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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 26, 2016

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
NORTH CAROLINA

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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.
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FILED 21 JANUARY 2014

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ADMINISTRATIVE LAW

Adoption of agency findings—but not conclusions—The trial court erred by reversing the decision of the Employment Security Division of the Department of Commerce (DOC) where it had adopted all of DOC's findings, which as a matter of law supported DOC's ruling that petitioner had engaged in misconduct. **Bailey v. Div. of Employment Sec., 10.**

APPEAL AND ERROR

Interlocutory orders and appeals—denial of motion to intervene—substantial right—Although intervenor SeaScape Property Owners' Association, Inc. appealed from an interlocutory order that denied its motion to intervene, it affected a substantial right and was immediately appealable. **Anderson v. SeaScape at Holden Plantation, LLC, 1.**

APPEAL AND ERROR—Continued

Mootness—appeal from contempt orders—Plaintiff's arguments were moot in an appeal from contempt orders in an equitable distribution action involving a receivership and the division of property. The trial court did not impose any consequence or penalty for plaintiff's contempt and the subsequent order dissolving the receivership and the equitable distribution order distributing the properties left no underlying controversy. **Yeager v. Yeager, 173.**

Motion to dismiss appeal—subject matter jurisdiction—stipulation—Plaintiffs' motion to dismiss the appeal for lack of subject matter jurisdiction on the basis that intervenor SeaScape Property Owners' Association, Inc. lacked authority, and therefore standing, to pursue the appeal was denied. The parties stipulated that the trial court had subject matter jurisdiction over the present action. **Anderson v. SeaScape at Holden Plantation, LLC, 1.**

Sealed record—no new trial warranted—The Court of Appeals examined the contents of the sealed record and concluded that there was nothing contained in the envelope that would warrant granting defendant a new trial or any other relief. **State v. Beam, 56.**

Sanctions—frivolous appeal—Sanctions were imposed for a frivolous appeal in light of the extensive history of litigation between the parties and the conclusion that plaintiff's arguments were moot**. Yeager v. Yeager, 173.**

Standard of review—reasonable cause—attorney fees—The Court of Appeals reviewed the trial court's conclusion as to reasonable cause *de novo* and its ultimate award of attorney fees for an abuse of discretion. **McMillan v. Ryan Jackson Props., LLC, 35.**

ATTORNEY FEES

Derivative action—abuse of discretion—The trial court abused its discretion by awarding attorney fees under N.C.G.S. § 55A-7-40(f). The case was remanded for entry of factual findings to distinguish the portion of attorney fees that were attributable to the defense against the derivative action and for adjustment of the fee award. **McMillan v. Ryan Jackson Props., LLC, 35.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Defendant's statements in patrol car—video clips—There was no prejudicial error in an assault and armed robbery prosecution where the trial court did not suppress statements defendant made while being transported in a camera-equipped car and the video clips of those statements. Although the trial court misapprehended the applicable law on the right-to-counsel issue, the error was harmless. Because any error in the admission of the video clips was not prejudicial, any error in the trial court's determination of their relevancy and prejudicial impact was also harmless. **State v. Council, 68.**

CONSTITUTIONAL LAW

Right to public trial—temporary closure of courtroom—presentation of pornographic images—Defendant's constitutional right to a public trial was not violated in a sexual exploitation of a minor case when the trial court closed the courtroom during the presentation of images involving sexual activity. The State advanced an overriding interest that was likely to be prejudiced, the closure of the

CONSTITUTIONAL LAW—Continued

courtroom was no broader than necessary, the trial court considered reasonable alternatives, and the trial court made findings adequate to support the closure. **State v. Williams, 152.**

CORPORATIONS

Derivative action—lack of reasonable cause—negligence—no reasonable belief—The trial court did not err in a derivative action by concluding that the action was brought without reasonable cause. Plaintiffs did not have a reasonable belief that there was a sound chance that the derivative action alleging negligence could be sustained. **McMillan v. Ryan Jackson Props., LLC, 35.**

CRIMINAL LAW

Charging document—misdemeanor—amendment—changed nature of offense—impermissible—The superior court lacked jurisdiction to try defendant for possession of lottery tickets in violation of N.C.G.S. § 14-290. Even if the original citation was sufficient to charge defendant under N.C.G.S. § 14-291 and the procedures purportedly employed in the district court resulted in an actual amendment to the citation to charge defendant under N.C.G.S. § 14-290, the amendment changed the nature of the offense charged. Accordingly, the amendment was legally impermissible under N.C.G.S. § 15A-922(f). **State v. Carlton, 62.**

DRUGS

Possession of heroin—trafficking in opium or heroin—failure to give requested instruction—no evidence of confusion or mistake—The trial court did not err in a possession of heroin and trafficking in opium or heroin by transportation case by failing to give defendant's requested instruction to the jury. The requested instruction was that the State had to prove defendant knew what he transported was heroin, but defendant did not present any evidence that he was confused or mistaken about the nature of the illegal drug his acquaintance was carrying. **State v. Beam, 56.**

EVIDENCE

Expert testimony—"use of force"—scientific knowledge—Rule 702—The trial court did not abuse its discretion and violate defendant's right to present a defense in a first-degree murder trial by excluding expert testimony offered by defendant regarding the doctrine of "use of force." Even assuming that the doctrine of "use of force" constituted scientific knowledge, the court's decision was well-reasoned, especially given the requirements set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, invoked by amended Rule 702 of the North Carolina Rules of Evidence. **State v. McGrady, 95.**

Officer testimony—images found on CD—sexual activity—no prejudice—The trial court did not abuse its discretion in a sexual exploitation of a minor case by allowing a detective and a special agent to testify that some of the images found on a CD that defendant gave to his neighbor included minors engaged in sexual activity. Given the jury's opportunity to observe each image and make an individualized determination of the nature of the image coupled with the fact that the image files frequently had titles noting the subject's status as a minor and the sexual act depicted, defendant could not establish that he was prejudiced. **State v. Williams, 152.**

EVIDENCE—Continued

Police testimony—no plain error—Assuming *arguendo* in a drugs case that it was improper for a police officer to testify that defendant drove an acquaintance to the same residence on twenty to twenty-five occasions in the month and a half leading up to defendant's arrest, and that the acquaintance was delivering heroin on each of those occasions, any error did not rise to the level of plain error when considered in light of the limiting instruction and the other evidence presented at trial. **State v. Beam, 56.**

Prior crimes or bad acts—intent—absence of mistake or accident—no plain error—The trial court did not commit plain error in a sexual exploitation of a minor case by admitting evidence that defendant set up a webcam in his minor neighbor's room, videotaped her dancing in her pajamas, and inappropriately touched her while they were riding four-wheelers. The evidence served to demonstrate defendant's intent to obtain sexual images of minors and showed absence of mistake or accident. **State v. Williams, 152.**

Witness's unrelated charge—cross-examination barred—no plain error—Because there was no prejudice, the trial court did not commit plain error in a prosecution for assault and armed robbery by ruling that the victim could not be questioned about an unrelated first-degree murder charge pending against him at the time of his testimony. Moreover, trial counsel's failure to object to the State's motion *in limine* to bar cross-examination of the victim about that charge did not constitute inadequate representation. **State v. Council, 68.**

Witness testimony—decedent's character—proclivity for violence—The trial court did not err and violate defendant's right to present a defense in a first-degree murder trial by excluding under N.C.G.S. § 8C-1, Rule 404 the testimony of a defense witness who addressed the decedent's alleged proclivity toward violence. The witness's testimony did not constitute evidence of the decedent's character for violence. Furthermore, the testimony failed to show that defendant was aware of any anger issues or the alleged violent nature of the decedent and there was ample direct evidence regarding the altercation between the decedent and defendant. **State v. McGrady, 95.**

HOMICIDE

First-degree murder—failure to instruct on affirmative defense—accepted medical purpose—new trial—The trial court committed reversible error by failing to instruct the jury on the affirmative defense of "accepted medical purpose" as provided in N.C.G.S. § 14-27.1(4) for the predicate felony on which the jury based its first-degree murder conviction. Defendant was entitled to a new trial. **State v. Stepp, 132.**

INSURANCE

Underinsured motorist's coverage—pro rata distribution among policy providers—The trial court erred in a declaratory judgment action arising out of an insurance coverage question by not applying a *pro rata* distribution of the credit paid by the underinsured motorist's insurance provider to all three underinsured motorist insurance (UIM) policy providers. Because the respective excess clauses were mutually repugnant and the claimant was a Class I insured under all three UIM policies, the trial court was required to allocate credits and liabilities amongst the three UIM

policyholders on a *pro rata* basis under *N.C. Farm Bureau v. Bost*, 126 N.C. App. 42. **Nationwide Mutual Ins. Co. v. Integon Nat. Ins. Co., 44.**

JUVENILES

Conclusions—reunification efforts not needed—supported by findings—The uncontested findings in a juvenile disposition supported the trial court's conclusions that reunification efforts would be inconsistent with the juveniles' health, safety and need for a permanent home within a reasonable period of time and were not required. **In re T.H., 16.**

Dependent—lack of caregivers—The trial court did not err by adjudicating two children as dependent juveniles where the legal custodian of the juveniles, their maternal grandmother, was deceased; there were no appropriate family members to care for the juveniles; respondent, the children's mother, did not present herself as a potential caregiver at the adjudicatory hearing; and no alternative caregivers were presented. **In re T.H., 16.**

Disposition—non-relative placement—The trial court did not abuse its discretion in a juvenile disposition by making a non-relative placement or in its conclusions. It is apparent from the trial court's exhaustive findings of fact that the trial court considered several relative placements but no suitable option was available. **In re T.H., 16.**

Disposition hearing—appeal—outside statutory categories—The appeal of a mother in a juvenile disposition hearing was dismissed as to four of her children who had been surrendered to adoption where the mother did not come within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C.G.S. §§ 7B-1001 and 7B-1002. **In re T.H., 16.**

Disposition hearing—mother's motion to intervene as a matter of right—The trial court correctly denied a mother's motion to intervene in a juvenile disposition hearing as a matter of right where her parental rights to the four adopted juveniles had been severed. Moreover, her motion was defective for failure to include a pleading asserting a claim or defense as required by N.C.G.S. § 1A-1, Rule 24(c). **In re T.H., 16.**

Permanent disposition plan—notice—The mother of juveniles for whom a permanent plan was entered at a disposition hearing was provided notice when the court entered a "temporary permanent" plan at adjudication, she and her attorney attended and participated in the dispositional hearing, and she did not object to the lack of formal notice. **In re T.H., 16.**

Disposition hearing—permissive intervention denied—parental rights previously terminated—The trial court did not abuse its discretion by denying a mother's motion for permissive intervention in the juvenile disposition hearing for some of her children where her parental rights had previously been terminated. **In re T.H., 16.**

Disposition plan—visitation by mother not specified—The trial court erred in a juvenile disposition where its visitation plan did not specify the time, place, and conditions under which visitation by the mother could be exercised. The trial court made no finding that the mother had forfeited her right to visitation or that it was in the best interests of the children to deny visitation. **In re T.H., 16.**

Temporary permanent plan—rendered harmless by subsequent order—The trial court did not err when, in a juvenile adjudicatory order, it made findings of fact and conclusions of law regarding a "temporary permanent plan" for the juveniles. Any error was rendered harmless by the trial court's entry of a permanent plan in its dispositional order. **In re T.H., 16.**

PARTIES

Motion to intervene—necessary party—The trial court erred by denying SeaScape Property Owners' Association, Inc.'s (POA) motion to intervene because it had a right to intervene under N.C.G.S. § 1A-1, Rule 24 (a)(2). To the extent that plaintiffs' claims were derivative, the POA was a necessary party because the derivative claims were brought in its name. **Anderson v. SeaScape at Holden Plantation, LLC, 1.**

PORNOGRAPHY

Second-degree sexual exploitation of minor—instruction—duplication—The trial court did not err by instructing the jury on second-degree sexual exploitation of a minor. The evidence sufficiently supported an instruction on duplication for all counts because defendant duplicated the images when he downloaded them from the internet and placed them on his computer. **State v. Williams, 152.**

Third-degree sexual exploitation of minor—multiple counts—receiving and possessing—separate harms—The trial court did not err by entering judgment on twenty-five counts of third-degree sexual exploitation of a minor. The Legislature's criminalization of both receiving and possessing such images prevents or limits two separate harms to the victims of child pornography. **State v. Williams, 152.**

PRETRIAL PROCEEDINGS

Defense motion for DNA testing—absence of DNA—not significant to defendant's defense—The trial court did not err in an attempted first-degree murder case by denying defendant's motion for DNA testing pursuant to N.C.G.S. § 15A-267(c). The absence of defendant's DNA on the shell casings at issue, if established, would not have had a logical connection or have been significant to defendant's defense that he was in Maryland at the time of the shooting. Furthermore, to the extent that defendant's motion sought to establish a lack of DNA evidence on the shell casings, such a motion was not proper under N.C.G.S. § 15A-267(c). **State v. McLean, 111.**

SEARCH AND SEIZURE

Community caretaking doctrine—recognized in North Carolina—The community caretaking doctrine is formally recognized as an exception to the warrant requirement of the Fourth Amendment in North Carolina. The State has the burden of proving that a search or seizure within the meaning of the Fourth Amendment has occurred, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown, and that the public need or interest outweighs the intrusion upon the privacy of the individual. Imminent danger to life or limb is not a required element of the test. **State v. Smathers, 120.**

Fourth Amendment—community caretaking exception—requirements satisfied—The three elements of the community caretaking exception to the Fourth

Amendment were satisfied in a driving while impaired case. Applying the exception narrowly, it was uncontested that the traffic stop was a seizure under the meaning of the Fourth Amendment; there was an objectively reasonable basis under the totality of the circumstances to conclude that the seizure was predicated on the community caretaking function of ensuring the safety of defendant and her vehicle; and there was a public need and interest in having the officer seize defendant that outweighed her privacy interest in being free from the intrusion. The officer was able to identify specific facts which led him to believe that help may have been needed, rather than a general sense that something was wrong. **State v. Smathers, 120.**

Motion to suppress evidence—statutory authority exceeded—domestic violence protective order—no exigent circumstances—In a case arising from defendant's motion to suppress evidence found in his home when officers served him with an *ex parte* domestic violence protection order (DVPO), the district court exceeded its statutory authority by ordering a general search of defendant's person, vehicle, and residence for unspecified "weapons" as a provision of the DVPO under North Carolina General Statute § 50B-3(a)(13). As defendant's premises were searched without a search warrant and without exigent circumstances, and as the good faith exception does not apply to evidence obtained in violation of the North Carolina Constitution, the evidence seized as a result of the search, which led to the criminal charges for which defendant was convicted, should have been suppressed. **State v. Elder, 80.**

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JOHN WILTON ANDERSON, SR., TRUSTEE FOR THE JOHN WILTON ANDERSON, SR. REVOCABLE TRUST DATED MAY 1990; ROBERT D. ANDERSON AND WIFE, PATRICIA A. ANDERSON; AL ARTALE AND WIFE, DEBBIE ARTALE; BALD EAGLE VENTURES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; ROBERT W. BARBOUR AND WIFE, KATHERINE G. BARBOUR; DOUGLAS R. BARR AND WIFE, KAREN W. BARR; DANIEL T. BARTELL AND WIFE, BARBARA J. BARTELL; MITCHELL W. BECKER; GEORGE D. BEECHAM AND WIFE, JACQUELINE J. BEECHAM; KAREN H. BEIGER; GARY E. BLAIR AND WIFE, KATHLEEN P. BLAIR; ANN M. BOILEAU AND HUSBAND, PAUL BOILEAU; GERARD C. BRADLEY AND WIFE, SUSAN M. BRADLEY; ROBERT WILLIAM BRICKER AND WIFE, PATRICIA ANNE BRICKER; TOBY J. BRONSTEIN; JAMES W. BURNS AND WIFE, CAROL J. BURNS; JOHN T. BUTLER; JOSEPH R. CAPKA AND WIFE, SUSAN J. CAPKA.; JOSEPH S. CAPOBIANCO AND WIFE, BARBARA K. CAPOBIANCO; ISAAC H. CHAPPELL AND JEAN M. HANEY AS CO-TRUSTEES OF THE ISAAC H. CHAPPELL TRUST DATED OCTOBER 10, 2000; KENNETH A. CLAGETT AND WIFE, MARY ELLEN CLAGETT; EDWARD EARL CLAY AND WIFE, CHARLENE HOUGH CLAY; GARY E. COLEMAN AND WIFE, HOLLY H. COLEMAN; WALTER N. COLEY AND WIFE, CARROLL M. COLEY; HARRY W. CONE AND WIFE, ELENORE W. CONE; MAURICE C. CONNOLLY AND WIFE, MADELINE S. CONNOLLY; JERRY W. CRIDER AND WIFE, BELINDA W. CRIDER; RICHARD S. CROMLISH, JR. AND WIFE, SANDRA K. CROMLISH; LAURA DEATKINE AND HUSBAND, MICHAEL J. WARMACK; NORVELL B. DEATKINE AND WIFE, THERESA M. DEATKINE; ROBERT E. DEMERS AND WIFE, DONNA L. FOOTE; JAN S. DENEROFF AND KAREN GILL DENEROFF, AS CO-TRUSTEES OF THE DENEROFF FAMILY TRUST DATED NOVEMBER 2, 2006; PAUL A. DENETT AND WIFE, LUCY Q. DENETT; JEROME V. DIEKEMPER AND WIFE, KAREN M. DIEKEMPER; MARK W. DORSET AND WIFE, DEBORAH M. DORSET; MICHAEL R. DUPRE, SR. AND WIFE, MOLLY H. DUPRE; DONALD D. EDWARDS AND BETTY M. EDWARDS AS TRUSTEES OF THE EDWARDS FAMILY TRUST DATED DECEMBER 21, 1992; TROY D. ELLINGTON AND WIFE, BETTY S. ELLINGTON; PETER W. FASTNACHT AND WIFE, CAROLE ANN FASTNACHT; RICK D. FAUTEUX AND WIFE, BRENDA S. FAUTEUX; WILLIAM H. FOERTSCH AND WIFE, PAMELA G. FOERTSCH; LOUIS J. FRATTO, JR. AND WIFE, EILEEN M. FRATTO; ROBERT A. FUNK AND WIFE, BEATRIZ B. FUNK; ROBERT A. MINK AND WIFE, BEATRIZ B. FUNK, AS TRUSTEES OF THE FUNK LIVING TRUST DATED MARCH 22, 1999; JOLANTA T. GAL; JOSEPH GARBARINO AND WIFE, BETTY GARBARINO; ROBERT J. GETTTNGS AND WIFE, KATHERINE ANNE GETTINGS; TIM GIBBLE AND WIFE, SUSAN GIBBLE; ROCKLIN E. GMEINER, JR. AND MARSHA A. GMEINER, TRUSTEES UNDER THE GMEINER FAMILY TRUST, DATED AUGUST 21, 2008; HARRY J. GRAHAM AND WIFE, MARYANNE S.

GRAHAM; RICHARD A. GRANO AND WIFE, ANGELA M. GRANO; RODNEY LAVERNE GROW AND WIFE, JO ELAINE GROW; RONALD E. GUAY AND WIFE, DORIS M. GUAY; LEON J. HARRISON AND WIFE, MARGARET A. HARRISON; GLEN A. HATZAI AND WIFE, BARBARA A. HATZAI; KJELL HESTVEDT AND WIFE, ANNE T. HESTVEDT; LARRY H. HITES AND WIFE, KARI F. HITES; DENNIS E. HOFFACKER AND SUE E. HOFFACKER AS TRUSTEES OF THE SUE E. HOFFACKER REVOCABLE LIVING TRUST DATED FEBRUARY 9, 1998; JOHN E. HOWARD AND WIFE, MARYE C. HOWARD; JAMES S. HUTCHISON AND WIFE, PAMELA E. HUTCHISON; CHARLES L. INGRAM AND WIFE, RHONDA M. INGRAM; THOMAS M. INMAN AND WIFE, DIANE M. INMAN; WILLIAM R. JONAS AND WIFE, DIAN M. JONAS; MICHAEL G. KIDD AND WIFE, VIRGINIA G. KIDD; H. WILLIAM KUCHLER AND WIFE, PATRICIA A. KUCHLER; SCOTT C. LEE AND WIFE, CYNTHIA A. LEE; PETER J. LEWIS AND WIFE, JANET L. LEWIS; JAMES R. LITTLE AND WIFE, BONITA S. LITTLE; PATRICK M. LOONAM AND WIFE, PATRICIA E. LOONAM; DONALD G. LUFF AND WIFE, JUDITH A. LUFF; MARK E. MAINARDI AND FRANCES B. MAINARDI, AS TRUSTEES OF THE MAINARDI LIVING TRUST DATED JANUARY 23, 1997; ANTHONY MARGLIANO AND WIFE, ERIN MARGLIANO; JOSEPH E. MCDERMOTT AND WIFE, MARY M. MCDERMOTT; JOHN 0. MCELROY AND WIFE, KETHLEEN A. MCELROY; GEORGE J. MCQUILLEN AND WIFE, BARBARA J. MCQUILLEN; STEVEN J. MEADOW AND BRENDA K. MEADOW, TRUSTEES OF THE MEADOW REVOCABLE TRUST DATED JANUARY 12, 2010; GEORGE EDWARD MERTENS, III AND WIFE, NANCY MERTENS; MICHAEL A. MICKIEWICZ, TRUSTEE OF THE MICHAEL A. MICKIEWICZ TRUST DATED APRIL 21, 2011; JACQUELINE A. MICKIEWICZ, TRUSTEE OF THE JACQUELINE A. MICKIEWICZ TRUST DATED APRIL 21, 2011; TERRY LEE MILLER AND WIFE, JOAN C. MILLER; TERRY STEPHEN MOLNAR; MARIAN E. CARLUCCI; MICHAEL R. MONETTI AND WIFE, IRENE A. MONETTI; MIMA S. NEDELCOVYCH AND WIFE, SALLY NEDELCOVYCH; WILLIAM W. NIGHTINGALE AND WIFE, BONNIE NIGHTINGALE; KEITH OKOLICHANY AND WIFE, LINDA A. OKOLICHANY; RICHARD L. PASTORIUS AND WIFE, BONNIE L. PASTORIUS; JOHN J. PATRONE AND WIFE, LINDA D. PATRONE; LOUIS M. PACELLI AND WIFE, MARLEEN S. PACELLI; LAURENCE F. PIAZZA AND WIFE, CHERYL ANN PIAZZA; JACK L. RAIDIGER AND WIFE, JUDY K. RAIDIGER; FRANK RINALDI AND WIFE, ROSEMARIE RINALDI; TIMOTHY T. ROSEBERRY AND WIFE, SUZANNE ROSEBERRY; EILEEN ROSENFELD AND ROBERT W. ROSENFELD, AS TRUSTEES UNDER THE EILEEN ROSENFELD LIVING TRUST DATED AUGUST 9, 2000; GEORGE M. SAVELL AND WIFE, MARIA VIOLET SAVELL; DENNIS J. SCHARF AND WIFE, CHERYL H. SCHARF; FRANCIS G. SCHAROUN AND WIFE, DEBORAH M. SCHAROUN; ROBERT L. SCHORR; JOHN FRANCIS SEELY AND WIFE, JANET CAVE SEELY; ERNEST J. SEWELL AND WIFE, ROWENA P. SEWELL; WILLIAM M. SHOOK AND WIFE, SUSAN M. SHOOK; CRAIG A. SKAJA AND WIFE, CHRISTINE C. SKAJA; CHARLES M. SMITH AND WIFE, LOIS S. SMITH; HELGA SMITH; THOMAS W. SMITH AND WIFE, MARTHA B. SMITH; ALAN H. SPIRO AND WIFE, RHONDA B. SPIRO; KENNETH STEEPLES AND WIFE, EILEEN P. STEEPLES; RICHARD L. STEINBERG AND WIFE, BARBARA J. STEINBERG; THOMAS STURGILL AND WIFE, LINDA STURGILL; SCOTT SULLIVAN AND WIFE, LORETTA F. SULLIVAN; JOHN M. SWOBODA AS TRUSTEE OF THE JOHN M. SWOBODA REVOCABLE LIVING TRUST DATED NOVEMBER 29, 2002; CAROL L. SWOBODA AS TRUSTEE OF THE CAROL L. SWOBODA REVOCABLE LIVING TRUST DATED OCTOBER 28, 2002; ROBERT C. THERRIEN AND WIFE, JANE A. THERRIEN; HARVEY L. THOMPSON AND WIFE, ROSALYN THOMPSON; PAULINE TOMPKINS; DERRAIL TURNER AND WIFE, PANSEY TURNER; WILLIAM E. WILKINSON AND WIFE, BETTY R. WILKINSON; JAMES M. WILLIAMS AND WIFE, PATRICIA E. WILLIAMS; THOMAS P. WOLFE AND WIFE, JULIA T. WOLFE; JAMES J.

