting a guilty plea, notwithstanding that the defendant does not have the statutory right to appellate review); *see also State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (holding that a challenge to procedures in accepting a guilty plea is reviewable by *certiorari*). Additionally, in Rule 1 of the Rules of Appellate Procedure, our Supreme Court stated that the appellate rules "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division[.]" *Id.*

Accordingly, I believe that the panel of this Court which considered the State's petition for a writ of certiorari had the authority to grant the writ, notwithstanding that an appeal by the State from an order granting a defendant's motion for appropriate relief is not among the circumstances contained in N.C.R. App. P. 21; and, therefore, we are bound by the decision of that panel.

WESTLAKE v. WESTLAKE

[231 N.C. App. 704 (2014)]

ELIZA ANN WESTLAKE, PLAINTIFF-APPELLEE
v.
EDWIN ALBERT WESTLAKE, DEFENDANT-APPELLANT

No. COA13-755

Filed 7 January 2014

1. Notice—motion to dismiss—timely—no prejudice

There was no error in an equitable distribution, child custody and child support action where defendant filed a motion for contempt for custodial interference and plaintiff's motion to dismiss the contempt motion for failure to state a claim was granted. Although defendant contended that plaintiff failed to provide sufficient notice of her motion to dismiss, both statute and case law indicated plaintiff's motion was timely. Furthermore, defendant did not show that he was prejudiced, even assuming that plaintiff's motion to dismiss was not timely served.

2. Contempt—custodial interference—failure to state a claim

The trial court erred in a domestic action by granting plaintiff's motion to dismiss for failure to state a claim defendant's motion for contempt for custodial interference. Construing defendant's motion liberally and treating the allegations as true, defendant alleged facts sufficient to support his motion for contempt.

3. Notice—inconvenient form—notice of determination not given—no prejudice

Defendant contended the trial court erred in determining that North Carolina was an inconvenient forum in a domestic action without first providing appropriate notice that the issue was being determined and without first allowing the parties to submit information. Even if defendant had a statutory right to submit information and was thus entitled to notice, he failed to show that he was not allowed to submit information, or that he would have submitted additional information had he received advanced notice.

4. Child Custody and Support—inconvenient form—statutory factors—not considered

The trial court erred by determining that North Carolina was an inconvenient forum without first considering all of the statutory factors listed in N.C.G.S. § 50A-207(b).

5. Child Custody and Support—inconvenient forum—stay

The trial court erred in an inconvenient forum determination by dismissing defendant's motion for reconsideration instead of staying the proceedings. On remand, if the trial court decides to decline jurisdiction, it must stay the case upon condition that a child-custody proceeding be promptly commenced in another designated state.

6. Child Custody and Support—North Carolina as inconvenient forum—continuation of payments

The trial court did not err in an inconvenient forum determination by ordering the resumption of defendant's child support payments instead of staying the proceedings. Defendant offered no authority to support his contentions that the resumption of payments was inconsistent with finding North Carolina to be an inconvenient forum, and that defendant should have had the opportunity to be heard. Furthermore, defendant did not seek to offer evidence relevant to child support and did not point to arguments he would have presented to the trial court if he had had the chance.

On writ of certiorari from order entered 1 June 2012 by Judge Ronald L. Chapman in District Court, Mecklenburg County and appeal by Defendant from order entered 6 November 2012 by Judge Ronald L. Chapman in District Court, Mecklenburg County. Heard in the Court of Appeals 10 December 2013.

Krusch & Sellers, P.A., by Rebecca K. Watts, for Plaintiff-Appellee.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell, for Defendant-Appellant.

McGEE, Judge.

Eliza Ann Westlake ("Plaintiff") filed a complaint on 31 July 2008 against Edwin Albert Westlake ("Defendant") seeking, inter alia, equitable distribution, child custody, and child support. The trial court entered an "Order for Permanent Custody and Temporary Child Support" on 22 March 2010.

On 16 April 2012, Defendant filed an "Emergency Motion for Contempt for Interstate Custodial Interference." Plaintiff filed a motion to dismiss, which the trial court granted in an order entered 1 June 2012, dismissing Defendant's motion for "failure to state a claim upon which relief can be granted."

Defendant filed a motion for reconsideration on 25 May 2012, which the trial court dismissed with prejudice in an order entered 6 November 2012. The trial court concluded that "North Carolina is no longer a convenient forum for the parties and it is no longer appropriate for [the trial court] to exercise jurisdiction." The trial court also concluded that "Defendant's Motion for Reconsideration does not state any grounds upon which relief can be granted."

Defendant, acting *pro se*, filed notice of appeal from the 6 November 2012 order. Defendant subsequently filed a petition for writ of certiorari from the 1 June 2012 order. In our discretion, we grant Defendant's petition to review the 1 June 2012 order.