ANDERSON v. SEASCAPE AT HOLDEN PLANTATION, LLC

[232 N.C. App. 1 (2014)]

YORIO AND WIFE, DEBORAH L. YORIO; JOSEPH ZALMAN AND WIFE, VALERIE ZALMAN; EUGENE E. ZIELINSKI AND WIFE, REBECCA R. ZIELINSKI, PLAINTIFFS
v.
SEASCAPE AT HOLDEN PLANTATION, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A SEASCAPE AT HOLDEN PLANTATION, INC.; THE COASTAL COMPANIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, D/B/A MARK SAUNDERS LUXURY HOMES; EASTERN CAROLINAS' CONSTRUCTION & DEVELOPMENT LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A EASTERN CAROLINAS' CONSTRUCTION & DEVELOPMENT CORPORATION; COASTAL CONSTRUCTION OF EASTERN NC, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A COASTAL DEVELOPMENT & REALTY BUILDER, INC.; MAS PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; MARK A. SAUNDERS, CAPE FEAR ENGINEERING, INC., A NORTH CAROLINA CORPORATION; EXECUTIVE BOARD OF SEASCAPE AT HOLDEN PLANTATION PROPERTY OWNERS ASSOCIATION, INC.; ERIC JOHNSON; CURT BOLDEN; HELEN STEAD; TONY BRADFORD CHEERS; CARROLL LIPSCOMBE; SEAN D. SCANLON; DANIEL H. WEEKS; RICHARD GENOVA; SUSAN LAWING; DEAN SATRAPE; GRACE WRIGLEY; BRUNSWICK COUNTY; BRUNSWICK COUNTY INSPECTION DEPARTMENT; ELMER DELANEY AYCOCK; HAROLD DOUGLAS MORRISON; ANTHONY SION WICKER; DAVID MEACHAM STANLEY, DEFENDANTS

No. COA13-799

Filed 21 January 2014

1. Appeal and Error—interlocutory orders and appeals—denial of motion to intervene—substantial right

Although intervenor SeaScape Property Owners' Association, Inc. appealed from an interlocutory order that denied its motion to intervene, it affected a substantial right and was immediately appealable.

2. Appeal and Error—motion to dismiss appeal—subject matter jurisdiction—stipulation

Plaintiffs' motion to dismiss the appeal for lack of subject matter jurisdiction on the basis that intervenor SeaScape Property Owners' Association, Inc. lacked authority, and therefore standing, to pursue the appeal was denied. The parties stipulated that the trial court had subject matter jurisdiction over the present action.

3. Parties—motion to intervene—necessary party

The trial court erred by denying SeaScape Property Owners' Association, Inc.'s (POA) motion to intervene because it had a right to intervene under N.C.G.S. § 1A-1, Rule 24 (a)(2). To the extent that plaintiffs' claims were derivative, the POA was a necessary party because the derivative claims were brought in its name.

Appeal by Intervenor SeaScape at Holden Plantation Property Owners Association, Inc. from Order entered 24 January 2013 by Judge Thomas H. Lock in Superior Court, Brunswick County. Heard in the Court of Appeals 19 November 2013.

Whitfield Bryson & Mason, LLP, by Daniel K. Bryson, for plaintiffs-appellees.

Young Moore and Henderson, P.A., by Robert C. deRosset, and Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe, for defendants Mark A. Saunders and MAS Properties, LLC.

Hamlet & Associates, PLLC, by H. Mark Hamlet, for Coastal Construction of Eastern NC, LLC.

Wall Templeton & Haldrup, PA, by Mark Langdon, for Seascape at Holden Plantation LLC, The Coastal Companies LLC, Eastern Carolinas Construction and Development LLC.

Cranfill Sumner & Hartzog, LLP, by Patrick Mincey, for Cape Fear Engineering, Inc.

Teague Campbell Dennis & Gorham, LLP, by Henry W. Gorham, for Elmer Delany Aycock, Harold Douglas Morrison, Anthony Sion Wicker, and David Meacham Stanley.

Chestnutt, Clemmons & Peacock, P.A., by Gary H. Clemmons, for defendants Eric Johnson, Curt Bolden, Tony Bradford Cheers, Carroll Lipscombe, Grace Wrigley, Helen Stead, Susan Lawing, Dan Weeks, Richard Genova, Dean Satrape, Sean D. Scanlon, and The Executive Board of Seascape at Holden Plantation Property Owners Association, Inc.

Ward and Smith, P.A., by Ryal W. Tayloe and Allen N. Trask, III, for Intervenor-Appellant Seascape at Holden Plantation Property Owners Association, Inc.

STROUD, Judge.

The SeaScape at Holden Plantation Property Owners Association, Inc. appeals from an order entered 24 January 2013 denying its motion to intervene. We reverse and remand.

I. Background

This action concerns a planned community in Brunswick County called SeaScape at Holden Plantation ("SeaScape Community"). The SeaScape Community was developed by SeaScape at Holden Plantation, LLC ("SeaScape LLC"), and its member-manager, Mark Saunders, both defendants here. Plaintiffs claim that the SeaScape Community "derives much of its value from the substantial common elements available for the owners' use, including a marina, a clubhouse, and ponds and natural areas throughout the property." Plaintiffs' claims arise from the construction of some of these common areas, including a marina and two ponds as well as the "failure to construct promised amenities, including without limitation, tennis courts, walking and biking trails, harbormaster house, intracoastal pier with gazebo, and observation towers" and failure to properly construct and maintain roadways and drainage. The developer had some of these common areas constructed and then conveyed them to the SeaScape Property Owners' Association, Inc. (POA), a non-profit corporation. Plaintiffs are property owners within the SeaScape Community and members of the POA. Under the POA's articles of incorporation, the developer has the unilateral authority to appoint and remove members of the POA Board of Directors.

On 5 October 2012, plaintiffs filed a verified complaint, motion for temporary restraining order, and motion for preliminary injunction. This initial complaint listed the POA as a defendant. The complaint alleged that two of the common ponds, the marina, and some of the roads had various construction defects resulting in excessive repair costs and diminution of property value, among other damages. Plaintiffs have alleged that the common areas at issue were defectively constructed by several LLCs operated by Mr. Saunders.

The complaint raised claims for breach of contract, breach of implied warranties, unfair and deceptive business practices, and constructive fraud against SeaScape LLC and the construction LLCs allegedly operated by Mr. Saunders, as well as piercing the corporate veil to impose liability on Mr. Saunders individually. Plaintiffs also alleged breach of fiduciary duty, negligence, unfair and deceptive business practices against Mr. Saunders individually. The complaint also raised negligence and breach of contract claims against Cape Fear Engineering, Inc. for its designs of several common elements. Plaintiffs further claimed that the POA Board of Directors and the individual board members had breached their fiduciary duties to plaintiffs and engaged in a civil conspiracy with the developer. Finally, plaintiffs claimed that Brunswick County and several individual inspectors were negligent in their inspections, had

engaged in a civil conspiracy with the developer, and acted in a manner that constituted unfair and deceptive business practices.

Before the POA filed an answer, plaintiffs filed an amended complaint on 26 October 2012, which included essentially the same claims but did not include the POA as a defendant. On 27 November 2012, the POA filed a motion to intervene "as a party Plaintiff." It claimed that it was the owner of the property that plaintiffs have alleged was defectively constructed. It contended that some of the interests asserted by plaintiffs were actually interests owned by the POA. It attached a draft complaint, largely copying plaintiffs' claims against the developer, the construction companies, Cape Fear, and the Brunswick County defendants. The superior court denied the POA's motion to intervene by order entered 24 January 2013. The POA filed written notice of appeal to this Court on 13 February 2013.

II. Appellate Jurisdiction

[1] We must first address the issue of appellate jurisdiction. We conclude that the appeal is interlocutory, but that the appealed order affects a substantial right and is therefore immediately appealable. Further, we deny plaintiffs' motion to dismiss the appeal for lack of subject matter jurisdiction.

The trial court's order denying the POA's motion to intervene is interlocutory, as it does not dispose of the entire case. *See High Rock Lake Partners, LLC v. North Carolina Dept. of Transp.*, 204 N.C. App. 55, 60, 693 S.E.2d 361, 366 ("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." (citation, quotation marks, and ellipses omitted)), *disc. rev. denied*, 364 N.C. 325, 700 S.E.2d 753 (2010). "Normally, interlocutory orders are not immediately appealable." *Highland Paving Co., LLC v. First Bank*, ___ N.C. App. ___, ___, 742 S.E.2d 287, 290 (2013) (citation omitted). Nevertheless,

> an interlocutory order may be immediately appealed (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Stinchcomb v. Presbyterian Medical Care Corp., 211 N.C. App. 556, 560, 710 S.E.2d 320, 323, *disc. rev. denied*, 365 N.C. 338, 717 S.E.2d 376 (2011).

The POA argues that the trial court's denial of its motion to intervene affects a substantial right. "Whether a party may appeal an interlocutory order pursuant to the substantial right exception is determined by a two-step test. The right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 55, 603 S.E.2d 539, 544 (2004) (citations, quotation marks, and brackets omitted).

Under the facts presented here, we conclude that the trial court's order affects a substantial right of the POA. *Cf. United Services Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 395, 485 S.E.2d 337, 339 (concluding that an order denying the appellants' motion to intervene affected a substantial right), *disc. rev. denied*, 347 N.C. 141, 492 S.E.2d 37 (1997); *Alford v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998) (concluding that the denial of a motion to intervene affected a substantial right). This action concerns property owned by the POA. To the extent that the parties contend that there are derivative claims at issue, they were derivative of rights possessed by the POA. Unless it is brought into the action, the POA would lose its ability to challenge plaintiffs' standing to bring an action on its behalf, which is a major issue in contention here. *See Swenson v. Thibaut*, 39 N.C. App. 77, 100, 250 S.E.2d 279, 294 (1978) (observing that "certain defenses which are properly asserted before trial on the merits of the action are peculiar to the corporation alone, and may be properly raised *only* by the nominal defendant who, for purposes of those matters, ceases to be a nominal defendant and becomes an actual party defendant."), *app. dismissed and disc. rev. denied*, 296 N.C. 740, 740, 254 S.E.2d 181, 181-83 (1979). We conclude that the order denying the POA's motion to intervene affects a substantial right and is immediately appealable.

[2] Plaintiffs have also filed a motion to dismiss the appeal for lack of subject matter jurisdiction on the basis that the POA lacks authority, and therefore standing, to pursue the appeal. This argument is misplaced. The only action currently pending and the action into which the POA moved to intervene is that filed by plaintiffs. The parties stipulated that the trial court had subject matter jurisdiction over the present action—the action filed by plaintiffs—and we see no reason to conclude otherwise. Therefore, we deny plaintiffs' motion to dismiss the appeal.

III. Motion to Intervene

[3] The POA argues that the trial court erred in denying its motion to intervene because it had a right to intervene under N.C. Gen. Stat. § 1A-1,

Rule 24(a) (2011), and, alternatively, the trial court abused its discretion in denying the POA's motion to intervene permissively under Rule 24(b). We hold that the POA had a right to intervene as a necessary party under Rule 24(a)(2). Because we conclude that the POA has a right to intervene under Rule 24 (a)(2), we do not address the issue of a statutory right to intervene or permissive intervention.

A. Standard of Review

"We review *de novo* the trial court's decision denying intervention under Rule 24(a)(2)." *Charles Schwab & Co., Inc. v. McEntee*, ___ N.C. App. ___, ___, 739 S.E.2d 863, 867 (2013) (citation omitted). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court." *Johns v. Welker*, ___ N.C. App. ___, ___, 744 S.E.2d 486, 488 (2013) (citation, quotation marks, and brackets omitted).

B. Analysis

"Rule 24 of the North Carolina Rules of Civil Procedure determines when a third party may intervene as of right or permissively." *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 458, 515 S.E.2d 675, 682 (1999), *cert. denied*, 529 U.S. 1033, 146 L.Ed. 2d 337 (2000). Under Rule 24, a person has a right to intervene in two circumstances:

> (1) When a statute confers an unconditional right to intervene; or (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a) (2011).

"The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani*, 350 N.C. at 459, 515 S.E.2d at 683.

> When a complete determination of the controversy cannot be made without the presence of a party, the court must cause it to be brought in because such party is a necessary party and *has an absolute right to intervene in a pending*

> *action.* Hence, refusal to permit a necessary party to intervene is error.

Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (emphasis added). Our Supreme Court held under the prior N.C. Gen. Stat. § 1-73 that a trial court erred in denying the owner of property at issue, a necessary party, the opportunity to participate. *Griffin & Vose v. Non-Metallic Minerals Corp.*, 225 N.C. 434, 436, 35 S.E.2d 247, 249 (1945).[1] Moreover, to the extent that plaintiffs' claims are derivative, the POA is a necessary party because the derivative claims are brought in its name. *Swenson*, 39 N.C. App. at 98, 250 S.E.2d at 293.

"A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence." *Moore Printing, Inc. v. Automated Print Solutions, LLC*, ___ N.C. App. ___, ___, 718 S.E.2d 167, 172 (2011). The POA is the owner of the property that plaintiffs have alleged was defectively constructed and is in need of repair. Plaintiffs have specifically requested an injunction prohibiting the POA from expending its funds to repair the marina, as plaintiffs assert that the other defendants should be held responsible for these expenses. Plaintiffs assert that several of their claims are derivative claims brought on behalf of the POA. No valid judgment can be entered without the participation of the POA. *See Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 440, 527 S.E.2d 40, 44 (2000) (concluding that "[a]n adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a "valid judgment."); *Swenson*, 39 N.C. App. at 98, 250 S.E.2d at 293. Therefore, regardless of whether plaintiffs' claims are derivative or individual, valid or inadequate, as a necessary party, the POA has a right to intervene under Rule 24. *See Virmani*, 350 N.C. at 459, 515 S.E.2d at 683; *Strickland*, 273 N.C. at 485, 160 S.E.2d at 316; *Swenson*, 39 N.C. App. at 98, 250 S.E.2d at 293.

We also note that the parties all seem to assume in their briefs that the plaintiffs' claims at issue are derivative claims brought on behalf of the POA. The only issue which the trial court has ruled upon and which is raised by this appeal is the POA's right to intervene, and we have addressed only that issue. We express no opinion on the legal sufficiency

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1. Both of these cases were decided before the Rules of Civil Procedure came into effect. However, our Supreme Court has noted that "[t]he rules of intervention as set out in N.C.G.S. § 1A-1 make no substantive change in the rules as previously set out in N.C.G.S. § 1-73." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 128 n.10, 388 S.E.2d 538, 554 n.10 (1990).

of plaintiff's claims or of the POA's complaint, the assertion that the claims are actually derivative and pled as such, or the POA's argument that derivative claims were not properly brought. These other legal issues and the proper role of the POA in the action may be addressed by the trial court on remand if and when they are raised by the parties.

IV. Conclusion

For the foregoing reasons, we hold that the POA is entitled to intervene as a matter of right under Rule 24. Therefore, we reverse the trial court's order denying the POA's motion to intervene and remand for further proceedings.

REVERSED and REMANDED.

Judges MCGEE and BRYANT concur.

CYNTHIA A. BAILEY, PETITIONER
v.
DIVISION OF EMPLOYMENT SECURITY, NORTH CAROLINA DEPARTMENT OF COMMERCE, RESPONDENT

No. COA13-452

Filed 21 January 2014

Administrative Law—adoption of agency findings—but not conclusions

The trial court erred by reversing the decision of the Employment Security Division of the Department of Commerce (DOC) where it had adopted all of DOC's findings, which as a matter of law supported DOC's ruling that petitioner had engaged in misconduct.

Appeal by respondent from order entered 14 January 2013 by Judge C. Philip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 26 September 2013.

Adams Hendon Carson Crow & Saenger, P.A., by John C. Hunter, for petitioner-appellee.

North Carolina Department of Commerce, Division of Employment Security, by Timothy M. Melton, for respondent-appellant.

STEELMAN, Judge.

Where the trial court adopted all of the findings of fact made by DOC, which as a matter of law supported DOC's ruling that petitioner engaged in misconduct, the trial court erred in reversing the decision of DOC.

I. Factual and Procedural Background

Cynthia A. Bailey (plaintiff) was employed by Pro Temps Medical Staffing (Pro Temps). On 11 December 2011, plaintiff's employment with Pro Temps was terminated. On 1 January 2012, plaintiff filed a claim for unemployment benefits. An Adjudicator found that plaintiff was assigned to monitor a patient who was on suicide watch; that plaintiff was found sleeping on the job; and that plaintiff was discharged due to this misconduct and was disqualified from receiving unemployment benefits. On 2 April 2012, plaintiff appealed *pro se* to the Appeals Referee.

On 1 May 2012, the Appeals Referee heard the appeal. The Appeals Referee affirmed the Adjudicator's determination, and held that plaintiff was discharged due to misconduct, and therefore was disqualified from receiving unemployment benefits. The Appeals Referee further found that while plaintiff was sleeping, the suicide-watch patient had been wandering the halls of the hospital. On 31 May 2012, plaintiff appealed *pro se* to the North Carolina Department of Commerce, Division of Employment Security (DOC).

On 26 September 2012, DOC adopted the facts found by the Appeals Referee, concluded that the Appeals Referee correctly applied the law, and affirmed the decision that plaintiff was disqualified from receiving unemployment benefits. On 26 October 2012, plaintiff filed a petition for judicial review to the Superior Court of Buncombe County.

On 15 January 2013, the trial court entered its order on judicial review, and held that plaintiff was not disqualified to receive unemployment benefits.

DOC appeals.

II. Standard of Review

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006). A determination that an employee has engaged in misconduct under N.C. Gen. Stat. §§ 96-14 and 96-15 is a conclusion of law. *See e.g. Williams*

v. Burlington Indus., Inc., 318 N.C. 441, 456, 349 S.E.2d 842, 851 (1986) (referring to "the referee's conclusion that petitioner was discharged for misconduct").

> [I]n cases appealed from an administrative tribunal under [Article 3 of North Carolina's Administrative Procedure Act], it is well settled that the trial court's erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b).

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

> When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

N.C. Sav. & Loan League v. N.C. Credit Union Comm'n, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981) (citations and quotations omitted).

III. Trial Court's Standard of Review

In its first argument, DOC contends that the trial court disregarded the standard of review set out in N.C. Gen. Stat. § 96-15(i). We agree.

N.C. Gen. Stat. § 96-15, concerning the procedure as to claims for unemployment benefits, provides that, in any judicial review of a decision by DOC:

> the findings of fact by the Division, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall

be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all civil cases.

N.C. Gen. Stat. § 96-15(i) (2013).

In the instant case, the Appeals Referee found that:

> 3. According to the employer's policies and procedures, of which the claimant knew or should have known, if an employee is found to be asleep or giving off the appearance of sleep while he/she is supposed to be performing job duties, then said employee may be subjected to an immediate discharge from employment.
>
> 4. On the claimant's final day of employment, she [claimant] was found asleep in a patient's room. The claimant was supposed to be providing sitter duties for said patient.
>
> 5. The above-mentioned patient was on "suicide watch" and left the room while the claimant was asleep.
>
> 6. A nurse woke up the claimant and informed her [claimant] that the patient she was to be watching over was outside of his room at the nurses' station.
>
> 7. The claimant was discharged from this job for sleeping during her work shift while she was supposed to be performing her job duties.

The Appeals Referee concluded that:

> the claimant fell asleep while she was supposed to be watching over a patient as a certified nursing assistant/sitter. The employer's policies allow for an employee to turn down patients and/or shifts if he or she thinks it would not be prudent or possible to perform job duties whether that decision is based on one's comfort level or level of fatigue. The claimant did not turn down providing sitting duties for the above-noted patient during her agreed to work shift. The claimant's actions were a willful disregard of the employer's interests and a disregard of the standards of behavior that the employer rightfully expected of the claimant. As such, the claimant was discharged for misconduct in connection with the work.

On appeal from the Appeals Referee, DOC held that:

> As the ultimate fact-finder in cases involving contested claims for unemployment insurance benefits, the undersigned concludes that the facts found by the Appeals Referee were based on competent evidence and adopts them as its own. The undersigned also concludes that the Appeals Referee properly and correctly applied the Employment Security Law (G.S. §96-1 et seq.) to the facts as found, and the resultant decision was in accordance with the law and fact.

On appeal from DOC, the trial court found simply that "There is competent evidence in the record to support the findings of fact made by the Division." However, the trial court then concluded that plaintiff's conduct was not "misconduct" which would merit disqualification, holding:

> The Division's conclusion of law as set out in the Memorandum of Law Section of the Division's Decision is in error as a matter of law in that Petitioner's actions were not, "conduct evincing a willful or wanton disregard of the employer's interest as is found in the deliberate violations or disregard of standards of behavior which an employer has a right to expect of an employee or has been explained orally or in writing to an employee or conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interest or of the employee's duties or obligations to the employer," and were not, therefore, "misconduct" as that term is defined and used in N.C. Gen. Stat. § 96-14(2).

N.C. Gen. Stat. § 96-14 defines misconduct as:

> intentional acts or omissions evincing disregard of an employer's interest or standards of behavior which the employer has a right to expect or has explained orally or in writing to an employee or evincing carelessness or negligence of such degree as to manifest equal disregard.

N.C. Gen. Stat. § 96-14(2) (2011)[1].

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1. N.C. Gen. Stat. § 96-14 was repealed by Session Laws 2013-2, s.2(a), effective 1 July 2013, and replaced by N.C. Gen. Stat. § 96-14.1 *et seq*. However, § 96-14 was effective during the proceedings before the trial court, and we will therefore apply the definition expressed therein.

The findings of fact of the Appeals Referee were adopted by DOC, and in turn by the trial court upon appeal. These findings explicitly stated that Pro Temps had a policy that employees found sleeping were subject to immediate discharge, and that employees who believed themselves unable to perform had the option to turn down patients or shifts, and that plaintiff knew or should have known about these policies. Further, these findings stated that plaintiff was found sleeping when she had been assigned to a patient on suicide watch, having chosen not to turn down the shift. These findings all support the conclusion that plaintiff had engaged in misconduct, and do not support a conclusion to the contrary.

Nonetheless, the trial court, despite adopting these findings in their entirety, concluded that no misconduct had occurred. Its conclusion is in direct contradiction to the findings it adopted, and is therefore without a basis in the law.

We hold that the trial court erred as a matter of law in making conclusions of law which were not supported by its findings of fact, and reverse and remand this matter to the trial court for entry of an order affirming the decision of DOC.

IV. Other Arguments

Because we have held that the trial court erred as a matter of law in reversing the decision of DOC, we need not address DOC's other arguments.

REVERSED AND REMANDED.

Judges HUNTER, ROBERT C. and BRYANT concur.

IN RE T.H.

[232 N.C. App. 16 (2014)]

IN THE MATTER OF T.H., T.H., A.S., J.S., M.W., A.W.