I. Defendant's Motion for Contempt

A. Notice of Plaintiff's Motion to Dismiss

[1] Defendant first contends Plaintiff failed to give Defendant sufficient notice of her motion to dismiss. Defendant's "motion for contempt for interstate custodial interference" was set for hearing 14 May 2012. That day, Plaintiff filed a motion to dismiss Defendant's motion. The certificate of service indicates Plaintiff served the motion to dismiss on Defendant via hand delivery on 14 May 2012. The trial court entered an order on 1 June 2012, dismissing Defendant's motion for failure to state a claim upon which relief could be granted.

Defendant acknowledges the North Carolina Rules of Civil Procedure permit a party to raise the "defense of failure to state a claim upon which relief can be granted . . . at the trial on the merits." N.C. Gen. Stat. § 1A-1, Rule 12(h)(2) (2011). "Unquestionably, a motion to dismiss for failure to state a claim upon which relief may be granted, under Rule 12(b)(6), can be made as late as trial upon the merits." *Bodie Island Beach Club Ass'n, Inc. v. Wray*, ___ N.C. App. ___, ___, 716 S.E.2d 67, 75 (2011). Therefore, both statute and case law indicate Plaintiff's motion was timely.

Nevertheless, Defendant requests this Court to hold that "when such a motion to dismiss is not an oral motion but is in the form of a written motion . . . it should be subject to the notice requirements of Rule 6(d)[.]" This we decline to do. Furthermore, even assuming *arguendo* that Plaintiff's motion to dismiss was not timely served on Defendant, Defendant has not shown that he was prejudiced. "The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986); *see also*

N.C. Gen. Stat. § 1A-1, Rule 61 (2011). Defendant asserts only that he "was not given sufficient time to prepare[.]" Defendant does not argue he would have taken any action differently or made any additional arguments at the hearing if he had been served earlier. Defendant thus has not shown reversible error on this basis.

B. Merits of Plaintiff's Motion to Dismiss

[2] Defendant next argues the trial court erred in dismissing his motion for contempt. The trial court dismissed Defendant's motion for contempt "for failure to state a claim upon which relief can be granted."

"The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 415 (2003). "Accordingly, when entertaining a motion to dismiss, the trial court must take the complaint's allegations as true and determine whether they are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (internal quotation marks omitted). "This rule . . . generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Id.* (alterations in original).

"An order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes." N.C. Gen. Stat. § 50-13.3(a) (2011). In small print on the first page of his motion for contempt, Defendant listed "§ G.S. 5A-23, § G.S. 14-320.1, § G.S. 50-13.1."

In his motion, Defendant referenced the "Order for Permanent Custody and Temporary Child Support" entered 22 March 2010 and made the following allegations:

> 3. The Order (for Permanent Custody and Temporary Child Support) cited above states that [Plaintiff] is the primary custodial parent and provides for visitation of [Defendant] with his two minor children on a schedule contained therein.
>
> 4. The Order has at all times since its entry remained in full force and effect and [the trial court] retains jurisdiction over the Order and all matters related thereto.
>
> 5. Plaintiff[] moved the parties' minor children to Pensacola, in Escambia County, Florida on July 15th, 2011

> without obtaining [Defendant's] consent or the permission of [the trial court] to allow the move.
>
> . . . .
>
> 7. [Plaintiff] has repeatedly obstructed [Defendant's] visitation with his children, as early as March 3rd, 2010, less than two months after the Order went into effect[.]

Defendant requested the following relief:

> 1. That the [trial court] cites [Plaintiff] for Contempt for Interstate Custodial Interference of [the trial court's] Order for Permanent Custody for moving the minor children out-of-state with the willful intent to violate the existing Custody Order.
>
> 2. That an extended Hearing be calendared on the earliest date possible to address additional Contempt by [] Plaintiff of the Custody Order and to Modify the Custody Order in consideration of changed circumstances.
>
> 3. That an Order of Enforcement be issued immediately to provide for enforcement of the existing Custody Order and Visitation Schedule contained therein, pending the Hearing for Modification of the Custody Order.
>
> 4. Any remedy which would also be appropriate to the proceedings herein, as a conclusion of law or that is incorporated herein by reference, including criminal proceedings, as they relate to § G.S. 14-320.1.

"[W]hen the allegations in the complaint give sufficient notice of the wrong complained of[,] an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory." H*aynie v. Cobb*, 207 N.C. App. 143, 149, 698 S.E.2d 194, 198 (2010) (quoting *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979)).

Defendant's motion indicates he sought to make the following claim for civil contempt:

> Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;

> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2011).

"The [motion] must be liberally construed, and the court should not dismiss the [motion] unless it appears beyond a doubt that the [movant] could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). Construing Defendant's motion liberally and treating the allegations as true, Defendant alleged facts sufficient to support his motion for contempt. Thus, the trial court erred in granting Plaintiff's motion and in dismissing Defendant's motion. For the same reasons discussed above in this section, the trial court also erred in dismissing with prejudice Defendant's motion for reconsideration.

II. Convenience of Forum

A. Notice

[3] Defendant contends the trial court erred in determining "North Carolina was an inconvenient forum without first providing appropriate notice that such issue was being determined and without first allowing the parties to submit information."

The trial court "shall allow the parties to submit information" before determining whether North Carolina is an inconvenient forum. N.C. Gen. Stat. § 50A-207(b) (2011). Defendant contends this "statutory right to submit information implies that the parties will be given advance notice of the hearing so that they will be prepared to submit such information."

Even assuming *arguendo*, without deciding, that Defendant's contention is accurate, Defendant has not shown he was not allowed to submit information, or that he would have submitted additional information had he received advanced notice. The transcript does not show the trial court refused any information Defendant offered. In his brief, Defendant gives no information that he would have submitted on the convenience of the forum. Defendant thus has not shown error on this basis.

B. Statutory Factors

[4] Defendant next contends the trial court erred in "determining that North Carolina was an inconvenient forum without first considering all of the statutory factors listed in N.C.G.S. § 50A-207(b)." We agree.

Before determining whether it is an inconvenient forum, the trial court "shall consider whether it is appropriate for a court of another state to exercise jurisdiction." N.C.G.S. § 50A-207(b).

> For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this State;
>
> (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
>
> (4) The relative financial circumstances of the parties;
>
> (5) Any agreement of the parties as to which state should assume jurisdiction;
>
> (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

N.C.G.S. § 50A-207(b). "The factors listed in N.C.G.S. § 50A-207(b) are necessary when the current forum is inconvenient[.]" *Velasquez v. Ralls*, 192 N.C. App. 505, 509, 665 S.E.2d 825, 827 (2008); *see also In re M.M.*, ___ N.C. App. ___, 750 S.E.2d 50, COA13-600 (5 November 2013).

The transcript and record indicate no consideration by the trial court of the factors listed in N.C.G.S. § 50A-207(b). Defendant has shown error on this basis. On remand, the trial court is to comply with the requirements of N.C.G.S. § 50A-207(b).

III. Staying the Proceedings

[5] Defendant next argues the trial court erred in dismissing his motion for reconsideration instead of staying the proceedings.

N.C. Gen. Stat. § 50A-207(c) (2011) states:

> If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

Id. (emphasis added).

In *In re M.M.*, *supra*, this Court considered a similar issue. The trial court "simply purported to transfer jurisdiction, effectively dismissing the case in North Carolina. It did not stay the present case and condition the stay on the commencement of a child custody proceeding in Michigan." *Id.* at ___, 750 S.E.2d at ___, slip op. at 7-8. "It is well established that the word 'shall' is generally imperative or mandatory." *Id.* at ___, 750 S.E.2d at ___, slip op. at 7. This Court remanded the case with instructions that, if the trial court determines it should decline jurisdiction and "makes sufficient findings to support its determination that North Carolina is an inconvenient forum[,]" the trial court must stay the case "upon condition that a child custody proceeding be promptly commenced in" Michigan. *Id.* at ___, 750 S.E.2d at ___, slip op. at 8.

Likewise, in the present case, the trial court effectively dismissed the case in North Carolina. The trial court concluded that "North Carolina is no longer a convenient or appropriate forum to hear matters between these parties." On remand, if the trial court decides to decline jurisdiction, the trial court must stay the case "upon condition that a child-custody proceeding be promptly commenced in another designated state[.]" N.C.G.S. § 50A-207(c); *see also In re M.M.*, *supra*.

IV. Child Support Payments

[6] Defendant argues the trial court erred in ordering the resumption of Defendant's child support payments. The trial court, on 6 November 2012, ordered Defendant "to resume payment of child support consistent with the prior Orders in this matter, including all arrearages."

Defendant contends the trial court erred in ordering the resumption of child support payments instead of staying the proceedings. The

implication in this argument seems to be that ordering the resumption of child support payments is somehow inconsistent with finding North Carolina to be an inconvenient forum. However, Defendant provides no citation to authority to support this argument.

Defendant further contends the trial court erred in ordering the resumption of child support payments "without first giving [Defendant] an opportunity to be heard." Again, the transcript reveals no instance in which Defendant sought to offer evidence relevant to a determination on child support and the trial court denied Defendant this opportunity. Furthermore, assuming that Defendant was denied an opportunity, Defendant on appeal points to no arguments that he would have presented to the trial court. Defendant thus has not shown error on this basis.