No. COA13-433

Filed 21 January 2014

1. Juveniles—disposition hearing—mother's motion to intervene as a matter of right

The trial court correctly denied a mother's motion to intervene in a juvenile disposition hearing as a matter of right where her parental rights to the four adopted juveniles had been severed. Moreover, her motion was defective for failure to include a pleading asserting a claim or defense as required by N.C.G.S. § 1A-1, Rule 24(c).

2. Juveniles—disposition hearing—permissive intervention denied—parental rights previously terminated

The trial court did not abuse its discretion by denying a mother's motion for permissive intervention in the juvenile disposition hearing for some of her children where her parental rights had previously been terminated.

3. Juveniles—disposition hearing—appeal—outside statutory categories

The appeal of a mother in a juvenile disposition hearing was dismissed as to four of her children who had been surrendered to adoption where the mother did not come within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C.G.S. §§ 7B-1001 and 7B-1002.

4. Juveniles—dependent—lack of caregivers

The trial court did not err by adjudicating two children as dependent juveniles where the legal custodian of the juveniles, their maternal grandmother, was deceased; there were no appropriate family members to care for the juveniles; respondent, the children's mother, did not present herself as a potential caregiver at the adjudicatory hearing; and no alternative caregivers were presented.

5. Juveniles—temporary permanent plan—rendered harmless by subsequent order

The trial court did not err when, in a juvenile adjudicatory order, it made findings of fact and conclusions of law regarding a "temporary permanent plan" for the juveniles. Any error was rendered harmless by the trial court's entry of a permanent plan in its dispositional order.

6. Juveniles—permanent disposition plan—notice

The mother of juveniles for whom a permanent plan was entered at a disposition hearing was provided notice when the court entered a "temporary permanent" plan at adjudication, she and her attorney attended and participated in the dispositional hearing, and she did not object to the lack of formal notice.

7. Juveniles—disposition—non-relative placement

The trial court did not abuse its discretion in a juvenile disposition by making a non-relative placement or in its conclusions. It is apparent from the trial court's exhaustive findings of fact that the trial court considered several relative placements but no suitable option was available.

8. Juveniles—conclusions—reunification efforts not needed—supported by findings

The uncontested findings in a juvenile disposition supported the trial court's conclusions that reunification efforts would be inconsistent with the juveniles' health, safety and need for a permanent home within a reasonable period of time and were not required.

9. Juvenile—disposition plan—visitation by mother not specified

The trial court erred in a juvenile disposition where its visitation plan did not specify the time, place, and conditions under which visitation by the mother could be exercised. The trial court made no finding that the mother had forfeited her right to visitation or that it was in the best interests of the children to deny visitation.

Appeal by respondent from adjudication order entered 3 May 2012 by Judge Charlie Brown and disposition order entered 9 January 2013 by Judge Lillian B. Jordan in Rowan County District Court. Heard in the Court of Appeals 8 October 2013.

Cynthia Dry for petitioner-appellee Rowan County Department of Social Services.

Jeffrey L. Miller for respondent-appellant mother.

Administrative Office of the Courts, by Associate Counsel Deana K. Fleming, for guardian ad litem.

BRYANT, Judge.

Where respondent-mother fails to establish an immediate and direct interest in four juveniles — Tracy, Todd, Mary, and Ann[1] —following the surrender of her parental rights as to them in a prior proceeding, we affirm the trial court's ruling that respondent-mother may not intervene in the juveniles' dispositional hearing as a matter of right. Where respondent-mother does not come within any category of persons afforded a right to appeal a juvenile matter arising from Subchapter I of Chapter 7B, as such appeal relates to the four juveniles adopted from respondent-mother, respondent-mother lacks standing to appeal. Accordingly, we must dismiss respondent-mother's appeal as to those four juveniles. Because there was sufficient evidence to support the trial court's findings of fact and those findings support the trial court's conclusion that Ashley and John were dependent, we affirm that determination. Where respondent-mother was on notice that the trial court would enter a permanent plan for her two children, respondent-mother participated in the dispositional hearing to establish a permanent plan, and did not object to the lack of notice, the trial court did not err in establishing a permanent plan. Where the trial court's unchallenged findings of fact support its conclusion that reunification efforts would be inconsistent with the juvenile's health, safety, and need for a permanent home, we affirm the trial court's conclusion that reunification efforts are not required at this time. Where the trial court failed to establish an appropriate schedule for respondent-mother to visit her children, we remand the matter to the trial court for entry of such a schedule.

Respondent-mother Claire Wilson ("Claire")[2], the biological mother of the juveniles, appeals from orders: (1) adjudicating the juveniles dependent; (2) denying her motion to intervene; (3) ordering a permanent plan of adoption for Tracy, Todd, Mary, and Ann; and (4) ordering a permanent plan of custody or guardianship for Ashley and John. After careful review, we affirm in part, remand in part, and dismiss in part Claire Wilson's appeal.

On 27 January 2012, the Rowan County Department of Social Services ("DSS") filed a petition alleging that Tracy, Todd, Ashley, John, Mary, and Ann were dependent juveniles. DSS stated that on 27 January 2012, Janice Lake ("Janice"), the maternal grandmother of the juveniles,

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1. Pseudonyms are used throughout this opinion to protect the juveniles' privacy and for ease of reading.

2. Pseudonyms are used to protect the identity of respondent-mother, her adult relatives and caretakers of the children.

was murdered. Janice had adopted Tracy, Todd, Mary, and Ann in 2009 and in 2004 had been granted custody of Ashley and John. In its petition, DSS alleged that there were no appropriate family members to care for the children and subsequently, took custody of the juveniles by non-secure custody order. On 2 February 2012, the trial court appointed the juveniles a guardian ad litem.

An adjudicatory hearing was held on 29 March 2012. The trial court adjudicated the children "dependent juveniles" and ordered that legal custody, as well as authority over placement and visitation, remain with DSS. Additionally, the trial court stated the following:

> It is in the best interests of the juveniles for the temporary permanent plan of [John and Ashley] to be custody or guardianship with a relative or other court approved caretaker. The temporary permanent plan for [Ann, Mary, Todd, and Tracy] should be adoption.

On 2 October 2012, several of the juveniles' relatives filed a joint motion to intervene in the juvenile proceedings. The relatives stated that they were willing and able to provide care for the juveniles and that it was in the best interests of the juveniles to be placed with family members. On 8 October 2012, Mr. and Mrs. Alfred, who were the court approved placement providers for all of the juveniles, also filed a motion to intervene. Mr. and Mrs. Alfred argued that they should be "permitted to intervene because it would be in the best interests of all the children to have [Mr. and Mrs. Alfred] involved as parties in their case, since [Mr. and Mrs. Alfred] [] have developed such strong bonds with the children and are providing their daily care."

On 10 October 2012, Claire filed a motion to intervene. The motion related solely to Tracy, Todd, Mary, and Ann, the four juveniles adopted by Janice. Claire noted that she was the biological mother of the juveniles and legally their sister since the children had been adopted by Claire's mother. Claire denied the material allegations made by Mr. and Mrs. Alfred in their motion to intervene and requested that the juvenile petition be terminated, the juveniles placed with her, or in the alternative, members of her family, and that Mr. and Mrs. Alfred's motion to intervene be denied.

A dispositional hearing was conducted on 8, 9, and 26 November 2012. The trial court denied all motions to intervene. The court found that no relative was able to provide proper care and supervision for the juveniles and that placement with "any of the identified relatives" was contrary to the best interests of the juveniles. The trial court specifically

found that it was contrary to the best interests of the juveniles for them to return to Clarie's home. The trial court made findings regarding Todd's repeated attempts to harm himself and others, as well as his auditory and visual hallucinations, and placed him in a residential psychiatric facility, with placement with Mr. and Mrs. Alfred if possible once his treatment was complete. The remaining juveniles were placed with Mr. and Mrs. Alfred. The court set the permanent plan for Tracy, Todd, Mary and Ann as adoption and the permanent plan for Ashley and John as custody or guardianship with Mr. and Mrs. Alfred. Claire appeals.

On appeal, Claire raises the following issues: whether (I) the trial court erred in denying her motion to intervene; (II) there was sufficient grounds to support the conclusion the children were dependent juveniles; (III) there were sufficient grounds to cease reunification efforts; (IV) the trial court erred in establishing a permanent plan for the juveniles; and (V) the written order failed to establish a proper visitation plan.

I. Motion to Intervene

[1] Claire first argues that the trial court erred by denying her motion to intervene as a matter of right, pursuant to our Rules of Civil Procedure, Rule 24(a)(2). We disagree.

"This Court reviews a trial court's decision granting or denying a motion to intervene pursuant to N.C. Gen. Stat. § 1A–1, Rule 24(a)(2), on a *de novo* basis." *Bailey & Assoc., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010) (citation omitted).

As to whether our Juvenile Code, codified in Chapter 7B of our North Carolina General Statutes, and specifically, Subchapter I, "Abuse, Neglect, Dependency," address intervention, the briefs submitted to us reference only section 7B-1103, which allows a person or agency to "intervene in a pending abuse, neglect, or dependency proceeding *for the purpose of filing a motion to terminate parental rights*." N.C. Gen. Stat. § 7B-1103(b) (2011) (emphasis added).[3] We find no other statute within

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3. We note that effective 1 October 2013, within Subchapter I, "Abuse, Neglect, Dependency," section 7B-401.1 states that "[e]xcept as provided in G.S. 7B-1103(b), the court shall not allow intervention by a person who is not the juvenile's parent, guardian, custodian, or caretaker but may allow intervention by another county department of social services that has an interest in the proceeding. This section shall not prohibit the court from consolidating a juvenile proceeding with a civil action or claim for custody pursuant to G.S. 7B-200." N.C. Gen. Stat. § 7B-401.1 (effective 1 October 2013).

this subchapter specifically referencing intervention. Therefore, we look to our Rules of Civil Procedure for authority governing intervention.

> The General Assembly has set out the judicial procedure to be used in juvenile proceedings in Chapter 7B of the General Statutes. This Court has previously held that [t]he Rules of Civil Procedure, while they are not to be ignored, are not superimposed upon these hearings. Instead, the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code.

In re L.O.K., 174 N.C. App. 426, 431—32, 621 S.E.2d 236, 240 (2005) (citations and internal quotation omitted).

Rule 24 of our Rules of Civil Procedure governs intervention, both intervention of right and permissive intervention. *See* N.C. Gen. Stat. § 1A-1, Rule 24 (2011). Rule 24(a)(2), "Intervention of right," states, in pertinent part, that

> [u]pon timely application anyone shall be permitted to intervene in an action . . . .
>
> When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C.G.S. § 1A-1, Rule 24(a)(2).

Permissive intervention pursuant to Rule 24(b)(2), states, in part, that

> anyone may be permitted to intervene in an action.
>
> When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or

> agency upon timely application may be permitted to intervene in the action.

N.C.G.S. § 1A-1, Rule 24(b)(2).

Statute 7B-100, entitled "Purpose," of our Juvenile Code, Subchapter I, states that Subchapter I "shall be interpreted and construed so as to implement the following purposes and policies . . . [t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family." N.C. Gen. Stat. § 7B-100(2) (2011). We construe this provision to permit intervention pursuant to Rule 24. *See generally*, *In re Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986) (where this Court, when considering permissive intervention under Chapter 7A, the predecessor to Chapter 7B, sanctioned the use of permissive intervention where it determined that intervention "was necessary to elicit full and accurate information pertaining to the welfare of the child." (citation omitted)).

In its 9 January 2011 disposition order, the trial court acknowledges that prior to receiving evidence as to the dispositional hearing, it considered motions to intervene, including the motion filed by Claire. The trial court concluded that "[n]o person seeking to intervene may be allowed to intervene as of right."

> This Court has stated that where no other statute confers an unconditional right to intervene, the interest of a third party seeking to intervene as a matter of right under N.C.G.S. § 1A–1, Rule 24(a)
>
> > must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment.... [sic] One whose interest in the matter in litigation is not a direct or substantial interest, but is an *indirect*, inconsequential, *or* a *contingent* one cannot claim the right to defend.

Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 459, 515 S.E.2d 675, 682—83 (1999) (citations and quotations omitted).

In her brief to this Court, Claire contends that

> [t]o the extent [I] [am] considered only as a legal 'sister' of [the] four children, [I] was entitled to intervene as a party in the proceedings as a matter of right so that [I] could adequately present and represent the otherwise

> unrepresented family member interest and arguments for maintaining a family placement, family relationship, and potential for a family reunification with the four juveniles . . . and so as to assure [I] may have a proper legal voice in this appeal and any subsequent juvenile court proceedings.
>
> [I] [have] a direct interest in the family relationships with each of the juveniles which can be protected and represented adequately only if [I] (or some family member) is allowed to participate as a full party to the juvenile proceedings. The adoption of the juveniles by strangers to the family would forever sever the family ties and legal relationships of [me] and [my] relatives with the children.

Initially, we note Claire's acknowledgment that as to four of the children subject to this action, she has no parental rights. In an unchallenged finding of fact, the trial court stated that Janice adopted Tracy, Todd, Mary, and Ann in 2009. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citations omitted). Pursuant to N.C. Gen. Stat. § 48-1-106,

> [a] decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. After the entry of a decree of adoption, the former parents are relieved of all legal duties and obligations due from them to the adoptee, . . . and the former parents are divested of all rights with respect to the adoptee.

N.C. Gen. Stat. § 48-1-106(c) (2011). Thus, Claire's parental rights to Tracy, Todd, Mary, and Ann — the four juveniles adopted by Janice — have been severed. Claire has also been divested of all rights and relieved of all legal duties and obligations with respect to these four juveniles. *See id.*

Furthermore, Claire's motion to intervene fails to provide any indication that she has the authority to defend or assert "the otherwise unrepresented family member interest [or can present] . . . arguments for maintaining a family placement, family relationship, and potential for a family reunification with the four juveniles[.]" *See Virmani*, 350 N.C. at 459, 515 S.E.2d at 683 (holding that a party cannot directly intervene where its interest is at best indirect). We find that Claire's motion to intervene failed to assert a claim or defense that can act as

a basis for intervening in this action. Pursuant to our Rules of Civil Procedure, Rule 24, "[a] person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." N.C. Gen. Stat. § 1A-1, Rule 24(c) (2011).

Given that Claire's parental rights to the four adopted juveniles have been severed, her motion to intervene in the juvenile's dispositional hearing failed to present any direct or immediate interest such that she was entitled to intervene in the juvenile's dispositional hearing as a matter of right. *See* N.C.G.S. § 1A-1, Rule 24(a)(2); *Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83. Moreover, Claire's motion was defective for failure to include a pleading asserting a claim or defense as required by Rule 24(c). *See Kahan v. Longiotti*, 45 N.C. App. 367, 371, 263 S.E.2d 345, 348 (1980) ("[A] motion to intervene . . . must be accompanied by a proposed pleading."), *overruled on other grounds by Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982). Accordingly, we affirm the trial court's denial of Claire's motion to intervene as a matter of right.

[2] We also note that in addition to its conclusion denying intervention as a matter of right, the trial court denied Claire's motion to intervene on the basis of permissive intervention. In considering the use of permissive intervention as authorized under the juvenile code as codified in Chapter 7A, the predecessor to the juvenile code as codified in Chapter 7B, this Court has sanctioned its use where it "was necessary to elicit full and accurate information pertaining to the welfare of the child." *In re Baby Boy Scearce*, 81 N.C. App. at 541, 345 S.E.2d at 410 (citation omitted).

In *Baby Boy Scearce*, the foster parents sought to intervene in an action in which a biological father sought physical and legal custody of a child. The trial court concluded that the foster parents' right to intervene "derives from the child's right to have his or her best interests protected." *Id.* Other factors considered by this Court included that intervention "was necessary to elicit full and accurate information pertaining to the welfare of the child," *id.* at 541, 345 S.E.2d at 410 (citation omitted), and that "intervention by the foster parents would not 'prejudice the adjudication of the rights of the original parties.' " *Id.*

Nevertheless, while Claire did not challenge on appeal the trial court's ruling that permissive intervention should be denied as a matter of law, we do not believe the trial court abused its discretion in denying Claire's motion to intervene on the basis of permissive intervention.

While the trial court's order denied Claire's motion to intervene and participate as a party to the dispositional proceedings, we acknowledge the trial court's findings regarding the participation of the juvenile's family members in determining their individual best interests: "from the representations of counsel and the presence of all interested relatives in the courtroom, the court is comfortable that sufficient evidence regarding all possible relative placements will be offered for the court's consideration in determining the best interests of each of the children"; and "[t]he proposed intervenors' interests will not be adversely affected by denying their motions to intervene since they may participate indirectly in the proceedings through their status as witnesses in the disposition and suggested relative placements."

Standing

[3] We next consider a motion to dismiss Claire's appeal as to the four juveniles to whom Claire has surrendered her parental rights. Before the Court, the guardian ad litem ("GAL") asserts that Claire lacks standing to bring forward her appeal in relation to Tracy, Todd, Mary and Ann. We agree, and grant the GAL's motion to dismiss Claire's appeal as to Tracy, Todd, Mary and Ann.

A juvenile matter based on Subchapter I, "Abuse, Neglect, Dependency" of General Statutes Chapter 7B may be appealed by the following parties:

> (1) A juvenile acting through the juvenile's guardian ad litem previously appointed under G.S. 7B-601.
>
> (2) A juvenile for whom no guardian ad litem has been appointed under G.S. 7B-601. If such an appeal is made, the court shall appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17 for the juvenile for the purposes of that appeal.
>
> (3) A county department of social services.
>
> (4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.
>
> (5) Any party that sought but failed to obtain termination of parental rights.

N.C. Gen. Stat. § 7B-1002 (2011); *see* N.C. Gen. Stat. § 7B-1001 (2011) (Right to appeal); *see also In re A.P.*, 165 N.C. App. 841, 600 S.E.2d 9

(2004) (holding that a step-grandfather had no standing to appeal even though his name was listed on the petition seeking to adjudicate the child neglected where the step-grandfather was not a caregiver, custodian, or parent of the child).

The trial court's finding of fact that Janice adopted four of Claire's biological children — Tracy, Todd, Mary and Ann — in 2009 is uncontested. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citations omitted). As a consequence, Claire's parental rights to those four juveniles have been severed. *See* N.C.G.S. § 48-1-106 ("[a] decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents."). Claire was not appointed by the court as a guardian for the four adopted juveniles following Janice's death and no findings of fact support a conclusion that Claire acted as a custodian for the juveniles. *See* N.C. Gen. Stat. § 7B-101(8) (2011) (A "Custodian" is defined as "[t]he person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.); *see also In re T.B.*, 200 N.C. App. 739, 685 S.E.2d 529 (2009) (holding that the respondent was not a custodian to the child where the record reflected no order awarding either legal or physical custody of the juvenile to the respondent and no evidence supported a finding that the respondent stood *in loco parentis* in relation to the child).

Because Claire does not come within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C.G.S. §§ 7B-1001 and 7B-1002, Claire lacks standing to appeal the trial court's 3 May 2012 adjudication order and 9 January 2013 juvenile disposition order as those orders pertain to Tracy, Todd, Mary, and Ann — the four children Claire surrendered to adoption. *See* N.C.G.S. § 7B-1002. As a result, we address Claire's arguments arising from her appeal of the 3 May 2012 adjudication order and 9 January 2013 juvenile disposition order only as those orders relate to Ashley and John.

II. Adjudication of Dependency

[4] Claire argues that the trial court erred by adjudicating Ashley and John dependent juveniles within the meaning of N.C. Gen. Stat. § 7B-101. Claire contends that there was insufficient evidence presented at the adjudicatory hearing to meet the clear and convincing standard necessary to conclude the juveniles were dependent. We disagree.

> In all actions tried upon the facts without a jury . . . [sic] the court shall find the facts specifically and state separately its conclusions of law thereon[.] . . . The resulting findings of fact must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.

In re J.S., 165 N.C. App. 509, 510—11, 598 S.E.2d 658, 660 (2004) (citations and quotations omitted). "The role of this Court in reviewing a trial court's adjudication of [dependency] is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation and quotation omitted). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citation omitted).

"Dependent juvenile" is defined in N.C. Gen. Stat. § 7B-101(9) as:

> [a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2011). "In determining whether a juvenile is dependent, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (citation and quotation omitted). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *Id.* (citation omitted).

In the instant case, it is not disputed that the legal custodian of the juveniles, Janice, is deceased. The trial court further found that "[a]t the time that the juvenile petition was filed, there were no appropriate family members immediately available to care for the children long-term." This finding is supported by the uncontradicted testimony of Kris Tucker, a DSS social worker, who testified at the adjudicatory hearing that there were no appropriate family members to care for the juveniles. Tucker further testified that although the juveniles were in the care of an aunt and uncle, Mr. and Mrs. Chase, "they are not able to provide ongoing care and are not interested in establishing permanence

for [the juveniles]." Claire did not present herself as a potential caregiver at the adjudicatory hearing, nor were any alternative caregivers presented. Accordingly, we conclude that the trial court did not err by adjudicating Ashley and John as dependent juveniles.

III. Permanent Plan

[5] Claire next argues that the trial court erred when, in the adjudicatory order, it made findings of fact and conclusions of law regarding a "temporary permanent plan" for the juveniles. However, we conclude that any alleged error was rendered harmless by the trial court's entry of a permanent plan in its dispositional order. *See In re J.P.*, ___ N.C. App. ___, ___ S.E.2d ___ (19 November 2013) (COA13-35-2).

[6] Claire additionally argues that the trial court erred by entering a permanent plan for the juveniles at disposition when she did not have the statutorily required notice that the trial court would consider a permanent plan. We disagree.

Claire was provided notice that the trial court intended to consider a permanent plan for the juveniles at disposition when it made a "temporary permanent plan" at adjudication. *See id.* Thus, as in *In re J.P.*, Claire and her attorney attended and participated in the trial court's dispositional hearing and did not object to the lack of formal notice. *Id.* at ___, ___ S.E.2d at ___ (citing *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004) (where this Court stated that a party waives its right to notice under section 7B–907(a) by attending the hearing in which the permanent plan is created, participating in the hearing, and failing to object to the lack of notice). Accordingly, we conclude that Claire waived any objection to lack of formal notice of a hearing on a permanent plan when she made a pre-trial motion to intervene in the dispositional hearing, made arguments before the trial court, was allowed to present witnesses regarding the best interest of the child, and failed to object to the lack of formal notice.

IV. Dispositional Conclusions

Claire next challenges several of the trial court's conclusions of law. Claire does not challenge any of the trial court's findings of fact and, accordingly, they are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Our review is therefore limited to whether the trial court's findings of fact support its conclusions of law and disposition. *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004).

[7] Claire first challenges the trial court's conclusions of law 2 and 7.

> 2. No relative of the juveniles is able to provide proper care and supervision of all the juveniles in a safe home. Placement with any of the identified relatives is contrary to the best interests of the juveniles.
>
> . . . .
>
> 7. The [DSS] has made reasonable and diligent efforts to secure relative placements for the children. The three relatives identified were not completely able to provide for the children.

Pursuant to N.C. Gen. Stat. § 7B-903(a)(2)(c), when placing a juvenile outside of the home,

> [i]n placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile.

N.C. Gen. Stat. § 7B-903(a)(2)(c) (2011). This Court has recognized that our statutes give a preference, where appropriate, to relative placements over non-relative, out-of-home placements. *In re L.L.*, 172 N.C. App. 689, 701, 616 S.E.2d 392, 399 (2005). However, before determining whether relative or non-relative placement is in the best interest of the juvenile, the statute first requires the trial court to determine whether the relative in question is *willing and able* to provide proper care and supervision in a safe home. N.C. Gen. Stat. § 7B-903(a)(2)(c). We review a dispositional order only for abuse of discretion. *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567 (2002).

Here, the trial court found as fact:

> 8. On March 29, 2012, [Ann, Mary and John] were moved from the home of [Mr. and Mrs. Chase] at the request of the placement. [Mr. and Mrs. Chase] indicated to [DSS] that they thought the placement would be a temporary one and that they could not provide for the children long term. At the time placement was needed . . . the only identified and approved placement was with . . . the younger children's

school principal, and her fiancé [Mr. Alfred]. Placement with [Kimberly Chase, an aunt] was not approved at the time because a fire in her home in late February 2012 had left her without a home, because she had several identified medical issues and medications, and because she had fallen asleep on two occasions while talking with Social Worker Hardison about the children. The [DSS] was concerned that [Kimberly Chase] could not provide the supervision needed for the children. [Claire Wilson] was unable to be approved for placement of the children because she was under investigation by the [DSS] regarding the two children in her home following positive drug screens for cocaine on February 16, 2012 and March 8, 2012.

9. On May 3, 2012, [Tracy, Todd and Ashley] were moved from [Lisa Chase's, an aunt] home because of concerns identified by the [DSS]. These concerns included a lack of sufficient space in the home for the children, the fact that [Lisa Chase] was out of compliance with Rowan Housing Authority regulations by having the children in the home, issues with supervision, excessive tardiness and absences in school, reports from the school . . . that the children would come to school hungry, [Lisa Chase's] tendency to minimize the school behavioral problems of the children, and [Lisa Chase's] transporting of the children in her car without having them properly restrained in safety seats. Social Worker Hardison witnessed the children in the car not properly restrained on three occasions. [Tracy, Todd, and Ashley] were placed with their siblings in the home of [Mr. and Mrs. Alfred]. The children were happy and excited to be placed together in one home again.

. . . .

23. On May 17, 2012, the [DSS] received a request from [Claire Wilson's attorney] to consider certain relatives and family friends for placement of the juveniles. Since the juveniles were all placed together by this time, keeping them together was an important goal of [DSS] in its decision-making. The [DSS] made diligent efforts to study and become familiar with each option presented to it for placement of the children.

. . . .

27. [Lisa Chase] continued to be ruled out as a placement option because of the concerns that led to the removal of the three youngest children from her home on May 3, 2012. . . . [Terra Roberts (Godmother to the juveniles)] was ruled out as a placement because of her inability to provide proper [care and] supervision of the children and because of inadequate space for the children in her home.

28. [Mr. and Mrs. Miles], who live in Guilford County, submitted to a pre-placement assessment by Guilford Count DSS. The assessment was positive, and [they were] willing to have all six children placed with them. The children were not moved to [their] home for several reasons. One, several of the children indicated that they did not know [them] and did not want to move to Greensboro. Two, . . . [a]lthough a past investigation of neglect was not substantiated, it was of some concern to the [DSS] that [Mrs. Miles] told Social Worker Williams on September 5, 2012 that she had no past history with any DSS. Three, the [DSS] has been unable to ascertain after speaking with [Mr. and Mrs. Miles] and other family members exactly how [Mr. Miles] is related to the children. [Mr. Miles] could only indicate that he was somehow related on "his father's side." A few other kinship options . . . were individually ruled out as placement options for failing to return the kinship assessment packets mailed to them by the [DSS] or because they were 19 and 20 years old, too young to take on the responsibility of raising six children.

29. The most positive relative placement option for the children [was Jenetta Thomas]. [Jenetta Thomas is] the children's second cousin. . . . [Jenetta Thomas] stated that she is willing to provide a home for all of the children, but at the time Social Worker Williams visited her she could accommodate only two or three additional children in her home. . . . [Ashley, Mary, and John] were asked about possible placement with [Jenetta Thomas], and they indicated that they do not know [her] well and do not want to live with her in a different county "out in the country."

30. [Betsy Monroe, Jenetta Thomas' sister]. . . was found by [DSS to be] willing and able to take two or three of the children based on space limitations. . . . The children only

> have an acquaintance relationship with [Betsy Miller] at this time.

It is apparent from the trial court's exhaustive findings of fact that the trial court considered several relative placements but no suitable option was available; where potentially available, the court considered it not in the juveniles' best interests to place the juveniles with the relative. Thus, we conclude the trial court did not abuse its discretion by placing the juveniles in a non-relative placement. Accordingly, we hold that the trial court did not err in making conclusions of law 2 and 7.

[8] Claire next challenges conclusions of law 5 and 6:

> 5. Efforts to eliminate the need for placement of the juveniles would be inconsistent with the juveniles' health, safety, and need for a safe permanent home within a reasonable period of time.
>
> 6. Reunification efforts are not required in this matter . . . [as to John and Ashley because] significant safety issues make reunification with a parent within a reasonable time unlikely. [Claire], their mother, has not asked to have the children live with her.

Pursuant to N.C. Gen. Stat. § 7B-507,

> [i]n any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> > (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b) (2011).

Here, the trial court found as fact:

> 17. All of the children have been diagnosed with PTSD and anxiety disorder. . . [Ashley] has low cognitive functioning and a language disorder. All of the children . . . receive weekly counseling services for trauma-based disorders.

18. Therapist Jill [Hill] specializes in working with children who have experienced trauma. She has been seeing [Ann, John, Ashley, and Tracy] weekly since early September 2012. Ms. [Hill] has been working with the children on trust-building and establishing a rapport with them. Ms. [Hill] feels that all the children need ongoing counseling based on the traumatic death of [Janice Lake] and the past history of multiple placements, chaos, separation from siblings, and instability. Ms. [Hill]'s focus with the children is on stability and helping them to feel safe. [Ann, John, Ashley, and Tracy] have expressed to Ms. [Hill] that they like where they are living, they feel safe there, they want to stay together, and they want to stay with [Mr. and Mrs. Alfred]. The children speak of each other often during therapy with Ms. [Hill] and appear to have a strong connection with each other. Ms. [Hill] is concerned that moving the children at this point would be very disruptive to their pathway of feeling safe. The children's issues cannot be fixed quickly, and their nervous systems are very fragile.

. . . .

24. [Claire Wilson] continued to be ruled out as a placement because of her positive drug screens and her failure to follow up with drug and mental health treatment.

25. Also relevant to the inquiry of whether or not [Claire Wilson] may be an appropriate long-term placement for the children is the prior neglect and DSS history of the children. [Claire Wilson] has a total of ten children, with only two of those children in her care. Her oldest two children [] were in foster care due to neglect on two separate occasions and eventually were adopted by their maternal great-grandmother . . . in 2009. Custody of [John and Ashley] was granted to [Janice Lake], their maternal grandmother, in 2004[;] [Mary and Ann] were in foster care from 2003 until 2005 and from 2006 until 2009 pursuant to petitions filed and adjudicated for neglect by [Claire Wilson]. [Todd and Tracy] were in the legal custody of the [DSS] due to neglect by [Claire Wilson] from 2006 to 2009. [Mary, Ann, Todd, and Tracy] were adopted by their maternal grandmother, [Janice Lake], in 2009.

> [Claire Wilson] is not requesting that the court consider placing the six children with her. She is in treatment with Daymark Recovery Services[.]

We conclude the uncontested findings of fact support the trial court's conclusions that reunification efforts would be inconsistent with the juveniles' health, safety and need for a permanent home within a reasonable period of time and were not required. Accordingly, we hold that the trial court did not err in making conclusions of law 5 and 6.

VI. Visitation

[9] Claire next argues that the trial court erred regarding its visitation plan for Ashley and John because it failed to specify the time, place, and conditions under which visitation may be exercised. *In re E.C.*, 174 N.C. App. 517, 521—23, 621 S.E.2d 647, 651—52 (2005) (holding that a trial court must include "an appropriate visitation plan in its dispositional order"). We agree.

North Carolina General Statutes, section 7B-905(c) provides that any dispositional order which leaves the minor child in a placement "outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B 905(c) (2011). This Court has stated that:

> [i]n the absence of findings that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation "the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised."

In re E.C., 174 N.C. App. 517, 522-23, 621 S.E.2d 647, 652 (2005) (citation omitted).

Here, the trial court made no finding that Claire had forfeited her right to visitation or that it was in the best interests of Ashley or John to deny visitation. Therefore, the trial court was required to provide a plan containing a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised. *Id.* The court provided the following order governing visitation: "The juveniles shall visit regularly with their siblings who live with [Ms. Wilson] and [Ms. Chase], [Kimberly Chase], and [Claire Wilson]. These visits shall begin as soon as possible and shall be supervised by a caregiver selected by the [DSS], including some visits at [Ms. Chase]'s home if possible." The

order does not contain the "minimum outline" required by *In re E.C.* As such, the plan constitutes an impermissible delegation of the court's authority under N.C.G.S. § 7B 905. *See In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971) (discussing how the award of visitation rights, which is a judicial function, cannot be delegated to a child's custodian). Therefore, we remand for entry of an order of visitation which clearly defines and establishes "the time, place[,] and conditions" under which Claire may exercise her visitation rights. *In re E.C.*, 174 N.C. App. at 522—23, 621 S.E.2d at 652.

Affirmed in part, remanded in part, and appeal dismissed in part.

Judges McGEE and STROUD concur.

THOMAS G. McMILLAN, JR., ET ALS., PLAINTIFFS
v.
RYAN JACKSON PROPERTIES, LLC, ET ALS., DEFENDANTS

No. COA13-270

Filed 21 January 2014

1. Appeal and Error—standard of review—reasonable cause—attorney fees

The Court of Appeals reviewed the trial court's conclusion as to reasonable cause *de novo* and its ultimate award of attorney fees for an abuse of discretion.

2. Corporations—derivative action—lack of reasonable cause—negligence—no reasonable belief

The trial court did not err in a derivative action by concluding that the action was brought without reasonable cause. Plaintiffs did not have a reasonable belief that there was a sound chance that the derivative action alleging negligence could be sustained.

3. Attorney Fees—derivative action—abuse of discretion

The trial court abused its discretion by awarding attorney fees under N.C.G.S. § 55A-7-40(f). The case was remanded for entry of factual findings to distinguish the portion of attorney fees that were attributable to the defense against the derivative action and for adjustment of the fee award.

Appeal by plaintiffs from order entered 17 September 2012 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 9 October 2013.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponzi and Darrell A. Fruth, for plaintiffs-appellants.

Hicks McDonald Noecker LLP, by David W. McDonald, for defendant-appellee Collins & Galyon General Contractors, Inc.

HUNTER, Robert C., Judge.

Thomas G. McMillan, Jr. and Shawn De'Lace Hendrix ("plaintiffs") appeal the order awarding defendant Collins & Galyon General Contractors, Inc. ("C&G") attorneys' fees. On appeal, plaintiffs argue: (1) the trial court erred by concluding that the action was brought without reasonable cause; and (2) the trial court abused its discretion by awarding attorneys' fees.

After careful review, we affirm the trial court's conclusion that the derivative action was brought without reasonable cause, but remand for redetermination as to how much of the attorneys' fees were incurred in defense of the derivative action.

Background

Ryan Jackson Properties, LLC ("Ryan Jackson") purchased an office building at 220 West Market Street in Greensboro, North Carolina with the plan of converting it into a residential condominium complex. It contracted for the services of C&G, with the contract specifying that C&G was to be "responsible for causing all the Work to be performed as required by the Contract Documents for the Construction of ALTERATIONS TO 220 WEST MARKET STREET." C&G acquired two permits from the city to perform the renovations. The first permit stated that the work was for "Int./Ext. Alterations" and approximated the total cost of this project to be $1,488,100.00. C&G was the sole contractor named in the permit. The second permit stated that the work to be done was "Demolition – Renovation" and the total cost of the project was to be $5,000.00. Again, C&G was the only contractor named.

Each plaintiff purchased one unit in the newly renovated condominium complex in the summer of 2007. Both units were located in the former basement of the building, and both flooded in late July or early August of that same year. Plaintiffs had to move out of their units as a result of the flooding.

Plaintiffs first filed suit against Ryan Jackson and 220 West Market Street Condominium Association, Inc. ("the Condo Association") in March 2009, pursuing claims of breach of the implied warranty of habitability against Ryan Jackson and seeking monetary and injunctive relief from the Condo Association. All parties stipulated to voluntary dismissal without prejudice in November 2009.

On 14 July 2010, plaintiffs filed suit against Ryan Jackson and C&G. They asserted negligence against C&G individually and derivatively on behalf of the Condo Association, a nonprofit corporation of which plaintiffs were members, and claimed that Ryan Jackson breached the implied warranty of habitability and violated N.C. Gen. Stat. § 75-1.1. In support of the derivative action, plaintiffs alleged that the Condo Association "incurred prospective liability and compensatory damages for the costs of repairs to common areas caused by the negligence of [C&G]," based on C&G's "failure to provide proper and adequate waterproofing, dampproofing, and/or drainage for the exterior and common areas of the Real Property." Ryan Jackson did not appear to defend against plaintiffs' claims, thus causing default judgment to be entered against it in the amount of $38,658.04.

C&G did defend the suit and met with plaintiffs several times to discuss the flooding. Plaintiffs contended that the flooding could have come from three potential sources: (1) the exterior water handling system, (2) a dam effect created by the north retaining wall, or (3) a change in topography of the parking lot. Anthony Collins and James Galyon, Jr., C&G's vice president and owner, respectively, filed affidavits with the trial court wherein they averred that: (1) C&G did not agree to perform work on the exterior water handling system, and in fact did not perform any work on it, (2) the north retaining wall appeared in a survey of the property which predated any renovation, and C&G did not modify the wall in any way, and (3) the parking lot is owned by a third party and was never part of C&G's project. Collins and Galyon also averred that C&G did not have exclusive control over the construction project and except for limited circumstances such as windows, doors, and electrical boxes, only contracted to renovate the interior of the building.

C&G filed a motion for summary judgment on 29 April 2011, which was granted 11 July 2011. This Court affirmed the trial court's order dismissing C&G by unpublished opinion filed 3 July 2012. *See McMillan v. Ryan Jackson Properties, LLC*, No. COA11-1318, 2012 WL 2551261 (N.C. App. July 3, 2012) ("*McMillan I*"). C&G moved for an attorneys' fees award pursuant to N.C. Gen. Stat. § 55A-7-40(f) (2013) on 19 August

2011. This matter was heard on 4 September 2012, and the trial court granted C&G's motion for attorneys' fees by order entered 17 September 2012. Plaintiffs timely appealed from that order.

Discussion

1. Standard of Review

[1] Plaintiffs' first argument is that the panel should review the court's initial conclusion as to whether the case was brought without reasonable cause *de novo* and the ultimate awarding of fees for abuse of discretion. We agree.

"It is settled law in North Carolina that ordinarily attorneys fees are not recoverable either as an item of damages or of costs, absent express statutory authority for fixing and awarding them." *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (1973). Here, the trial court awarded fees pursuant to N.C. Gen. Stat. § 55A-7-40, which governs derivative actions for nonprofit corporations. Under section 55A-7-40(f), the trial court must make a finding that an action was brought "without reasonable cause" before awarding attorneys' fees.

C&G argues that the standard of review on appeal should be abuse of discretion, without reviewing the conclusion as to whether the suit was brought without reasonable cause *de novo*. It cites to a number of cases for the proposition that the general standard of review for an award of attorneys' fees is abuse of discretion. *See Furmick v. Miner*, 154 N.C. App. 460, 462, 573 S.E.2d 172, 174 (2002) ("The allowance of attorney fees is in the discretion of the presiding judge, and may be reversed only for abuse of discretion.") (quotation marks omitted).

However, section 55A-7-40(f) authorizes an award of attorneys' fees only upon a "finding" by the trial court that the derivative action was "brought without reasonable cause." Whether an action is brought without reasonable cause is a conclusion of law, as it involves the exercise of judgment and the application of legal principles. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Conclusions of law are reviewed *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). Therefore, we agree with plaintiffs, and will review the trial court's conclusion as to reasonable cause *de novo* and its ultimate award of attorneys' fees for an abuse of discretion.

II. Reasonable Cause

[2] Plaintiffs next argue that the trial court erred by concluding that the action was brought without reasonable cause. Specifically, plaintiffs

contend that the word "action" in section 55A-7-40(f) should be interpreted to include all claims in the lawsuit, and therefore, the action as a whole must have been brought with reasonable cause because plaintiffs were awarded default judgment against Ryan Jackson. In the alternative, plaintiffs argue that they had reasonable cause to bring the derivative suit on behalf of the Condo Association against C&G. We disagree with plaintiffs' interpretation of section 55A-7-40(f), and we affirm the trial court's conclusion that the derivative action was brought without reasonable cause.

As is discussed above, we review the trial court's conclusion as to whether the action was brought without reasonable cause *de novo*. Under *de novo* review, "the court considers the matter anew and freely substitutes its own judgment" for that of the trial court. *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

Section 55A-7-40 governs derivative proceedings under the North Carolina Nonprofit Corporation Act; it controls the method by which the members of a nonprofit corporation may bring an action in the right of that corporation. Under subsection (a) of the statute,

> An action may be brought in a superior court of this State . . . in the right of any domestic or foreign corporation by any member or director, provided that, in the case of an action by a member, the plaintiff or plaintiffs shall allege, and it shall appear, that each plaintiff-member was a member at the time of the transaction of which he complains.

N.C. Gen. Stat. § 55A-7-40(a) (2013). The attorneys' fees provision at issue in this case is found in section 55A-7-40(f); it provides that:

> (f) *In any such action*, the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action.

N.C. Gen. Stat. § 55A-7-40(f) (2013) (emphasis added).

Plaintiffs first argue that the word "action" in section 55A-7-40(f) should be interpreted to include all claims against all parties in a lawsuit, not just the derivative portion therein. Thus, because plaintiffs obtained judgment in their favor against Ryan Jackson on claims they pursued individually, they argue that the action as a whole could not have been brought without reasonable cause, and attorneys' fees should

not have been awarded pursuant to section 55A-7-40(f). In support of this argument, plaintiffs note that under the North Carolina Rules of Civil Procedure, an "action" is commenced by filing a complaint, which may have one or more "claims for relief," N.C. Gen. Stat. § 1A-1, Rules 3, 8 (2013), and that "more than one claim" may be presented in a single "action," N.C. Gen. Stat. § 1A-1, Rule 54 (2013).

We disagree with this interpretation. Plaintiffs seek to attach meaning to the word "action" in section 55A-7-40(f) based on the word's usage in general provisions of the North Carolina Rules of Civil Procedure. However, "where two statutory provisions conflict, one of which is specific or 'particular' and the other 'general,' the more specific statute controls in resolving any apparent conflict." *Furr v. Noland*, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (1991). Here, the word "action" in section 55A-7-40(f) is part of the phrase "[i]n any *such* action," with the word "such" referring to the "action[s]" described by subsection (a) of the statute – those which are brought "in the right of any domestic or foreign corporation by any member or director." *See* N.C. Gen. Stat. § 55A-7-40(a), (f). In other words, it is clear that the phrase "[i]n any such action" in section 55A-7-40(f) refers specifically to derivative actions set out by section 55A-7-40, not generic "actions" as the word is used in general portions of the North Carolina Rules of Civil Procedure. C&G could have attempted to recover attorneys' fees on the general "action" as a whole, but would have had to rely on a different statute to do so. *See United Artists Records, Inc.*, 18 N.C. App. at 187, 196 S.E.2d at 602 (noting that attorneys' fees may not be awarded absent specific statutory authority); *see also* N.C. Gen. Stat. § 6-21.5 (2013) (authorizing an attorneys' fee award "[i]n any civil action . . . if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading").

Therefore, in determining whether attorneys' fees were properly awarded under section 55A-7-40(f) here, it is irrelevant that plaintiffs obtained default judgment against Ryan Jackson on their individual claims. Ryan Jackson was not party to the derivative action. The only aspect of the lawsuit that triggered section 55A-7-40(f) was the derivative action brought by plaintiffs on behalf of the Condo Association against C&G for negligence. Thus, we must determine whether this derivative action, not the unrelated individual claims joined in the same lawsuit, was brought without reasonable cause in assessing whether attorneys' fees awarded under section 55A-7-40(f) were appropriate.

At the hearing on attorneys' fees, plaintiffs urged the trial court to apply an interpretation of the phrase "brought without reasonable

cause" in section 55A-7-40(f) used in an analogous context by this Court in *Lowder on Behalf of Doby v. Doby*, 79 N.C. App. 501, 511, 340 S.E.2d 487, 493 (1986). In *Lowder*, the Court construed N.C. Gen. Stat. § 55-55(e), the attorneys' fees provision for derivative suits on behalf of business corporations, which contained identical language to that found in section 55A-7-40(f).[1] *See id.* at 507, 511, 340 S.E.2d at 491, 493. Because no cases defined or explained the "brought without reasonable cause" provision in section 55-55(e), the Court drew analogy to the "lack of probable cause" standard in malicious prosecution cases, where plaintiffs "need only have a 'reasonable belief' that there [was] a 'sound chance' that their claims may be sustained," not "absolute certainty of the legal validity of their claims." *Id.* at 511, 340 S.E.2d at 493. On appeal, both plaintiffs and C&G argue that this standard should be used to interpret the phrase "brought without reasonable cause" under section 55A-7-40(f). We agree. Because the *Lowder* Court construed an identical attorneys' fees provision in the analogous context of business corporation derivative actions, we find its reasoning persuasive. Thus, an action is brought "without reasonable cause" under section 55A-7-40(f) if there is no "reasonable belief" in a "sound chance" that the claim could be sustained.

The trial court here "independently reviewed the proceedings in order to determine whether there was evidence put forward to support plaintiffs' claims" and correctly declined to consider this Court's opinion in *McMillan I* affirming the entry of summary judgment in C&G's favor as dispositive on the issue of whether the derivative action was brought without reasonable cause. However, the trial court and the *McMillan I* Court both reached the same conclusion — that "[p]laintiffs did not have evidence to support the allegations made in the [c]omplaint." Thus, pursuant to *Lowder*, the trial court concluded that the action was brought without reasonable cause because "the record is devoid of evidence that supports any reasonable belief that there was a sound chance that the plaintiffs' claims in this litigation might be sustained."

After our own independent inquiry, we affirm the trial court's conclusion that plaintiffs did not have a "reasonable belief" that there was a "sound chance" that the derivative action alleging negligence could be

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1. Section 55-55(e) provided that "In any such action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action." *Lowder*, 79 N.C. App. at 507, 340 S.E.2d at 491. The statute has since been replaced by N.C. Gen. Stat. § 55-7-46 (2013) and is substantially rewritten.

sustained.[2] "The elements of negligence are duty owed by defendants to plaintiffs and nonperformance of that duty proximately causing plaintiffs' injury." *Royal v. Armstrong*, 136 N.C. App. 465, 469, 524 S.E.2d 600, 602 (2000). Plaintiffs alleged in their complaint that the Condo Association incurred prospective liability and compensatory damages for the costs of repairs to the common areas as a result of C&G's negligent failure to provide proper and adequate waterproofing, dampproofing, and/or drainage for the exterior and common areas of the property. Plaintiffs argue that they had reasonable cause to bring the derivative action because: (1) the permits issued by the city listed C&G as the contractor on the renovations that it undertook and no other contractors were listed; (2) C&G was a general contractor under N.C. Gen. Stat. § 87-1 (2013) because the amount of work it undertook totaled more than $30,000.00; (3) general contractors owe a duty of reasonable care to anyone who may foreseeably be endangered by their negligence, *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 643, 643 S.E.2d 28, 32-33 (2007); and (4) prior to the filing of the complaint, a consultant proposed a plan to fix the water leakage, thus indicating the areas that plaintiffs claim to have been the source of the water damage.[3]

Even assuming that this information supports an allegation that C&G was a general contractor which owed a duty to those who could foreseeably be injured by the work it undertook, plaintiffs had no evidence at any point prior to or during the litigation tending to show that work performed by C&G or its agents was the proximate cause of the water damage. The contract between C&G and Ryan Jackson does not indicate that C&G performed any work on the areas of the property which plaintiffs theorized to be the source of the leakage. On the contrary, both Collins and Galyon averred that C&G performed no work on the retaining wall or the parking lot during the renovation, and that aside from the windows, doors, and electrical boxes, neither C&G nor its subcontractors penetrated the exterior of the building at all. Collins specifically averred that Ryan Jackson only wished to contract "some of

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2. The trial court seemed to inquire in part as to plaintiffs' individual claim of negligence against C&G in addition to the derivative action. Specifically, it mentioned the lack of evidence related to the causation of leaks into plaintiffs' condominiums, which would be irrelevant to the derivative action premised on damage to exterior "common areas." As is discussed above, the applicable attorneys' fees statute utilized here, section 55A-7-40(f), applies only to derivative actions.