V. Conclusion

On remand, the trial court is to comply with the requirements of N.C.G.S. § 50A-207. Should the trial court determine North Carolina is an inconvenient forum for this matter, the trial court is to make findings showing consideration of the factors set forth in N.C.G.S. § 50A-207(b). If the trial court determines it should decline jurisdiction and makes sufficient findings to support its determination that North Carolina is an inconvenient forum, the trial court must stay the case "upon condition that a child-custody proceeding be promptly commenced in another designated state[.]" N.C.G.S. § 50A-207(c); *see also In re M.M.*, *supra*.

Reversed and remanded.

Judges HUNTER, Robert C. and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JANUARY 2014)

BETHEA v. US AIRWAYS, INC. No. 13-740	N.C. Industrial Commission (381629)	Affirmed
BURGESS v. DORTON No. 13-509	Union (11CVS2342)	No error in part; Affirmed in part.
CARPENTER v. MCKINNEY No. 13-516	Guilford (10CVS10123)	Dismissed
CITIBANK, S. DAKOTA, N.A. v. GABLE No. 13-780	Wayne (09CVD1731)	Affirmed
I.B.S.A., INC. v. BUILDER'S SUPPLY INC. No. 13-552	Johnston (11CVS3878)	Affirmed
IN RE A.U.B.M. No. 13-786	Wake (11JT338)	Affirmed
IN RE C.A.G. No. 13-928	Sampson (12JA94)	Affirmed
IN RE C.L.C. No. 13-732	Guilford (10JT328-329)	Affirmed
IN RE C.T.L. No. 13-574	Guilford (11JT441-444)	Affirmed
IN RE H.J.A. No. 13-507	Mecklenburg (08JT326) (09JT368)	Affirmed
IN RE L.P. No. 13-643	Cumberland (12JA222)	Affirmed
IN RE WHATLEY No. 13-837	Mecklenburg (12SPC66)	Vacated
IN RE S. No. 13-751	Wilkes (07JT142)	Affirmed
JEFFREYS LEASING CO. v. GILLANI No. 13-598	Wayne (11CVS2501)	Affirmed

JUDGE v. N.C. DEP'T OF PUB. SAFETY No. 13-688	N.C. Industrial Commission (TA-21612)	Affirmed
MUCKLE v. DOLGENCORP, LLC No. 13-653	N.C. Industrial Commission (X33108)	Reversed
PERRY v. CRADDOCK No. 13-510	Dare (07CVS902)	No Error in Part; Reversed and Remanded in Part
PHILADELPHUS PRESBYTERIAN FOUND., INC., v. ROBESON CNTY. BD. OF ADJUST. No. 13-777	Robeson (12CVS2097)	Affirmed
STATE v. AVENT No. 13-665	Edgecombe (12CRS2258)	No Error
STATE v. BLACKWELL No. 13-196	Robeson (07CRS51866-67)	NO ERROR in part; DISMISSED in part
STATE v. BLALOCK No. 13-712	Stokes (08CRS50460) (08CRS51385-86) (08CRS52513-14) (12CRS50942-43) (12CRS51294)	08CRS52513-14 08CRS51385-86, and 08CRS50460-VACATED 12CRS050942-43, 12CRS051294-AFFIRMED
STATE v. BROOKS No. 13-663	Wake (11CRS228136)	No Error
STATE v. EDDINGS No. 13-474	Buncombe (11CRS63582-83) (12CRS112)	NO ERROR, in part; AFFIRMED, in part.
STATE v. FLOYD No. 13-396	Mecklenburg (07CRS234510-16)	No Error
STATE v. LINEBERGER No. 13-733	Catawba (12CRS53434)	No error in part; judgment arrested in part and remanded for resentencing.
STATE v. LOCKLEAR No. 13-301	Robeson (08CRS53464)	No Prejudicial Error

STATE v. MACMORAN No. 13-758	Mecklenburg (12CRS981)	No Error
STATE v. NWANGUMA N o. 13-274	Durham (11CRS60616)	Reversed
STATE v. PEAY No. 13-579	Mecklenburg (11CRS232023)	No Error
STATE v. QUICK No. 13-289	Guilford (10CRS78622)	No Error
STATE v. ROBINSON No. 13-500	Robeson (07CRS52689) (07CRS52691) (07CRS52693)	No Error
VALLADARES v. TECH ELECTRIC CORP. No. 13-705	N.C. Industrial Commission (X67511)	Affirmed
VENERIS v. DOMTAR PAPER CO., LLC No. 13-649	N.C. Industrial Commission (770306)	Affirmed
WILLIAMS v. WILSON CNTY. BD. OF EDUC. No. 13-481	N.C. Industrial Commission (TA-22046)	Affirmed

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