3. The plan consisted of sealing the water penetration areas, applying a waterproofing membrane, and connecting downspouts to the foundation drain system and the back corner of the lot.

the work" to C&G, and that C&G "did not have exclusive control over construction of the improvements." Faced with these affidavits at the summary judgment phase of the litigation, plaintiffs still could not produce any evidence tending to show the existence of a genuine issue of material fact concerning their claims. The *McMillan I* Court held that "[u]ltimately, plaintiffs fail[ed] to cite any evidence which indicated that [C&G] performed any work on either the retaining wall or the parking lot during the course of the renovations," and "[p]laintiffs failed to present any evidence that the windows, doors and electrical boxes mentioned in Collins's affidavit as the only exterior work performed by [C&G] were the cause of the leaks into plaintiffs' condominiums." *McMillan I* at *4-*5. Given that plaintiffs could not produce any evidence to support their allegation that C&G proximately caused the water damage at summary judgment, it follows that they also had no such evidence when they filed the derivative action almost a year earlier. Without any evidence of causation, a necessary element of the derivative action for negligence, plaintiffs could not have had a "reasonable belief" that there was a "sound chance" that the derivative action could be sustained.

Accordingly, we affirm the trial court's conclusion that the derivative action was brought without reasonable cause under section 55A-7-40(f).

III. Abuse of discretion

[3] Having determined that the trial court did not err in concluding that the derivative action was brought without reasonable cause, we must now review the attorneys' fees awarded by the trial court under section 55A-7-40(f) for abuse of discretion. "An abuse of discretion will be found only when the trial court's decision . . . could not have been the result of a reasoned decision." *Manning v. Anagnost*, __ N.C. App. __, __, 739 S.E.2d 859, 861 (2013) (citation and quotation marks omitted). Here, the trial court awarded the entirety of the attorneys' fees incurred by C&G in defense of the lawsuit as a whole, $36,325.00, which could have included costs incurred in defense of both the derivative action and plaintiffs McMillan's and Hendrix's individual claim of negligence. However, section 55A-7-40(f) only authorizes an award "in the defense of the [derivative] action," not in the defense of an individual negligence claim. Therefore, the trial court abused its discretion by failing to distinguish between costs incurred by C&G in defense of plaintiffs' individual negligence claim and the costs incurred in defense of the derivative action. Accordingly, we remand for entry of factual findings as to what portion of the attorneys' fees are attributable to defense against the derivative action and adjustment of the fee award that is reflective of those findings.

Conclusion

After careful review, we affirm the trial court's conclusion that the derivative action was brought without reasonable cause, and we remand for entry of attorneys' fees based on the costs incurred in defense of the derivative action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges BRYANT and STEELMAN concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
INTEGON NATIONAL INSURANCE COMPANY AND STATE NATIONAL INSURANCE COMPANY, DEFENDANTS

No. COA13-640

Filed 21 January 2014

Insurance—underinsured motorist's coverage—pro rata distribution among policy providers

The trial court erred in a declaratory judgment action arising out of an insurance coverage question by not applying a *pro rata* distribution of the credit paid by the underinsured motorist's insurance provider to all three underinsured motorist insurance (UIM) policy providers. Because the respective excess clauses were mutually repugnant and the claimant was a Class I insured under all three UIM policies, the trial court was required to allocate credits and liabilities amongst the three UIM policyholders on a *pro rata* basis under *N.C. Farm Bureau v. Bost*, 126 N.C. App. 42.

Appeal by plaintiff from order entered 27 March 2013 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 23 October 2013.

Cranfill Sumner & Hartzog, LLP, by George L. Simpson, IV, for plaintiff-appellant.

Bennett & Guthrie, PLLC, by Rodney A. Guthrie, for defendant-appellee Integon National Insurance Company.

Pinto Coates Kyre & Bowers, PLLC, by Deborah J. Bowers, for defendant-appellee State National Insurance Company.

HUNTER, JR., Robert N., Judge.

Plaintiff Nationwide Mutual Insurance Company ("Plaintiff") appeals from a 27 March 2013 order granting summary judgment in favor of Integon National Insurance Company ("Integon") and State National Insurance Company ("State National").[1] Upon review, we find the trial court erred by not applying a pro rata distribution of the credit paid by the underinsured motorist's insurance provider to all three underinsured motorist insurance ("UIM") policy providers. We reach this conclusion because the respective excess clauses were (i) mutually repugnant and (ii) because the claimant was a Class I insured under all three UIM policies. Under *North Carolina Farm Bureau v. Bost*, 126 N.C. App. 42, 483 S.E.2d 452 (1997), the trial court was required to allocate credits and liabilities amongst the three UIM policyholders on a pro rata basis if both of these conditions are met. We thus reverse the trial court and remand for the trial court to enter summary judgment for Plaintiff.

I. Facts & Procedural History

This declaratory judgment action arose out of an insurance coverage question allocating proceeds of three separate UIM policies to pay a wrongful death claim. Plaintiff filed its original complaint for declaratory judgment on 8 June 2012, which was amended by consent on 7 December 2012.[2] Integon and State National timely answered Plaintiff's complaint on 10 January 2013 and 17 January 2013 respectively. All parties moved for summary judgment. The summary judgment motions were heard by Judge Carl R. Fox in Wake County Superior Court on 7 March 2013. Judge Fox denied Plaintiff's motion for summary judgment and allowed Defendants' motions on 27 March 2013. Plaintiff filed a timely written notice of appeal on 18 April 2013. Plaintiff and Defendants stipulated to the following facts.

A three-vehicle accident occurred on 23 August 2011, involving the decedent Nelson Lee Clark ("Clark"), the tortfeasor Gaye Holman Ikerd ("Ikerd"), and Lucille Pitts ("Pitts"). Ikerd ran a red light and collided

1. Collectively, Integon and State National will be referred to as "Defendants."

2. The complaint was amended to reflect ownership of the insurance policy held by State National, rather than the originally named party, Direct General Insurance Company. State National is a subsidiary of Direct General Insurance Company.

with Clark's motorcycle. Pitts was driving a separate vehicle that ran over Clark after he was thrown from his motorcycle. Ikerd admitted liability to Clark's estate, and her liability insurer paid the policy limit of $50,000. Pitts was not found liable for the incident.

Clark was insured for UIM coverage under three policies: (1) the Integon policy, number NCV 9474162, issued to Nelson Clark as the named insured and covering the motorcycle that Clark was driving at the time of the accident in the amount of $100,000 per person; (2) the State National policy, number 47 NCQD 118505586, issued to Nelson Clark as the named insured in the amount of $50,000 per person; and (3) a policy issued by Plaintiff, number 6132 019939, to Walter Lee and Nancy Ikard Clark as named insureds in the amount of $50,000 per person. Mr. and Mrs. Clark were the decedent's parents, and he was a resident of their household at the time of the accident. The parties stipulated to the following relevant policy provisions:

> **Nationwide Policy:**
> Policyholder – Named Insured: Walter Lee and Nancy Ikard Clark
>
> UM/UIM limits: $50,000 per person/ $100,000 per accident
>
> Other Insurance
> If this policy and any other auto insurance policy apply to the same accident, the maximum amount payable under all applicable policies for all injuries to an insured caused by an uninsured motor vehicle or underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each policy.
>
> In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.
>
> **Integon policy**[3]**:**
> Policyholder – Named Insured: Nelson Clark

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3. The "Other Insurance" clause in the Integon policy contains the word "loss" instead of "share" in the second sentence of the clause. However the Integon policy defines "loss" the same way both other policies define "share": "the proportion that our limit of liability bears to the total of all applicable limits."

UM/UIM limits: $100,000 per person/ $300,000 per accident

OTHER INSURANCE
If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum amount payable under all applicable policies for all injuries caused by an uninsured motor vehicle under all policies shall not exceed the highest applicable limit of liability under any one policy.

If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum amount payable for injuries to you or a family member caused by an underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each such policy.

In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our loss is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

State National policy:
Policyholder – Named Insured: Nelson Clark

UM/UIM limits: $50,000 per person/ $100,000 per accident

OTHER INSURANCE
If this policy and any other auto insurance policy apply to the same accident, the maximum amount payable under all applicable policies for all injuries to an insured caused by an uninsured motor vehicle or underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each policy.

In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

All three policies define the term "you" as:

> Throughout this policy, "you" and "your" refer to:
>
> 1. The "named insured" shown in the Declarations; and
>
> 2. The spouse if a resident of the same household.

After reviewing the policies, the pleadings, the parties' motions, the parties' memoranda, and hearing the parties' arguments, Judge Carl Fox granted summary judgment on behalf of Defendants based on Defendants' contention that their policies should be considered primary and Plaintiff's policy should be considered excess. The trial court concluded "as a matter of law that there is no genuine issue of any material fact in this case that the underinsured motorist coverage afforded . . . on those same claims is excess[.]"

II. Jurisdiction & Standard of Review

On appeal, Plaintiff asks this Court to reverse the trial court based upon this Court's holding in *Bost*. 126 N.C. App. at 52, 483 S.E.2d 458–59.

This Court has jurisdiction to review the matter pursuant to N.C. Gen. Stat. § 7A-27(b) (2013). "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

Plaintiff argues that the holding in *Bost* requires a pro rata distribution of the $50,000 credit supplied by the underinsured motorist Ikerd's insurer. Plaintiff argues that *Bost* requires pro rata distribution because (i) the three policies' "other insurance" sections are mutually repugnant and (ii) claimant Clark was a Class I insured under the three policies, which requires pro rata distribution under *Bost*. Defendants argue that the language used in the UIM policies controls and class designation is not relevant when multiple UIM excess clauses may be read together harmoniously. *See Iodice v. Jones*, 133 N.C. App. 76, 79 & n.3, 514 S.E.2d 291, 293 & n.3 (1999).

For purposes of clarity, we hold that courts resolving UIM credit/liability apportionment disputes amongst multiple providers must make the following inquiry in deciding these cases. First the language used in the excess clause must be identical between the excess clauses of the respective UIM policies, or "mutually repugnant." *See Sitzman v. Gov't Employees Ins. Co.*, 182 N.C. App. 259, 262–64, 641 S.E.2d 838, 840–42 (2007) (noting that identical language is mutually repugnant, requiring that neither is given effect, and applying the rule to non-identical excess clauses). If the language is not identical, the inquiry ends, as the excess policies are not mutually repugnant, and the trial court may apply the facial policy language to determine distribution. *Id.*

If this first prong is satisfied and the policies are repugnant, the second inquiry is to determine whether the respective UIM carriers are in the same class; if so, the trial court must apportion liabilities and credits on a pro rata basis. *Bost*, 126 N.C. App. at 52, 483 S.E.2d at 458–59.

Only after considering the "class" of the claimant do we reach the third step of the inquiry. If separate classes exist, a primary/excess distinction may be drawn despite identical language. *Iodice*, 133 N.C. App. at 79 & n.3, 514 S.E.2d at 294 & n.3. Such identical clauses may allow a finding of non-repugnancy after applying the policies' definitions, specifically relating to ownership identified in the policy. *Id.*

Because this issue was settled in *Bost* and we are bound to follow this holding, we must disagree with Defendants' contention that identical excess clauses as applied to claimants all situated within the same class may be read together "harmoniously." *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). As such, we reverse the trial court, and remand to the trial court for a pro rata distribution of the $50,000 credit supplied by Ikerd's insurer.[4] The three tests described above are more fully discussed hereinafter.

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4. If Nationwide is considered "excess," Nationwide pays the full amount of its $50,000 liability limit under the UIM coverage, Integon pays $66,666.67 and State National pays $33,333.33. Integon and State National both divided the $50,000 paid by Ikerd's insurer and received $25,000 each.

A pro rata distribution would net Nationwide a credit of 25 percent of its liability limit, or $12,500. Nationwide would then be liable for $37,500, rather than the full $50,000 of its UIM policy. Integon would pay $75,000 and State National would pay $37,500 under a pro rata distribution.

i. Mutually Repugnant Excess Clauses

The first item in the inquiry is to determine whether or not the respective excess clauses are identical. Identical "excess clauses" are typically deemed mutually repugnant and neither excess clause is given effect. *Integon Nat'l. Ins. Co. v. Phillips*, 212 N.C. App. 623, 630, 712 S.E.2d 381, 386 (2011) ("Due to the excess clauses being identically worded, it is impossible to determine which policy is primary, and thus the excess clauses must be deemed mutually repugnant, with neither clause being given effect." (quotation marks and citation omitted)); *see also* James E. Snyder, Jr., North Carolina Automobile Insurance Law § 33-5 (Supp. 2013). Where identical excess clauses exist, the policies are read as if the identical excess clauses were not present. *Iodice* at 78, 514 S.E.2d at 293 ("Where it is impossible to determine which policy provides primary coverage due to identical 'excess' clauses, 'the clauses are deemed mutually repugnant and neither . . . will be given effect.' " (quoting *N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 511, 369 S.E.2d 386, 388 (1988)) (alterations in original)); *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 690, 456 S.E.2d 882, 884, *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995).

When mutually repugnant clauses exist, the multiple UIM carriers share both credits and liabilities pro rata, as sharing "the liability in proportion to the coverage but not the credit in a like manner is irrational." *Onley*, 118 N.C. App. at 691, 456 S.E.2d at 885; *see also Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 165 N.C. App. 543, 600 S.E.2d 901, 2004 WL 1610050 at *3 (2004) (unpublished) (" 'Where an insured is in the same class under two policies and the 'other insurance' clauses in the policies are mutually repugnant, the claims will be prorated.' " (quoting *Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 330, 524 S.E.2d 386, 393, *aff'd on other grounds in part and disc. review improvidently allowed in part*, 353 N.C. 240, 539 S.E.2d 274 (2000))).

The converse is also true—when policies are *not* identical in form or effect, they are not mutually repugnant. *Sitzman*, 182 N.C. App. at 264, 641 S.E.2d at 842 (noting the differences between two policies' excess clauses in both form and effect); *see also Hlasnick*, 136 N.C. App. at 330, 524 S.E.2d at 393 ("[T]here is no need to consider the class into which an insured falls or to prorate coverage where, as here, the 'other insurance' clauses are not mutually repugnant, but may be read together harmoniously."). In *Sitzman*, two UIM policies' excess clauses were at issue. The first policy was issued by Geico to the claimant in North Carolina and uses the standard North Carolina excess clause language used by both Plaintiff and Defendants' policies discussed above in Section I *supra*.

182 N.C. App. at 262, 641 S.E.2d at 841. The second policy was issued by Harleysville in Virginia to the claimant's parents. *Id.* at 261, 641 S.E.2d at 840. The policy was interpreted under Virginia law as it was issued in that state. *Id.* at 263, 641 S.E.2d at 842. The Harleysville policy also contained an excess clause that was distinct from the standard North Carolina excess clause:

> [T]he following priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:
>
> > First Priority[:] The policy applicable to the vehicle the "insured" was "occupying" at the time of the accident.
> >
> > Second Priority[:] The policy applicable to a vehicle not involved in the accident under which the "insured" is a named insured.
> >
> > Third Priority[:] The policy applicable to a vehicle not involved in the accident under which the "insured" is other than a named insured.

Id. at 263, 641 S.E.2d at 841–42 (alterations in original). This Court explicitly noted the differences between the wording of the Geico and Harleysville policy:

> Unlike the GEICO excess clause, the Harleysville policy does not differentiate between policies based upon ownership of the vehicle in which the insured was riding at the time of the accident. Rather, the Harleysville policy differentiates between the first priority on one hand, and the second and third priorities on the other, based upon whether the policy is applicable to (1) the vehicle involved in the accident or (2) a vehicle not involved in the accident. The Harleysville policy further differentiates between the second and third priorities depending upon whether the insured is a named insured or other than a named insured.
>
> The Harleysville policy does not define the phrase "applicable to [the or a] vehicle." GEICO argues the phrase "applicable to [the or a] vehicle" is synonymous with "covering [the or a] vehicle." Under that interpretation, the vehicle referred to would be the vehicle listed as an insured vehicle under the policy. The bicycle is not listed as an insured vehicle under either policy. Therefore, the GEICO policy would have second priority because it is

> "[t]he policy [covering] a vehicle not involved in the accident [i.e., Plaintiff's 1987 Buick] under which [Plaintiff] is a named insured." GEICO further argues the Harleysville policy has third priority because it is "[t]he policy [covering] a vehicle not involved in the accident [i.e., Plaintiff's parents' vehicles] under which [Plaintiff] is other than a named insured." Under this interpretation, the GEICO policy would have higher priority and would therefore be primary under the Harleysville excess clause. *Accordingly, the GEICO policy would be primary under both the GEICO and Harleysville policies, and the excess clauses would not be mutually repugnant.*

Sitzman, 182 N.C. App. at 264, 641 S.E.2d at 842 (emphasis added) (alterations in original). As such, the excess clauses under consideration were not identical and not mutually repugnant, necessitating no further inquiry.

However, identical policy language is not axiomatically mutually repugnant if the excess clauses at issue do not have the same meaning as applied to the facts of the case. *See Iodice*, 133 N.C. App. at 78, 514 S.E.2d at 293 (agreeing with appellant that the " 'other insurance' clauses in this case, although identically worded do not have identical meanings and are therefore not mutually repugnant"). In *Iodice*, this Court held:

> Because "you" is expressly defined as the named insured and spouse, the Nationwide "excess" clause reads: "[A]ny insurance we provide with respect to a vehicle [Penney] do[es] not own shall be excess over any other collectible insurance." It follows that Nationwide's UIM coverage is *not* "excess" over other collectible insurance (and is, therefore, primary), because the vehicle in which the accident occurred is owned by Penney. The GEICO "excess" clause reads: "[A]ny insurance we provide with respect to a vehicle [Iodice's mother] do[es] not own shall be excess over any other collectible insurance." It follows that GEICO's UIM coverage is "excess" (and is, therefore, secondary), because the vehicle in which the accident occurred is not owned by Iodice's mother. Accordingly, Nationwide provides primary UIM coverage in this case.

Id. at 78–79, 514 S.E.2d at 293 (alterations in original).

Thus, where identically worded policy provisions existed but the actual application of the policies negated mutual repugnancy, this Court

held that the "excess" UIM policy was not entitled to a set-off credit. *Id.* In so holding, however, this Court reaffirmed the class distinction discussed in *Bost* and considered *infra*, stating that a "Class II insured may be treated differently than a Class I insured." *Id.* at 79 n.3, 514 S.E.2d at 293 n.3. *Iodice* thus stands for the proposition that identical language in excess clauses may be read together harmoniously if a claimant is categorized under separate "classes."

A subsequent case, *Hlasnick*, is instructive in prescribing and applying the required three questions in this area of the law. In *Hlasnick*, a husband and wife were injured in an automotive accident caused by a negligent driver. *Id.* at 321–22, 524 S.E.2d at 387–88. The husband was driving a Dodge pick-up truck owned by the car dealership where he worked, and was running a personal errand while his wife was present. *Id.* at 322, 524 S.E.2d at 388. The negligent driver was underinsured, the driver's policy carrier tendered its limits, and the husband and wife sought recovery under their UIM policies. *Id.* The husband's employer had UIM coverage, while both husband and wife each had personal insurance policies that carried UIM coverage. *Id.*

This Court held the policies were not mutually repugnant because the "term 'you' in the different policies refers to different individuals; *and* the 'other insurance' provisions in the policies are not identical," meaning the policies could thus be read together harmoniously. *Id.* at 330, 524 S.E.2d at 392–93 (emphasis added). This Court also noted the claimants fit within separate classes, but held that even had the claimants been within the same class under both UIM policies, the language of the respective excess clauses was not mutually repugnant. *Id.* at 330, 524 S.E.2d at 392 ("By contrast, plaintiffs here are second-class insureds under Federated Mutual's policy, but are first-class insureds under State Farm's policy[.]"). This Court contrasted *Hlasnick* with *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991), where "there were two policies. The insureds were in the same class under both policies, the term 'you' in each policy referred to the same individual, and the policies contained identical 'other insurance' provisions." *Hlasnick*, 136 N.C. App. at 330, 524 S.E.2d at 392.

Here, the language contained in the "excess clause" is identical in all three policies. *Id.* at 330, 524 S.E.2d at 392–93; *see also Phillips*, 212 N.C. App. at 630, 712 S.E.2d at 386 (noting where identical language exists, a presumption of repugnancy exists). Thus, the first part of the inquiry is satisfied, however our work is not finished. As *Iodice* noted, identically-worded policies may be read together "harmoniously," but that reading is predicated on whether the claimant falls within different "classes"

between the respective policies. 133 N.C. App. at 79 n.3, 514 S.E.2d at 293 n.3; *Hlasnick*, 136 N.C. App. at 330, 524 S.E.2d at 393. Thus, whether we may reach the third portion of our inquiry (whether the identical excess clauses may be read harmoniously) depends on the classes of the UIM providers, as announced in *Bost* and affirmed in *Iodice*, *Hlasnick*, *Harleysville*, *Sitzman*, and *Benton v. Hanford*, 195 N.C. App. 88, 92, 671 S.E.2d 31, 34 (2009).

ii. Class Recognition under Bost

This Court in *Bost* noted a distinction with how liabilities and credits are apportioned according to the class of the "persons insured:"

> [g]enerally, the first class of "persons insured" are the "named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise." All persons in the first class are treated the same for insurance purposes. When "excess" clauses in several policies are identical, the clauses are deemed mutually repugnant and neither excess clause will be given effect, leaving the insured's claim to be pro rated between the separate policies according to their respective limits.

126 N.C. App. at 52, 483 S.E.2d at 458–59 (internal citations omitted). *Bost* identified and categorized these "classes" in the relevant statute. *Id.* at 52, 483 S.E.2d at 458; N.C. Gen. Stat. § 20-279.21 (2013) (" '[P]ersons insured' means the named insured and while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise[.]"). Despite efforts to overturn *Bost*, the class distinction drawn in *Bost* remains today. Defendant Appellant's New Brief, *Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 359 N.C. 421, 611 S.E.2d 832 (2005) No. 444PA04, 2004 WL 3120959 at *23–24 ("Accordingly, *Bost* was decided incorrectly and should be overruled. Because the Court of Appeals based its decision in the present case on *Bost*, the Court of Appeals decided the present case incorrectly as well, and its decision in the present case should be reversed.").

Defendants point to decisions decided subsequent to *Bost*, but none of these cases overrule *Bost* and all involve either excess clauses that are not mutually repugnant or distinctions in classes of underinsured motorist policies. *See Sitzman*, 182 N.C. App. at 265, 267, 641 S.E.2d at 843, 844 (finding that the two UIM policies were not mutually repugnant due to different wording and Virginia's choice not to recognize North Carolina's class distinction (citing *Dairyland Ins. Co. v. Sylva*, 409 S.E.2d 127,

128 (Va. 1991)); *Harleysville*, 165 N.C. App. 543, 600 S.E.2d 901, 2004 WL 1610050 at *3 ("While Nationwide points to two decisions by this Court subsequent to *Bost* as supporting its position, each of those cases recognizes that *Bost* controls when, as here, the injured party is a Class I insured under each of the policies at issue."); *Hlasnick*, 136 N.C. App. at 330, 524 S.E.2d at 392-93 ("[P]laintiffs here are second-class insureds under Federated Mutual's policy, but are first-class insureds under State Farm's policy; the term 'you' in the different policies refers to different individuals; and the 'other insurance' provisions in the policies are not identical."); *Iodice*, 133 N.C. App. at 79 n.3, 514 S.E.2d at 293 n.3 (holding *Bost* was distinguishable because the plaintiff in *Bost* was "a Class I insured under both policies" and stating a "Class II insured may be treated differently than a Class I insured").

The one case addressing this issue that does not mention the Class I/Class II distinction is *Benton*, and the facts of that case include a Class I UIM provider and a Class II UIM provider, making the excess and primary distinction this Court drew appropriate. 195 N.C. App. at 97, 671 S.E.2d at 36. In *Benton*, the claimant was injured while a passenger-guest in a vehicle that struck a tree. *Id.* at 90, 671 S.E.2d at 32. Nationwide provided UIM coverage that applied to the vehicle and its occupants involved in the accident, a vehicle owned by the operator. *Id.* at 97, 671 S.E.2d at 36. The claimant also received UIM coverage as a member of his mother's household under a Progressive insurance policy. *Id.* As such, the claimant was a Class II insured under the Nationwide policy (as a passenger-guest) and a Class I insured under his mother's Progressive policy (as a resident-relative). Because the classes of the UIM policies were different, this Court could conduct the analysis laid forth in *Iodice* to find the Nationwide policy was "primary" and the Progressive policy was "excess." *Id.*

The facts of *Bost* were also similar to the present case:

> Carrie Bost was not a named insured under Larry Bost's insurance policy with Farm Bureau. Both Farm Bureau and defendant Allstate insured Carrie Bost as a first class insured because she was a relative and resident of the households of both Larry and Cara Bost. Both policies have "Other Insurance" provisions which are identical, and therefore, the provisions nullify each other, leaving Farm Bureau and defendant Allstate to share the Ezzelle settlement on a pro rata basis.

126 N.C. App. at 52, 483 S.E.2d at 459. Here, the claimant Clark was a Class I insured under all three UIM policies and the three policies all

contained identical language. Clark also held two policies (the Integon policy and the State National Policy) as the named policyholder and was a relative resident of his parents' household, making him a Class I beneficiary of their Nationwide UIM policy. Under *Bost*, the credit paid by Ikerd's insurer must be distributed pro rata amongst Plaintiff and Defendants. Because the policies are (i) identical and (ii) claimant was a member of the same class within the excess clause of all three UIM policies, we cannot reach the third consideration of whether the identical language of the excess clause, as applied, may be read harmoniously amongst the excess clauses. We thus reverse the trial court and remand for a pro rata distribution of the credit.

IV. Conclusion

Because (i) all three policies were mutually repugnant and (ii) the claimant was a Class I insured under all three policies, pro rata distribution of the $50,000 credit provided by Ikerd is required under *Bost*. For the foregoing reasons, the trial court's granting of summary judgment for Defendants is

REVERSED AND REMANDED FOR ENTRY OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF.

Judges ROBERT C. HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
NAMATH PHILIP BEAM

No. COA13-635

Filed 21 January 2014

1. Drugs—possession of heroin—trafficking in opium or heroin—failure to give requested instruction—no evidence of confusion or mistake

The trial court did not err in a possession of heroin and trafficking in opium or heroin by transportation case by failing to give defendant's requested instruction to the jury. The requested instruction was that the State had to prove defendant knew what he transported was heroin, but defendant did not present any evidence

that he was confused or mistaken about the nature of the illegal drug his acquaintance was carrying.

2. Evidence—police testimony—no plain error

Assuming *arguendo* in a drugs case that it was improper for a officer to testify that defendant drove an acquaintance to the same residence on twenty to twenty-five occasions in the month and a half leading up to defendant's arrest, and that the acquaintance was delivering heroin on each of those occasions, any error did not rise to the level of plain error when considered in light of the limiting instruction and the other evidence presented at trial.

3. Appeal and Error—sealed record—no new trial warranted

The Court of Appeals examined the contents of the sealed record and concluded that there was nothing contained in the envelope that would warrant granting defendant a new trial or any other relief.

Appeal by Defendant from judgment entered 28 September 2012 by Judge W. David Lee in Superior Court, Rowan County. Heard in the Court of Appeals 10 December 2013.

Attorney General Roy Cooper, by Associate Attorney General Laura Askins, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

McGEE, Judge.

A jury found Nathan Philip Beam ("Defendant") guilty on 28 September 2012 of possession of heroin and trafficking in opium or heroin by transportation. The actions leading to Defendant's convictions began on 13 April 2011, when the Rowan County Sheriff's Department and other law enforcement agencies entered the home of Joshua Sprinkle ("Sprinkle") pursuant to a search warrant obtained on information that Sprinkle had been dealing illegal narcotics from his residence. In an effort to improve his legal position, Sprinkle agreed to cooperate with authorities by disclosing his heroin source, and by agreeing to set up a delivery with that source. Sprinkle told officers that he had been obtaining heroin from a "Mexican" named "Daniel" who was always driven to Sprinkle's house by the same white man.

At trial, Sprinkle identified "Daniel" from a photograph as Daniel Ponce ("Ponce"). Sprinkle also identified Defendant as the man who always drove Ponce to Sprinkle's house for the transactions. Sprinkle called Ponce on 13 April 2011, and arranged for a delivery of heroin. Later that day, a truck, driven by Defendant and containing Ponce as a passenger, backed into the driveway to Sprinkle's house. Officers approached the truck, and Ponce, sitting in the passenger seat, dropped two bags that he had in his hands onto the floorboard of the truck. The bags were later determined to contain heroin, and a total of 20.2 grams of heroin were recovered from the truck Defendant was driving on 13 April 2011.

Defendant was arrested and charged with multiple drug-related offenses. The jury found Defendant guilty of possession of heroin and trafficking in opium or heroin by transportation on 28 September 2012. Defendant was sentenced to an active sentence of 90-117 months. Defendant appeals.

I.

[1] In Defendant's first argument he contends that the trial court erred in denying one of Defendant's requested instructions to the jury. We disagree.

Specifically, Defendant argues the trial court should have instructed the jury in accordance with a footnote in the pattern jury instructions that, in order to convict Defendant, the State had to prove that Defendant "knew what he transported was [heroin]." In *State v. Coleman*, this Court addressed that footnote:

> Footnote 4 of pattern instructions – criminal 260.17 and 260.30 advises the trial judge to further instruct the jury where defendant contends he did not know the identity of the substance. Footnote 4 of pattern instruction – criminal 260.17 reads, as follows: "If the defendant *contends* that he did not know the true identity of what he possessed, add this language to the first sentence: 'and the defendant knew that what he possessed was [heroin].' " N.C.P.I.—Crim. 260.17 n.4 (emphasis added). Therefore, if given as proposed by defendant, the first sentence of pattern instruction-Crim. 260.17 would read as follows: "First, that defendant knowingly possessed heroin and defendant knew that what he possessed was heroin." N.C.P.I.—Crim. 260.17 n.4.

State v. Coleman, __ N.C. App. __, __, 742 S.E.2d 346, 349 (2013). In *Coleman*, the "defendant's sole defense to the charges of trafficking in heroin by possession and by transportation was that he did not know the box in his possession contained heroin." *Id.* at __, 742 S.E.2d at 350. Recorded statements of the defendant were played at the trial in *Coleman*, where the defendant stated multiple times "that when he was in possession of the box, he believed that it contained only marijuana and cocaine[,]" and not heroin. *Id.* at __, 742 S.E.2d at 349. Because the defendant's sole defense was that he believed the box he was carrying only contained marijuana and cocaine, and that he did not know it also contained heroin, this Court held that the trial court erred in failing to give the additional instruction concerning the defendant's knowledge of the type of contraband he was carrying. *Id.* at __, 742 S.E.2d at 352.

The present case is distinguishable from *Coleman*. The additional instruction in *Coleman* was clearly required so that the jury would not mistakenly convict the defendant of knowingly possessing heroin if they believed his defense that he only knew about the marijuana and cocaine, and had no knowledge that heroin was contained in the box as well.[1] In the case before us, Defendant presented no evidence or argument that he was confused as to the correct identity of the illegal drugs carried by Ponce. Defendant's argument at trial was that he was just driving Ponce, and had no knowledge that Ponce was carrying any illegal drugs whatsoever. Concerning the possession charge, the jury was instructed that the State had to prove beyond a reasonable doubt that Defendant,

> acting either by himself or acting together with another person or persons, knowingly possessed opium, including heroin or any mixture containing opium or heroin, and that the amount which he possessed was 14 grams or more or less than 28 grams, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Similarly, the instruction of trafficking required the jury to determine beyond a reasonable doubt that Defendant knowingly transported heroin, or some other form of opium. The jury clearly did not believe Defendant's argument that he did not know Ponce was carrying heroin. Because Defendant did not present any evidence that he was confused or

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1. It is unclear in *Coleman* whether there was any cocaine in the box, or if the defendant was arguing that he believed one of the substances was cocaine when in fact it was heroin.

mistaken about the nature of the illegal drug Ponce was carrying, we hold that the additional instruction Defendant requested was not required. The trial court did not err in denying Defendant's requested instruction.

II.

[2] In Defendant's second argument, he contends the trial court committed plain error in allowing irrelevant and prejudicial testimony at trial. We disagree.

Sprinkle testified that Defendant drove Ponce to Sprinkle's residence on twenty to twenty-five occasions in the month and a half leading up to Defendant's arrest, and that Ponce was delivering heroin on each of those occasions. The following colloquy occurred between the State and Sprinkle:

> Q. I believe it was your prior testimony that every time [Ponce] came to your house, somebody else was driving.
>
> A. Yes, sir.
>
> Q. Who was driving on the other occasions that Mr. Ponce came to your house?
>
> A. On every occasion? On every single occasion he come up?
>
> Q. Yes.
>
> A. Mr. Namath Beam [Defendant].
>
> Q. Okay. On the other occasions when [Defendant] would drive, how would he pull into the driveway there?
>
> A. He would pull past the driveway and then back up.
>
> Q. And was this on every occasion including the ones where you actually conducted the transaction in the driveway?
>
> A. Yes, sir, it is.

The trial court instructed the jury that it should limit its consideration of this testimony to issues concerning Defendant's "motive, opportunity, and plan or . . . lack of mistake with regard to the crimes charged in this case."

Later in the trial, Chief Deputy David C. Ramsey ("Chief Deputy Ramsey") of the Rowan County Sheriff's Office testified that "Sprinkle said that his dealings were directly with [Ponce] but that the white

guy had been in the vehicle and the deal was done in his presence." Defendant did not object to this testimony at trial, but argues on appeal that "it was plain error for the trial court not to strike from the record the above testimony and provide a curative instruction[.]" Following the close of all the evidence, the trial court instructed the jury, including giving the following instruction:

> As I indicated to you earlier, ladies and gentlemen, at the time the evidence was received tending to show that on earlier occasions the defendant drove a vehicle occupied by another passenger to the residence of the witness, Joshua Sprinkle, and that on those occasions the passenger exchanged controlled substances with the witness for cash money, you recall my earlier instruction that that evidence was received solely for the purpose of showing that the defendant had a motive for the commission of the crimes charged in this case, that there existed in the mind of the defendant a plan, scheme, system, or design involving the crimes charged in this case, that the defendant had the opportunity to commit the crimes, and the absence of mistake with respect to the commission of the crimes charged in this case. As I previously instructed you, if you believe this evidence, you may consider it, but only for the limited purposes for which it was received. You may not consider it for any other purpose.

Assuming, *arguendo*, that it was improper for Chief Deputy Ramsey to give the above testimony, when considered in light of the limiting instruction and the other evidence presented at trial, we hold any error did not rise to the level of plain error. This argument is without merit.

III.

[3] In Defendant's final argument, he requests that this Court "examine the sealed records and order a new trial if the records contain relevant, discoverable, impeaching, and/or exculpatory evidence." We find no error.

We have examined the contents of the sealed envelope. We hold that there is nothing contained in the envelope that would warrant granting Defendant a new trial, or any other relief.

No error.

Judges HUNTER, Robert C. and ELMORE concur.

STATE v. CARLTON

[232 N.C. App. 62 (2014)]

STATE OF NORTH CAROLINA
v.
MAURICE ERSEL CARLTON, DEFENDANT

No. COA13-359

Filed 21 January 2014

Criminal Law—charging document—misdemeanor—amendment—changed nature of offense—impermissible

The superior court lacked jurisdiction to try defendant for possession of lottery tickets in violation of N.C.G.S. § 14-290. Even if the original citation was sufficient to charge defendant under N.C.G.S. § 14-291 and the procedures purportedly employed in the district court resulted in an actual amendment to the citation to charge defendant under N.C.G.S. § 14-290, the amendment changed the nature of the offense charged. Accordingly, the amendment was legally impermissible under N.C.G.S. § 15A-922(f).

Appeal by defendant from judgment entered 2 August 2012 by Judge Charles H. Henry in Wayne County Superior Court. Heard in the Court of Appeals 12 September 2013.

Roy Cooper, Attorney General, by David Shick, Associate Attorney General, for the State.

Gerding Blass, PLLC, by Danielle Blass for defendant-appellant.

DAVIS, Judge.

Maurice Ersel Carlton ("Defendant") appeals from his conviction for possession of tickets used in an illegal lottery. On appeal, he argues that the trial court did not have jurisdiction to try him on the possession of lottery tickets offense. After careful review, we vacate the trial court's judgment.

Factual Background

On 11 September 2011, Officer Matthew Fishman ("Officer Fishman") of the Mount Olive Police Department was on patrol and noticed that the right rear brake light on Defendant's vehicle was not functioning properly. Officer Fishman initiated a traffic stop and asked Defendant to step out of the vehicle. He then issued Defendant a warning citation, returned his license and registration, and asked Defendant if "there was

anything in the vehicle . . . that [he] needed to know about." Defendant replied: "[N]o, you're welcome to look."

Officer Fishman conducted a search of the vehicle and located "approximately 10 carbon copy books which contained a white, pink, and yellow copy" and a calculator in the center console of the car. He proceeded to issue Defendant a North Carolina Uniform Citation purporting to charge Defendant with violating N.C. Gen. Stat. § 14-291.[1] The citation simply stated that "[a] person . . . guilty of this offense acts as an agent in this state for a lottery."

The case was first tried before the Honorable Charles P. Gaylor, III in Wayne County District Court on 9 March 2012. Judge Gaylor found Defendant guilty of "operating [a] lottery" in violation of N.C. Gen. Stat. § 14-290 (rather than § 14-291, the statute referenced on the citation) and sentenced him to 45 days imprisonment. Judge Gaylor then suspended the sentence and placed Defendant on unsupervised probation for six months. Defendant appealed his conviction to Wayne County Superior Court.

A jury trial was held on 2 August 2012 in Wayne County Superior Court before the Honorable Charles H. Henry. Immediately prior to the trial, the prosecutor informed Judge Henry that "[t]he State had made a motion at the district court trial to have the charging statute amended . . . [I]t was originally charged as 14-291 and during the district court proceeding the State amended that to 14-290 and that was allowed by the district court judge."[2]

The trial proceeded on the charge of possession of tickets used in the operation of an illegal lottery in violation of N.C. Gen. Stat. § 14-290, and the jury found Defendant guilty of that offense. Judge Henry entered judgment on the jury's verdict and sentenced Defendant to 60 days imprisonment but suspended the sentence and placed him on supervised probation for 18 months. Defendant gave notice of appeal in open court.

Analysis

Defendant argues that the superior court lacked jurisdiction to try him for possession of lottery tickets in violation of N.C. Gen. Stat. § 14-290. We agree.

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1. The citation also charged Defendant with misdemeanor simple possession of marijuana. Because Defendant was found not guilty of this offense by the district court, that charge is not relevant to this appeal.

2. The record on appeal does not contain written documentation of the purported amendment or a transcript of the district court proceedings. The prosecutor's statement to the trial court is the only indication in the record that the district court consented to the State's request to have the citation amended in this fashion.

The confusion in this case arises from the fact that two separate criminal statutes are implicated — N.C. Gen. Stat. § 14-291 (the original charging statute) and N.C. Gen. Stat. § 14-290 (the statute under which Defendant was convicted in both district and superior court).[3] N.C. Gen. Stat. § 14-291, the original charging statute identified in the citation, provides as follows:

> Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-291 (2011).

Thus, in order to successfully prosecute Defendant under § 14-291, the State is required to prove that (1) Defendant acted as an agent in the State (2) for or on behalf of a lottery. *See State v. Heglar*, 225 N.C. 220, 223, 34 S.E.2d 76, 77 (1945) (reversing trial court's denial of defendants' motion to dismiss alleged violation of N.C. Gen. Stat. § 14-291 where there was no evidence that defendants "were agents for others in the operation of a lottery"). An agent is typically defined as an individual who is not merely "a subordinate employee without discretion, but . . . one . . . having some charge or measure of control over the business entrusted

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3. A source of additional confusion lies in the fact that the written judgment mistakenly lists a *third* statute — N.C. Gen. Stat. § 14-291.1 — as the statute prohibiting possession of lottery tickets instead of listing § 14-290. This mistake in the judgment is noted by both parties in their respective briefs but treated as a clerical error. Although § 14-291.1 — like § 14-290 — punishes the possession of tickets used in illegal lotteries, its particular elements are inconsistent with the jury instructions provided by the trial court. Furthermore, entering judgment on a violation of § 14-291.1 would be contrary to the pretrial dialogue in which the prosecutor explained that he was proceeding on a charge of possession of tickets used in an illegal lottery in violation of § 14-290. As such, we agree with the parties that the reference to § 14-291.1 on the written judgment is appropriately deemed a clerical error. *See State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (defining clerical error as "[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination") (citation and quotation marks omitted)). Therefore, our analysis of this appeal treats Defendant's conviction as arising under § 14-290. Moreover, because we are vacating the judgment for lack of jurisdiction, we need not remand for the correction of this clerical error.

to him or some feature of it . . . ." *Carolina Paper Co. v. Bouchelle*, 19 N.C. App. 697, 699, 200 S.E.2d 203, 205 (citation and quotation marks omitted), *aff'd*, 285 N.C. 56, 203 S.E.2d 1 (1974).

N.C. Gen. Stat. § 14-290, on the other hand, reads as follows:

> Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed two thousand dollars ($2,000). Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. This section shall not apply to the possession of a lottery ticket or share for a lottery game being lawfully conducted in another state.

N.C. Gen. Stat. § 14-290 (2011).

In order to establish a violation of § 14-290, therefore, the State need only establish that Defendant (1) knowingly possessed (2) lottery tickets (3) used in the operation of a lottery. Furthermore, mere possession of such lottery tickets is *prima facie* evidence of a violation of the statute. *Id.* As such, if the jury finds beyond a reasonable doubt that the defendant knowingly possessed the lottery tickets, it may also infer that those tickets were used in the operation of a lottery. *See State v. Dawson*, 23 N.C. App. 712, 714, 209 S.E.2d 503, 505 (1974) (evidence that defendant possessed tickets found on floorboard of his automobile "was sufficient to support the inference that the tickets were those used in the operation of a lottery"), *cert. denied*, 286 N.C. 417, 211 S.E.2d 798 (1975).

Here, Defendant was charged by means of a North Carolina Uniform Citation. A citation may serve as the State's pleading for a misdemeanor prosecuted in district court "unless the prosecutor files a statement of charges, or there is objection to trial on a citation." N.C. Gen. Stat. § 15A-922(a) (2011).

The citation in this case alleged that, on 11 September 2011, Defendant violated N.C. Gen. Stat. § 14-291. The handwritten statement of the offense at the bottom of the citation reads as follows: "G.S. 14-291[.] A person . . . guilty of this offense acts as an agent in this state for a lottery." However, as discussed above, the district court found Defendant guilty of violating N.C. Gen. Stat. § *14-290* and entered judgment on that offense.

It is well established that misdemeanor charging documents may not be amended so as to charge the defendant with committing a different crime. *See* N.C. Gen. Stat. § 15A-922(f) (2011) ("A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment *when the amendment does not change the nature of the offense charged.*" (emphasis added)); *State v. Clements*, 51 N.C. App. 113, 116, 275 S.E.2d 222, 225 (1981) ("[A]n amendment to a warrant under which a defendant is charged is permissible *as long as the amended warrant does not charge the defendant with a different offense.*" (emphasis added)).

Assuming, without deciding, that the original citation was sufficient to charge the commission of a criminal offense and that the procedures purportedly employed in the district court resulted in an actual amendment to the original charging instrument — subjects about which we express no opinion, the resolution of Defendant's jurisdictional argument hinges on whether a violation of N.C. Gen. Stat. § 14-290 is a different crime than a violation of N.C. Gen. Stat. § 14-291. Based on our examination and comparison of these two statutes, we conclude that amending Defendant's citation by replacing N.C. Gen. Stat. § 14-291 with N.C. Gen. Stat. § 14-290 as the charging statute would, in fact, effectively charge Defendant with a different offense. Instead of requiring the State to establish that Defendant was acting as a representative in the State for an illegal lottery, such an amendment would merely require proof that Defendant knowingly possessed lottery tickets in order to make out a *prima facie* violation of the statute.

Thus, given the significantly distinct elements of these two crimes, we are compelled to conclude that amending the citation to charge Defendant under § 14-290 — rather than under § 14-291 — would change

the nature of the offense charged. *See State v. Davis*, 261 N.C. 655, 656, 135 S.E.2d 663, 663 (1964) (holding that trial court could not amend warrant to change charging statute where "[e]ach of these statutes creates and defines a separate criminal offense"); *In re Davis*, 114 N.C. App. 253, 256, 441 S.E.2d 696, 698 (1994) (holding that trial court could not amend petition to charge juvenile with different offense than that originally alleged). Therefore, even assuming that the district court did attempt to amend the citation in this manner (as was related by the prosecutor to Judge Henry shortly before the trial in superior court), such an amendment would not have been legally permissible.

Because the district court lacked legal authority to amend the citation to charge Defendant with a violation of N.C. Gen. Stat. § 14-290, the superior court did not have jurisdiction to try Defendant for possession of tickets used in the operation of an illegal lottery in violation of that statute. Accordingly, we must vacate the superior court's judgment.[4] *See State v. Caudill*, 68 N.C. App. 268, 272, 314 S.E.2d 592, 594 (1984) (vacating judgment where superior court did not have jurisdiction because amended offense was "separate and distinct" from offense originally charged).

Conclusion

For the reasons stated above, we vacate the trial court's judgment.

VACATED.

Judges HUNTER, JR. and ERVIN concur.

4. Because we vacate Defendant's judgment for lack of jurisdiction, we need not address Defendant's remaining arguments on appeal.

STATE v. COUNCIL

[232 N.C. App. 68 (2014)]

STATE OF NORTH CAROLINA
v.
RAMIL MARQUE COUNCIL

No. COA13-607

Filed 21 January 2014

1. Evidence—witness's unrelated charge—cross-examination barred—no plain error

Because there was no prejudice, the trial court did not commit plain error in a prosecution for assault and armed robbery by ruling that the victim could not be questioned about an unrelated first-degree murder charge pending against him at the time of his testimony. Moreover, trial counsel's failure to object to the State's motion *in limine* to bar cross-examination of the victim about that charge did not constitute inadequate representation.

2. Confessions and Incriminating Statements—defendant's statements in patrol car—video clips

There was no prejudicial error in an assault and armed robbery prosecution where the trial court did not suppress statements defendant made while being transported in a camera-equipped car and the video clips of those statements. Although the trial court misapprehended the applicable law on the right-to-counsel issue, the error was harmless. Because any error in the admission of the video clips was not prejudicial, any error in the trial court's determination of their relevancy and prejudicial impact was also harmless.

Appeal by Defendant from judgments entered 15 November 2012 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 24 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery,[1] *for the State.*

Marilyn G. Ozer for Defendant.

STEPHENS, Judge.

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1. On 18 September 2013, the State moved to substitute Special Deputy Attorney General Robert C. Montgomery for Special Deputy Attorney General Tina A. Krasner due to her leaving her position with the Office of the Attorney General. By order entered 22 October 2013, this Court allowed that motion. As Defendant himself notes, Powell's credibility was impeached on several fronts at trial.

Evidence at Trial and Procedural History

Defendant Ramil Marque Council appeals from the judgments entered upon his convictions for one count each of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") and attempted robbery with a dangerous weapon, and two counts of robbery with a dangerous weapon. The evidence at trial tended to show the following: On 28 August 2010, Christopher Powell, Mary Foy, and Angela Wiggins stopped at a convenience store in Mount Olive, North Carolina, to buy beer. Defendant,[2] who was standing in a group of men outside the store, offered to sell Powell some marijuana, and Powell agreed to drive Defendant to another location to complete the drug purchase. When the women came out of the store, Powell instructed Wiggins to sit in the front seat with Foy, who was driving. Powell and Defendant rode in the back seat. Shortly after the group drove away from the store, Defendant brandished a chrome revolver in Powell's face and demanded his money. When Powell replied that Defendant would have to shoot him first, Defendant put the gun to Powell's stomach and shot him. Powell then handed over his money and began screaming that he had been shot.

Upon hearing the pop of the handgun and Powell's cries, Foy slammed on the brakes. Defendant stuck the gun between the headrests of the front seats and demanded money from the women. Foy said that she did not have any money, but Wiggins gave Defendant about $30. Defendant then jumped out of the car and ran away from the scene. Wiggins called 911, and Powell was taken by ambulance to a hospital where he underwent two surgical procedures and remained hospitalized for several weeks. On 31 August 2010, while still in the hospital, Powell identified Defendant in a photographic lineup. Foy also picked out Defendant in a photo lineup, although Wiggins was not able to do so.

In September 2010, Officer Jason Holliday of the Mt. Olive Police Department ("MOPD") arrived at the Duplin County home of Defendant's grandparents to serve a warrant for Defendant's arrest. After being given permission to enter the home, Holliday eventually located Defendant hiding in the attic and placed him under arrest. At some point after Defendant's arrest, MOPD Chief Ralph Schroeder advised Defendant of his *Miranda* rights in the presence of Defendant's mother.[3] Schroeder noted on a juvenile rights form that Defendant had responded that he

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2. Defendant was seventeen years old at the time.

3. The record and trial transcript are unclear about exactly how and when Schroeder first came in contact with Defendant or why he decided to involve himself personally in Defendant's case.

understood those rights and had invoked his right to counsel. Schroeder then personally transported Defendant from Mt. Olive to Goldsboro, apparently to the magistrate's office, in a patrol car equipped with an interior camera. Schroeder testified that he had chosen that particular car so that he could record any statements Defendant might make on the way. Defendant and Schroeder talked during the drive. The video recording of those conversations was later divided into six five-minute clips. At trial, over Defendant's objection, the jury was shown clips 3, 4, and 5.

On 15 November 2012, the jury convicted Defendant of all charges against him, and the trial court imposed consecutive terms of 72 to 96 months for the AWDWIKISI charge, 62 to 84 months for the attempted robbery charge, and 62 to 84 months for each of the robbery charges. Defendant gave notice of appeal in open court. On 25 June 2013, Defendant filed a motion for appropriate relief ("MAR") with this Court, alleging that he received ineffective assistance of council ("IAC") at trial. That motion was referred for resolution to this panel by order dated 23 July 2013.

Discussion

In his direct appeal, Defendant brings forward two arguments: that the trial court erred in (1) ruling that Defendant could not cross-examine Powell about Powell's pending first-degree murder charge and (2) failing to suppress statements made by Defendant while he was being transported to jail. In his MAR, Defendant contends that his trial counsel's failure to object to the State's motion to bar mention of Powell's pending criminal charge constituted IAC. Because they are closely related, we address Defendant's first issue on appeal and the issue raised in his MAR together. We find no prejudicial error in Defendant's trial and deny his MAR.

I. Powell's pending criminal charge

[1] Defendant argues that the trial court committed plain error in ruling that Powell could not be questioned about an unrelated first-degree murder charge pending against him at the time of his testimony. Defendant also contends that his trial counsel's failure to object to the State's motion *in limine* to bar cross-examination of Powell about that charge constituted IAC. We disagree with both arguments.

After Powell was shot, he was charged with first-degree murder in another county in connection with an incident unrelated to his encounter with Defendant. During a pretrial conference, the State informed the

trial court of Powell's pending charge and made an oral motion *in limine* to prevent Defendant from questioning Powell about it. Defendant did not object, and the court granted the State's motion. Defendant now argues that the court's ruling violated his constitutional rights.

It is error for a trial court to bar a defendant from cross-examining a State's witness regarding pending criminal charges, even if those charges are unrelated to those for which the defendant faces trial. *State v. Hoffma*n, 349 N.C. 167, 180, 505 S.E.2d 80, 88 (1998). Cross-examination can be used to impeach the witness by showing a possible source of bias in his testimony, to wit, that the State may have some undue power over the witness by virtue of its ability to control future decisions related to the pending charges. *Id.* at 180-81, 505 S.E.2d at 88. However, as Defendant concedes, his failure to object to the trial court's ruling requires him to establish plain error in order to obtain relief. As our Supreme Court has recently reaffirmed,

> the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, internal quotation marks, and brackets omitted).

To establish IAC,

> 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. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). Further, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged error[] the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Thus, for Defendant to prevail on either his claim of plain error or of IAC, he must show prejudice. This Defendant cannot do.

Here, as noted *supra*, it was error for the trial court to prohibit cross-examination of Powell regarding his pending criminal charge. *See Hoffman*, 349 N.C. at 180-81, 505 S.E.2d at 88. However, Defendant fails to show that this "error had a probable impact on the jury's finding that [D]efendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. As Defendant himself notes, Powell's credibility was impeached on several fronts at trial. During his testimony, Powell revealed that, although he was only seventeen years old at the time Defendant shot him, he used alcohol and had stopped to have one of his companions buy alcohol on the evening of the crime. On cross-examination, Powell admitted to buying and using marijuana previously and, of course, Powell was trying to purchase marijuana from Defendant when he was shot. Defendant's counsel also extensively cross-examined Powell about inconsistencies between Powell's various pretrial statements to police officers and his trial testimony, such as whether he had ever purchased marijuana from Defendant before the evening of the crime and whether Defendant stole money from him at the time of the shooting. In sum, Powell's credibility was substantially impeached as he was shown to be an underage drinker and illegal drug user who gave inconsistent statements regarding a variety of facts connected to the shooting.

Further, we observe that Powell first identified Defendant as the man who shot him on 31 August 2010, only a few days after the crime occurred. Powell did not allegedly commit the murder for which he was later charged until 23 October 2010. Thus, the most crucial piece of Powell's testimony, his original identification of Defendant as the man who shot him, cannot have been influenced in any way by the pending charge. Even had Defendant been able to cross-examine Powell about his pending charge, Powell's original identification of Defendant, which never varied and which was corroborated by Foy's identification of Defendant as the assailant, would have been entirely unaffected. In light of that consistent and definite identification and Foy's testimony that Defendant was the man who shot Powell and robbed her, we see

no reasonable probability that the result of Defendant's trial would have been different if he had been able to cross-examine Powell about Powell's pending criminal charge. Accordingly, we overrule Defendant's first argument and deny his MAR.

II. Defendant's post-arrest statements during transport

[2] Defendant next argues that the trial court erred in failing to suppress both the statements he made while being transported by Schroeder in the camera-equipped car and the video clips of those statements. Defendant contends (1) the admission of the video clips violated his right to counsel and (2) the clips were irrelevant and grossly prejudicial and thus inadmissible under our Rules of Evidence. We conclude that the trial court misapprehended the applicable law on the right-to-counsel issue in considering Defendant's motion to suppress. However, this error was harmless. Because any error in the admission of the video clips was not prejudicial to Defendant, any error in the trial court's determination of their relevancy and prejudicial impact was also harmless.

A. Standard of review

> This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. If so, the trial court's conclusions of law are binding on appeal.

State v. Veazey, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009) (citations and internal quotation marks omitted), *disc. review denied*, 363 N.C. 811, 692 S.E.2d 876 (2010). However, the trial court's conclusions of law are reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

B. Defendant's right to counsel

"[D]uring a custodial interrogation, if the accused invokes his right to counsel, the interrogation must cease and cannot be resumed without an attorney being present . . . ." *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (citations and internal quotation marks omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). To determine whether a defendant's invoked right to counsel has been waived, courts "must ask: (1) whether the [post-invocation interrogation] was police-initiated[] and (2) whether [the defendant] knowingly and intelligently

waived the right." *State v. Tucker*, 331 N.C. 12, 33, 414 S.E.2d 548, 560 (1992) (citation omitted).

Here, Defendant explicitly invoked his right to counsel after being read his *Miranda* rights and before being driven to Goldsboro by Schroeder. At trial, Defendant specifically argued that Schroeder's comments to Defendant during the drive were "an effort to subvert *Miranda*[.]" Accordingly, in ruling on Defendant's motion to suppress, the trial court was required, at a minimum, to resolve the factual issues of (1) whether Defendant reinitiated the conversation, thereby waiving his invoked right to counsel, and (2) whether that waiver was voluntary and knowing. *See id.*

As for which party reinitiated a post-invocation communication, our Supreme Court has noted that

> not every statement obtained by police from a person in custody is considered the product of interrogation. Interrogation is defined as either express questioning by law enforcement officers, or conduct on the part of law enforcement officers which constitutes the functional equivalent of express questioning. The latter is satisfied by any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. However, because the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. Factors that are relevant to the determination of whether police should have known their conduct was likely to elicit an incriminating response include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion.

State v. Fisher, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003), *affirmed*, 358 N.C. 215, 593 S.E.2d 583 (2004).

Here, the trial court found that "Schroeder did not ask any direct questions of the Defendant and did not question him concerning the

circumstances involving the alleged robberies or alleged shootings. Any statements made during [the drive] were initiated by [] Defendant." While these findings are supported by the evidence and properly address whether Schroeder engaged in interrogation of Defendant by "express questioning[,]" the trial court made no "determination of whether [Schroeder] should have known [his] conduct was likely to elicit an incriminating response" by considering "(1) the *intent* of the police; (2) whether the practice [wa]s *designed to elicit an incriminating response* from the accused; and (3) any knowledge the police may have had concerning the *unusual susceptibility of [D]efendant to a particular form of persuasion*." *Id.* (emphasis added). This failure is particularly concerning in light of evidence before the trial court that Schroeder, the city police chief, (1) chose to transport Defendant himself, (2) intentionally used a camera-equipped car in case Defendant made a statement, (3) had a prior relationship with Defendant from a youth sports team Schroeder coached, and (4) knew Defendant was only seventeen years old. These facts surely raised questions regarding the three *Fisher* issues.

As noted *supra*, in reviewing the denial of a motion to suppress, it is not our role to make factual findings, but rather, only to consider whether the trial court has engaged in the appropriate legal analysis, made findings of fact which are supported by competent evidence, and made conclusions of law supported by those findings. The trial court failed to make the necessary findings of fact under the first prong of the required analysis regarding Defendant's *Miranda* claim. Accordingly, the denial of Defendant's motion to suppress was error.

Further, even if the trial court had made the necessary findings of fact to support its conclusion that Defendant reinitiated the communication with Schroeder, the court also failed to resolve the second prong of the analysis set forth in *Tucker*: whether Defendant knowingly and intelligently waived his invoked right to counsel. "Whether a waiver is knowingly and intelligently made depends on the specific facts of each case, including the defendant's background, experience, and conduct. Age, although not determinative, can be one of the factors considered as part of the totality of the circumstances." *State v. Quick*, __ N.C. App. __, __, 739 S.E.2d 608, 612 (2013) (citations omitted).

After watching the clips and hearing arguments from counsel, the trial court found them relevant under Rules of Evidence 401 and 403. The Court then stated, "I have to look at the more specific issue as to *whether or not it's a voluntary statement*." (Emphasis added). On the

second issue, the court made the following oral findings of fact and conclusions of law:

> On Clip Two, in watching and listening, [] Defendant initiated the conversation. He wanted Chief Schroeder to take him to Main Street in Mt. Olive. Before that comment was made there had been no discussion at all going on in the car. After a brief pause [] Defendant struck up the conversation again. Then I heard on Clip Two Chief Schroeder on the radio, and then things got quiet once again, which led into Clip Three.
>
> At approximately 1 minute and 25 seconds into Clip Three [] Defendant asked Chief Schroeder for a cigarette. At approximately 2 minutes and 44 seconds into Clip Three, again initiated by [] Defendant, [] Defendant made some comments about he might do 5 to 7. Chief Schroeder responded to the effect I can't tell you that; it depends on if the case is pled down. There were no threats, there were no promises, and it did not appear there was any deception. It does not appear any things were said in an effort to obtain a confession from [] Defendant.
>
> Clip Four. [] Defendant continues to voluntarily talk. There's some comment made around the 1 minute mark into the video about staying or running. I don't recall there being any questions asked by Chief Schroeder. And I find that those statements, in the totality of the circumstances, were also voluntarily made by [] Defendant, giving deference to these issues I've addressed, and that I find [] Defendant was not deceived, his *Miranda* rights were honored, there were no physical threats or shows of violence by Chief Schroeder towards [] Defendant, no promises were made to obtain any statement of [] Defendant, [] Defendant was familiar with the criminal justice system by the comments that he made, and it appears his mental condition was clear. In fact, I think it was around this time, between Clips Four and Five, that there was some discussion made of [] Defendant playing football, and Chief Schroeder may have been — as I understand the conversation, coaching football, a youth league or something along those lines.
>
> In Clip Five, around the 1 minute mark into the clip [] Defendant asked Chief Schroeder, do you think all the

> charges are going to stick? Chief Schroeder's response, I can't tell you that. There was a comment then made that it would be up to the attorneys and what type of evidence is presented. There was then a discussion about Shania, Rania and Tremia (all phonetic). That may be some children that [] Defendant's related to or at least has a close relationship with. It didn't appear to me at any time during these clips [] Defendant felt at all threatened. He smoked a cigarette. He brought up things in conversation. At no time do I find Chief Schroeder brought up anything about the case. If anything, he was responding to [] Defendant, and his responses were very general in nature, without promises, without threats, without an attempt to deceive. The entire six clips last 30 minutes. Again, Clips [O]ne and Two, 5 minutes each, take that 10 minutes out; the remaining four clips last approximately 20 minutes. This was a very short period of time during which Chief Schroeder did not ask any direct questions of [] Defendant and did not question him concerning the circumstances involving the alleged robberies or alleged shootings. Any statements made during that 20 minute period of time were initiated by [] Defendant.
>
> In light of *Wilkerson*, *Hardy*, and the totality of the circumstances, I find that [] Defendant's statements were of a voluntary nature, were not coerced, he was not deceived, his *Miranda* rights were honored. The length of the drive was no more than necessary from Mt. Olive to Goldsboro, which if you were to track it it's around about a 15 mile drive, but also involves some driving in town where the speed limit may be 20, 25 or 35 miles per hour, and I'm familiar with those roads, both in Mt. Olive and in Goldsboro. There were no physical threats or shows of violence, no promises were made to obtain any statements, [] Defendant had familiarity with the criminal justice system, and his mental condition appeared to be clear. And in light of all of these, the motion to suppress the video is denied. I find that it is relevant, that it was voluntarily made by [] Defendant and is proper for consideration by this jury in this case.

As the transcript reveals, the court misapprehended the second prong of the *Tucker* analysis: whether Defendant knowingly and

intelligently waived his previously invoked right to counsel. The court made no conclusions of law about the *knowing and intelligent nature of Defendant's waiver of his right to counsel*, but instead concluded only that Defendant's statements were *voluntary*, citing *State v. Wilkerson*, 363 N.C. 382, 683 S.E.2d 174 (2009), *cert. denied*, __ U.S. __, 176 L. Ed. 2d 734 (2010), and *State v. Hardy*, 339 N.C. 207, 451 S.E.2d 600 (1994).

"[T]he voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." *Edwards v. Arizona*, 451 U.S. 477, 484, 68 L. Ed. 2d 378, 385-86 (1981) ("[H]owever sound the conclusion of the state courts as to the voluntariness of [the defendant's] admission may be, neither the trial court nor the [state appellate court] undertook to focus on whether [the defendant] understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.").

In *Hardy*, the issue before our Supreme Court was whether the defendant's statements were voluntary. The defendant had not been arrested and had never invoked his right to counsel. 339 N.C. at 216-17, 451 S.E.2d at 605-06. While that case discusses many of the factors about which the trial court made findings, it does not discuss knowing and intelligent waiver of the right to counsel. *See Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 ("If, looking to the totality of the circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, then he has willed to confess and it may be used against him; where, however, his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Factors that are considered include whether [the] defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.") (citations, internal quotation marks, and brackets omitted).

Here, the trial court's oral findings of fact discuss the length of the drive to Goldsboro; the absence of coercion, threats or promises by Schroeder; and other factors relevant in determining the *voluntariness* of a statement under Hardy.[4] The court explicitly made conclusions of

4. *Wilkerson* discusses both waiver of *Miranda* rights (waiver "must be (1) given voluntarily . . . , and (2) made with a full awareness of both the nature of the right being

law regarding voluntariness. However, the trial court failed to make any conclusion as to the central question of whether Defendant's waiver of his invoked right to counsel was knowing and intelligent. Like the trial court's failure to consider whether Schroeder's conduct was likely to elicit an incriminating response, this failure renders denial of Defendant's motion to suppress erroneous. However, as discussed below, we conclude that this error was harmless beyond a reasonable doubt. *See State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982) ("Error committed at trial infringing upon a defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error committed was harmless beyond a reasonable doubt. Overwhelming evidence of guilt may render constitutional error harmless.").

In the video clips shown to the jury, Defendant does not confess to the crimes for which he which was tried. He and Schroeder largely discuss unrelated matters, including snakes, convertibles, and people they both know. The only comments Defendant made which could be viewed as even possibly inculpatory were: (1) wondering whether he "might do 5 to 7" years in prison (presumably a reference to the possible consequences of his arrest), (2) an admission that he had seen and narrowly avoided police officers the night before, (3) an expression that he had intended to stay "on the run" as long as possible, and (4) a question about why police had described him as "armed and dangerous." In sum, the clips contained little relevant evidence, but Defendant's statements were not particularly prejudicial. Thus, even had the video clips been suppressed, in light of the clear and definite testimony from Powell and Foy identifying Defendant as their assailant, we conclude beyond a reasonable doubt that the outcome of Defendant's trial would have been the same.

C. Relevance and prejudicial impact

[3] Defendant also contends that the trial court erred in concluding that the selected video clips were relevant and that their probative value was not substantially outweighed by their prejudicial impact. *See* N.C. Gen. Stat. § 8C-1, Rules 401, 403 (2013). "A defendant is prejudiced by

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abandoned and the consequences of the decision to abandon it"), and the voluntariness of statements by suspects ("To be admissible, a defendant's statement must be the product of an essentially free and unconstrained choice by its maker."). *Wilkerson*, 363 N.C. at 430-31, 683 S.E.2d at 203-04 (citations and internal quotation marks omitted). However, in that case, the defendant had never invoked his right counsel and further, on appeal, contested only the *voluntariness* of his statement. *Id.* at 430, 683 S.E.2d at 203.

errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2013). As noted *supra*, while we agree that the video clips contained relatively little relevant evidence, we also find that they contained little if any prejudicial content. Accordingly, even if the admission of the video clips was error under Rules of Evidence 401 and/or 403, we conclude that there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" *Id.* Accordingly, Defendant cannot establish prejudice which would entitle him to relief.

NO PREJUDICIAL ERROR.

Judges GEER and ERVIN concur.

STATE OF NORTH CAROLINA
v.
GREGORY ELDER, DEFENDANT

No. COA13-710

Filed 21 January 2014

Search and Seizure—motion to suppress evidence—statutory authority exceeded—domestic violence protective order—no exigent circumstances

In a case arising from defendant's motion to suppress evidence found in his home when officers served him with an *ex parte* domestic violence protection order (DVPO), the district court exceeded its statutory authority by ordering a general search of defendant's person, vehicle, and residence for unspecified "weapons" as a provision of the DVPO under North Carolina General Statute § 50B-3(a)(13). As defendant's premises were searched without a search warrant and without exigent circumstances, and as the good faith exception does not apply to evidence obtained in violation of the North Carolina Constitution, the evidence seized as a result of the search, which led to the criminal charges for which defendant was convicted, should have been suppressed.

Judge BRYANT dissents in a separate opinion.

Appeal by defendant from judgment entered 18 December 2012 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Michael E. Bulleri, for the State.

Michele Goldman, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment entered upon his guilty plea after the denial of his motion to suppress. For the following reasons, we vacate the judgment and remand.

I. Background

On 23 September 2010, based upon an action brought under North Carolina General Statute Chapter 50B by defendant's wife, Stacy Elder, the district court entered an ex parte domestic violence order of protection ("ex parte DVPO") against defendant. In the ex parte DVPO, the district court found that on 22 September 2010, defendant had placed his wife in "fear of imminent serious bodily injury" and had threatened to "torch their son's preschool," among other threats of violence. The district court did *not* make any findings under finding 3 of the "ADDITIONAL FINDINGS"[1] portion of the ex parte DVPO on page 2, which would be a finding listing any "firearms, ammunition, and gun permits" to which defendant was "in possession of, owns or ha[d] access." The district court ordered several of the enumerated forms of relief under North Carolina General Statute § 50B-3, including the following provisions which are relevant for purposes of this case:

> It is ORDERED that:
>
> . . . .
>
> 12. the defendant is prohibited from possessing, owning or receiving[,] purchasing a firearm for the effective period of this Order[,] and the defendant's concealed handgun permit is suspended for the effective period of this Order. . . .

1. "ADDITIONAL FINDINGS" are optional findings on the form for the ex parte DVPO, AOC-CV-304 Rev. 8/09.

> 13. the defendant surrender to the Sheriff serving this order the firearms, ammunition, and gun permits described in Number 3 of the Findings on Page 2 of this Order and any other firearms and ammunition in the defendant's care, custody, possession, ownership or control.[2] . . .
>
> . . . .
>
> 15. Other: (specify) . . .
> Any Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found.

See N.C. Gen. Stat. § 50B-3 (2009).

This case arises from defendant's motion to suppress evidence found in his home when the officers served defendant with the ex parte DVPO, and the evidence seized as a result of the search pursuant to the ex parte DVPO led to the criminal charges for which defendant was convicted. The relevant events as found by the trial court are that between 23 September and 26 September officers had attempted several times, without success, to serve defendant with the ex parte DVPO. On 26 September 2010, a deputy sheriff "received a call from the dispatcher indicating that the defendant was at the residence[,]" and so "several deputies" went to the residence. The deputies knocked on the door "for a period of time" with no answer, and "[a]fter about 15 minutes, the defendant came to answer the door, and the defendant opened the door and slid out of the door, closing the door behind him." Defendant then locked the deadbolt on the door. One of the deputies took defendant's "keys from the defendant's pocket and unlocked the door" and the officers entered the home to search the house in accord with "paragraph 15 of the domestic violence order." "[U]pon entry into the residence, a pungent odor of marijuana was smelled by the officers[,]" and ultimately they went downstairs and found marijuana.

At the hearing on the motion to suppress, the officers' testimonies are not consistent on many facts regarding the search of defendant's home, but they all seem to agree that they went to defendant's home not only to serve the ex parte DVPO but also to arrest defendant upon a valid arrest warrant for communicating threats, and defendant was indeed arrested upon this warrant. Yet we also note that the findings do not mention the existence of an arrest warrant for defendant, do not

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2. As we have already noted, nothing was "described in Number 3 of the Findings on Page 2 of this Order[.]"

indicate that the officers arrested defendant based upon the arrest warrant, and do not state that any "firearms, ammunition, [or] gun permits" were seized. But the trial court's findings of fact are uncontested by either party, so they are the facts upon which we rely.[3]

As a result of the items seized during this search, defendant was indicted for possession of drug paraphernalia, maintaining a place to keep controlled substances, and manufacturing a controlled substance. On 8 October 2012, defendant made a motion to suppress "any and all physical evidence and any statements attributed to the defendant by the police as such evidence was obtained as the result of an illegal and unconstitutional search and seizure of the Defendant and his home" because

> the police had neither reasonable suspicion nor probable cause to search his home and no exceptions to the fourth amendment existed. Instead, the search was performed pursuant to an Ex Parte 50B order signed and dated 9/23/2012 by Judge Hoover in the Mecklenburg County District Court. The search authorized in the Ex Parte 50 B Order exceeded the statutory provisions in GS 50B-3.1 and has no other constitutional grounds constituting an exception to the 4th am[]e[n]dment.

Defendant's motion to suppress was denied, and on 18 December 2012, the trial court entered judgment upon defendant's guilty plea of all the charges; the trial court suspended defendant's sentence. Defendant appeals.

II. Standard of Review

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

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3. The State has not argued any alternative basis in law for the trial court's ruling, such as the arrest warrant, under North Carolina Rule of Appellate Procedure Rule 10(c).

State v. Johnson, ___ N.C. App. ___, ___, 737 S.E.2d 442, 445 (2013) (citation omitted).

III. Motion to Suppress

Defendant contends that his motion to suppress should have been allowed because "[t]he North Carolina [a]nd United States Constitutions [b]oth [r]equired [o]fficers [t]o [o]btain [a] [v]alid [w]arrant [b]efore [e]ntering Mr. Elder's [h]ome." Defendant does not challenge the trial court's factual findings regarding this search but only its legal conclusion that "defendant's rights under the Fourth and Fourteenth Amendment have not been violated and that the officers acted pursuant to a valid Court order, valid at the time the officers followed the order as designated to them[;]" defendant raises this challenge pursuant to both the federal and state constitutions.

The State contends that defendant failed to argue violation of the North Carolina Constitution before the trial court such that his state constitutional challenge is not properly preserved before this Court. We disagree, as we conclude that the State's argument is hyper-technical regarding the portions of the North Carolina Constitution defendant cited; it is clear that defendant argued before the trial court that his North Carolina constitutional rights were violated when law enforcement officers searched his home without a warrant or exigent circumstances. Accordingly, we will address defendant's North Carolina constitutional claim.

The State relies upon the ex parte DVPO as providing sufficient legal authority for this search, since the officers were simply carrying out the directive of the district court's ex parte DVPO, which directed that "[a]ny Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found." The State contends that North Carolina General Statute § 50B-3(a)(13) "provided authority for the district court judge to issue the search provision in question." In the alternative, the State argues that if the ex parte DVPO did not properly authorize the search or if it is not sufficient to serve as a de facto "search warrant," the officers executed the ex parte DVPO under exigent circumstances and in good faith, and thus the exclusionary rule should not apply to exclude the items seized in the search.

The district court order in question is a civil ex parte domestic violence order of protection issued in an action completely unrelated to the current criminal action before us regarding the drug-related charges brought against defendant. The State was not a party to the ex parte

DVPO, and no issues regarding that order are before us on appeal. Accordingly, we consider the ex parte DVPO as a valid district court order which was issued in an unrelated civil action.

Defendant contends that the law does not provide an avenue for converting the ex parte DVPO into a search warrant and despite the State's arguments, North Carolina General Statute § 50B-3(a)(13) does not provide authority for the district court to order a general search of a defendant's home without probable cause and without complying with "the provisions of N.C. Gen. Stat. §§ 15A-241 through -259."

North Carolina General Statute § 50B-3(a) sets out the relief which the district court may grant under Chapter 50B:

> (a) If the court, including magistrates as authorized under G.S. 50B-2(c1), finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief:
>
> (1) Direct a party to refrain from such acts.
>
> (2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household.
>
> (3) Require a party to provide a spouse and his or her children suitable alternate housing.
>
> (4) Award temporary custody of minor children and establish temporary visitation rights pursuant to G.S. 50B-2 if the order is granted ex parte, and pursuant to subsection (a1) of this section if the order is granted after notice or service of process.
>
> (5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it.
>
> (6) Order either party to make payments for the support of a minor child as required by law.
>
> (7) Order either party to make payments for the support of a spouse as required by law.
>
> (8) Provide for possession of personal property of the parties, including the care, custody, and control of

> any animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.
>
> (9) Order a party to refrain from doing any or all of the following:
>
> a. Threatening, abusing, or following the other party.
>
> b. Harassing the other party, including by telephone, visiting the home or workplace, or other means.
>
> b1. Cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.
>
> c. Otherwise interfering with the other party.
>
> (10) Award attorney's fees to either party.
>
> (11) Prohibit a party from purchasing a firearm for a time fixed in the order.
>
> (12) Order any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission.
>
> (13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

N.C. Gen. Stat. § 50B-3.

North Carolina General Statute § 50B-3.1, entitled "Surrender and disposal of firearms; violations; exemptions[]," has additional provisions which are relevant for our purpose of determining the extent of the district court's authority to order a general search of defendant, his vehicle, and his residence for weapons.

> (a) Required Surrender of Firearms. -- Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:

(1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.

(2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.

(3) Threats to commit suicide by the defendant.

(4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

(b) Ex Parte or Emergency Hearing. -- The court shall inquire of the plaintiff, at the ex parte or emergency hearing, the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

. . . .

(d) Surrender.--Upon service of the order, the defendant shall immediately surrender to the sheriff possession of all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant. In the event that weapons cannot be surrendered at the time the order is served, the defendant shall surrender the firearms, ammunitions, and permits to the sheriff within 24 hours of service at a time and place specified by the sheriff. The sheriff shall store the firearms or contract with a licensed firearms dealer to provide storage.

(1) If the court orders the defendant to surrender firearms, ammunition, and permits, the court shall inform the plaintiff and the defendant of the terms of the protective order and include these terms on the face of the order, including that the defendant is prohibited from owning, possessing, purchasing, or receiving or attempting to own, possess, purchase, or receive a firearm for so long as the protective order or any

> successive protective order is in effect. The terms of the order shall include instructions as to how the defendant may request retrieval of any firearms, ammunition, and permits surrendered to the sheriff when the protective order is no longer in effect. The terms shall also include notice of the penalty for violation of G.S. 14-269.8.

N.C. Gen. Stat. § 50B-3.1 (2009).

While North Carolina General Statute § 50B-3(a)(13) provides that the district court may "[i]nclude any additional prohibitions or requirements the court deems necessary to protect any party or any minor child" we cannot read "any" as broadly as the State suggests. N.C. Gen. Stat. § 50B-3(a)(13). We first note that North Carolina General Statute § 50B-3(a)(13) must be read *in pari materia* with the rest of the relevant statutory provisions. *See Redevelopment Commission v. Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960) ("It is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other.") North Carolina General Statute § 50B-3.1 contains very detailed provisions specifically addressing the authority of the district court as to the surrender, retrieval, return, and disposal of "all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms[.]" N.C. Gen. Stat. § 50B-3.1(a). North Carolina General Statute § 3.1 repeatedly uses the word "surrender" to describe what a defendant must do. "Surrender" is defined "to yield to the power, control, or possession of another upon compulsion or demand[.]" Merriam-Webster's Collegiate Dictionary 1258 (11th ed. 2003). Thus, a defendant is required "[u]pon service of the order" to "immediately" yield to the law enforcement officer "all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms[.]" N.C. Gen. Stat. § 50B-3.1(d). North Carolina General Statute § 50B-3.1 simply does not provide any basis for the district court to order a general search of a defendant's person, vehicle, and residence for unspecified "weapons[.]" *See id.* If a defendant specifically refused a law enforcement officer's direct request, in accord with a court order, to surrender a weapon, this may present another issue, but here no such request was made. The district court exceeded its statutory authority by ordering a general search of defendant's person, vehicle, and residence for unspecified "weapons" as a provision of the ex parte DVPO under North Carolina General Statute § 50B-3(a)(13).

In addition, the State's argument implies that even if the district court lacked statutory authority pursuant to North Carolina General Statute

§ 50B-3(a)(13) to order the search, the ex parte DVPO could still serve as a valid search warrant. "[T]he power of the State to conduct searches and seizures is in derogation of . . . Article One, Section 20 of the North Carolina Constitution[.]" *Brooks, Comr. Of Labor v. Enterprises, Inc.*, 298 N.C. 759, 761-62, 260 S.E.2d 419, 421 (1979).

> Our Supreme Court has held that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances. The North Carolina Constitution forbids general warrants whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence. The North Carolina Constitution requires that evidence discovered pursuant to an unreasonable search or seizure be excluded.

State v. Cline, 205 N.C. App. 676, 679, 696 S.E.2d 554, 556-57 (2010) (citations, quotation marks, and brackets omitted).

> It is fundamental that a search warrant is not issued except upon a finding of probable cause. Probable cause means that there must exist a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender.

State v. Lindsey, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982) (citation and quotation marks omitted).

The district court did not make any findings of fact or conclusions of law in the ex parte DVPO regarding probable cause to believe that the search "will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *Id.* The district court did not mention "probable cause" because the ex parte DVPO was entered in a civil proceeding, not a criminal matter, and the concept of "probable cause" is simply not applicable to this situation, between two private parties. Although there may be many other reasons that an ex parte DVPO is not a *de facto* search warrant, one reason is that the district court made no determination regarding probable cause for the search. *Id.* Furthermore, without a proper search warrant, unless exigent circumstances existed, the

objects seized during the search must be suppressed. *Cline*, 205 N.C. App. at 679, 696 S.E.2d at 556-57.

The State next contends that exigent circumstances existed because the officers needed to perform a "protective sweep" of the home. The State cites *State v. Stover*, 200 N.C. App. 506, 685 S.E.2d 127 (2009) in support of its argument. In *Stover*, officers went to do a " 'knock and talk' " at a house identified by an informant as the place she had purchased marijuana. 200 N.C. App. at 507, 685 S.E.2d at 129. The officers had no warrant to search the house, but when they approached the house, they smelled "a 'strong odor of marijuana' " and saw the defendant, "whose entire upper torso was out of a window." *Id.* This Court stated:

> *In addition to probable cause*, the situation must have presented exigent circumstances in order to justify the officers' entrance into defendant's house. When Officers Crisp and Brown arrived at the residence and after they smelled marijuana, Officer Crisp heard a noise from the back of the house and saw defendant, whose upper torso was partially out a window. Although defendant states that he simply had responded to a call from his neighbor, Officer Crisp could reasonably believe that defendant was attempting to flee the scene. The officers also stated that they were concerned about possible destruction of evidence, due to the smell of marijuana and defendant's possible attempted flight. These facts sufficiently support a conclusion that exigent circumstances existed at the time the officers gained entrance into defendant's house. We hold, therefore, that both probable cause and exigent circumstances existed when officers entered defendant's residence and conducted a protective sweep. Because the officers legally entered defendant's house and saw the evidence seized in plain view during their protective sweep, the trial court did not err in admitting that evidence.

Id. at 513, 685 S.E.2d 132-33 (emphasis added).

There are some factual similarities between *Stover* and this case: officers approached a house in which they found marijuana, and at some point they smelled the marijuana, *see id.* at 507, 685 S.E.2d at 129, but the similarities end there. The State overlooks a crucial point in *Stover*: this Court first determined that "the officers had probable cause to enter defendant's house" before there was a need for a protective sweep. *Id.* at 513, 685 S.E.2d at 132. Here, the State does not contend, nor did the

trial court conclude, that the officers had probable cause to suspect any particular criminal activity when they approached defendant's home.[4] In addition, the trial court made no findings as to any exigent circumstances or the need for a protective sweep.

At last, the State also contends that even if the ex parte DVPO did not properly authorize the search, and if there were no exigent circumstances to justify it, the "good faith exception" applies. There is no doubt that the officers acted entirely in "good faith" as they served the ex parte DVPO and fulfilled the directives of the district court, which included a general search of the defendant's person, residence, and vehicle. While we agree that the good faith exception might have applied if defendant challenged this search only under the United States Constitution, defendant also challenges this search based upon the North Carolina Constitution, and there is a no good faith exception to the exclusionary rule applied as to violations of the North Carolina Constitution. *See State v. Carter*, 322 N.C. 709, 710-24, 370 S.E.2d 553, 554-62 ("We hold that there is no good faith exception to the requirements of article I, section 20 as applied to the facts of this case . . . . [I]t must be remembered that it is not only the rights of this criminal defendant that are at issue, but the rights of all persons under our state constitution. The clearly mandated public policy of our state is to exclude evidence obtained in violation of our constitution. This policy has existed since 1937. If a good faith exception is to be applied to this public policy, let it be done by the legislature, the body politic responsible for the formation and expression of matters of public policy. We are not persuaded on the facts before us that we should engraft a good faith exception to the exclusionary rule under our state constitution." (citation omitted)). In the Editor's Note of North Carolina General Statute § 15A-974, our legislature responded: "Session Laws 2011-6, s. 2, provides 'The General Assembly respectfully requests that the North Carolina Supreme Court reconsider, and overrule, its

4. We note that while the testimony before the trial court indicates that officers arrested defendant at his home based upon a valid arrest warrant for communicating threats, the trial court did not address this issue at all in its findings of fact and the State makes absolutely no argument that the search of defendant's home was in any way related to his arrest or any other actual or suspected criminal activity. Although it appears from the testimony at the hearing that the officers arrested defendant based upon a valid arrest warrant the State makes no argument that the search the officers conducted was incident to the arrest. We again note that the testimonies of the officers as to the details of the search were not consistent, but we must rely upon the facts as found by the trial court, which do not mention any arrest warrant. Furthermore, we again note, the State has not argued any alternative basis in law for the search. The only arguments before this Court in support of the search are based upon the ex parte DVPO.

holding in *State v. Carter* that the good faith exception to the exclusionary rule which exists under federal law does not apply under North Carolina State law.' " N.C. Gen. Stat. § 15A-974, Editor's Note (2011). The legislature specifically adopted a good faith exception in certain situations regarding statutory violations, but did not address constitutional violations, instead deferring to the Supreme Court in its session laws. *See* N.C. Gen. Stat. § 15A-974(a)(2). At this time, our Supreme Court has not overruled *Carter*, and "[w]e are bound by precedent of our Supreme Court[.]" *State v. Pennell*, ___ N.C. App. ___, ___, 746 S.E.2d 431, 441 (2013). We realize that the legislature recently adopted the session law requesting that the Supreme Court overrule *Carter* in 2011, and it is possible that the Court has not yet had an appropriate opportunity to address this issue. This case could potentially present such an opportunity, should the State petition for discretionary review of this ruling, but we are not permitted to anticipate or predict what the Supreme Court might do; we are bound by the existing precedent of *Carter*. *See id.* Accordingly, there is no good faith exception to the exclusionary rule as to violations of the North Carolina State Constitution.[5] *See Carter*, 322 N.C. 709, 710-24, 370 S.E.2d 553, 554-62.

As defendant's premises were searched without a search warrant and without exigent circumstances, and as the good faith exception does not apply to evidence obtained in violation of the North Carolina Constitution, we conclude that the wrongfully seized evidence should have been excluded; *see Cline*, 205 N.C. App. at 679, 696 S.E.2d at 556-57, accordingly, defendant's motion to suppress should have been allowed.

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5. We note that this Court has stated that it is unclear whether there is a good faith exception to the exclusionary rule for violations of the North Carolina Constitution; however, we believe the language of *Carter* is clear that such an exception does not currently exist. *See State v. Banner*, 207 N.C. App. 729, 732-33 n. 7, 701 S.E.2d 355, 358 n.7 (2010) ("This is known as the good-faith exception. The *Leon* Court explained that suppression of evidence is only required when doing so will further the goal of the exclusionary rule--deterrence. There is disagreement over whether there is such an exception to the North Carolina Constitution. Thus, it is possible that evidence not excluded by the federal constitution might be excluded by the North Carolina Constitution." (Citation and quotation marks omitted.) Footnote seven goes on to provide, "*Compare Carter*, 322 N.C. at 722-24, 370 S.E.2d at 561-62 (refusing to allow a good-faith exception to the North Carolina Constitution with respect to non-testimonial identification orders), with *State v. Garner*, 331 N.C. 491, 506-08, 417 S.E.2d 502, 510-11 (1992) (rejecting the notion that Article I, Section 20 of the North Carolina Constitution provides more protection than the Fourth Amendment to the United States Constitution while approving the use of the inevitable discovery rule (Citation omitted.))."

IV. Conclusion

For the foregoing reasons, we vacate the judgment entered upon defendant's guilty plea and remand this case for entry of an order allowing defendant's motion to suppress.

VACATED and REMANDED.

Judge MCGEE concurs.

BRYANT, Judge, dissenting.

In vacating the trial court's judgment entered upon defendant's guilty plea and directing entry of an order allowing defendant's motion to suppress, the majority states that in issuing the 22 September 2010 DVPO order, the district court "exceeded its statutory authority by ordering a general search of the defendant's person, vehicle, and residence for unspecified 'weapons' as a provision of the ex parte DVPO under . . . . § 50B-3(a)(13)." Because I believe the district court acted within its statutory authority, I respectfully dissent.

Pursuant to North Carolina General Statutes, section 50B-3,

> (a) If the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order . . . . A protective order may include any of the following types of relief: . . . (13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

N.C. Gen. Stat. § 50B-3(a)(13) (2013).

In its 22 September 2010 DVPO, the Mecklenburg County District Court ordered law enforcement officers to "search the Defendant's person, vehicle and residence and seize any and all weapons found." The majority goes to great length to explain why it deems the general authority authorized by section 50B-3(a)(13) not broad enough to support the order. Specifically, the majority relies upon section 50B-3.1(a) as providing a limitation to the authority conferred to the court in section 50B-3(a)(13) by statutory construction rule to read statutory provisions *in pari materia*. However, the authority conferred in General Statutes section 50B-3(a)(13) is broader than that of section 50B-3.1. Where section 50B-3.1 provides a procedure for initially determining the likely existence of firearms and the surrender and disposal of firearms, section 50B-3(a)(13) authorizes a trial court to include in its protective orders "any . . .

prohibitions or requirements the court deems necessary to protect any party or any minor child." N.C.G.S. § 50B-3(a)(13).

In addressing whether the 22 September 2010 DVPO order was proper, the trial court made the following findings of fact:

> The domestic violence [protective] order was issued based on a finding by that Court that the defendant had threatened the plaintiff and that the defendant had threatened to get some gasoline and torch their son's preschool, her house, the plaintiff, and her sister's house and also stated that I'm going to get all of you and that "You won't f**king stop me, the police won't f**king stop me."
>
> The findings of fact also include the finding that the defendant had a history of substance abuse and mental illness and that the defendant also made threats to anyone attempting to go into the marital residence.

As noted, there was certainly probable cause to search incident to the lawful arrest for communicating threats, which was not considered by the trial court as a basis for the denial of the motion to suppress; likewise, the State did not argue that the search incident to service of the arrest warrant provided an additional basis. So, I will not further address it.

However, because the district court had authority to order the search of defendant's residence in its 22 September 2010 DVPO pursuant to section 50B-3(a)(13), the law enforcement officers acted properly in response to that authority such that the resulting search and seizure of contraband was proper. For this reason, I would affirm the order of the trial court denying defendant's motion to suppress the seizure of contraband from defendant's residence due to said search and leave undisturbed the trial court's judgment entered pursuant to defendant's plea of guilty to the charges of manufacturing marijuana and possession of drug paraphernalia.

STATE OF NORTH CAROLINA
v.
CHARLES ANTHONY McGRADY

No. COA13-330

Filed 21 January 2014

1. Evidence—expert testimony—"use of force"—scientific knowledge—Rule 702

The trial court did not abuse its discretion and violate defendant's right to present a defense in a first-degree murder trial by excluding expert testimony offered by defendant regarding the doctrine of "use of force." Even assuming that the doctrine of "use of force" constituted scientific knowledge, the court's decision was well-reasoned, especially given the requirements set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, invoked by amended Rule 702 of the North Carolina Rules of Evidence.

2. Evidence—witness testimony—decedent's character—proclivity for violence

The trial court did not err and violate defendant's right to present a defense in a first-degree murder trial by excluding under N.C.G.S. § 8C-1, Rule 404 the testimony of a defense witness who addressed the decedent's alleged proclivity toward violence. The witness's testimony did not constitute evidence of the decedent's character for violence. Furthermore, the testimony failed to show that defendant was aware of any anger issues or the alleged violent nature of the decedent and there was ample direct evidence regarding the altercation between the decedent and defendant.

Appeal by Defendant from judgment entered 8 August 2012 by Judge R. Stuart Albright in Wilkes County Superior Court. Heard in the Court of Appeals 9 October 2013.

Attorney General Roy Cooper, by Assistant Solicitor General Gary R. Govert, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

This case arises from the death of James Allen Shore, Jr. ("the decedent"), who was shot by Defendant Charles Anthony McGrady in a field near both individuals' homes. Defendant and the decedent are first cousins and were involved in a number of disputes during the decedent's life. On 6 February 2012, Defendant was charged with first-degree murder. The trial began on Monday, 30 July 2012, and continued through the following Wednesday. The evidence presented at trial tended to show the following:

At the time of the shooting, the decedent lived on the western side of Wiles Ridge Road with his fiancée, Tammy Wood ("Wood"), in Hays, North Carolina. Defendant and his girlfriend, Darlene Kellum, lived on the eastern side of the road, opposite the decedent. Defendant's son, Brandon McGrady ("Brandon"), lived approximately 400 feet to the northwest of his father's home. Defendant's aunt and the decedent's mother, Betty Shore, lived on the western side of the road. The area encompassing these homes is approximately nine acres.

In the early morning hours of 20 December 2011, the decedent took his dog for a walk outside his house. Afterward, he returned home upset and told Wood that Defendant had been shining a light on him. Later that morning, around 10:00 a.m., the decedent got up, walked his dog to his mother's house, and told her the same thing. He was wearing a knife on his waist, attached by a rope, and carrying a walking stick. After talking with his mother, the decedent walked back toward his house with his dog. On the way, he came in contact with Defendant and Defendant's son, Brandon, who were riding together in a golf cart to get the mail. Defendant was seated in the driver's seat, and Brandon was seated in the passenger seat. Defendant was carrying a loaded, 9-millimeter Beretta pistol in his right pocket and an audio cassette player in his left hand. Brandon had a loaded AR-15 semi-automatic rifle between his legs.

While Defendant and Brandon were checking the mail, they saw the decedent walking toward the golf cart. Shortly thereafter, Defendant and the decedent started arguing, and Defendant began recording with his cassette player. Speaking to the decedent, Defendant asked, "Do you have anything to add about murdering my family last night?" The decedent responded, "No, I plainly told you." Defendant repeated his question and the decedent told him to "shut the fuck up." More arguing occurred, and Defendant told the decedent to "stay away from us." The decedent responded, "You know I'll whoop your ass and put you on the ground if you try to stab me in the back; now get over here and get

some." Defendant responded by saying, "I'll put you in the grave; in the morgue, in the morgue, motherfucker."

The argument continued, and the decedent put his hands on the golf cart, shaking it. Defendant asked Brandon to give him the AR-15. As Brandon attempted to hand it to his father, the decedent took the AR-15 and stood back, pointing it at Defendant and his son. Brandon got out of the golf cart, but Defendant remained seated. After exchanging more insults with the decedent, Defendant stepped out of the golf cart, pulled out his pistol, and fired approximately seven shots at the decedent in rapid succession.[1] Afterward, Defendant said to the decedent, "What about now, Bozo? What about now, motherfucker, huh?" He then proclaimed that the decedent "attacked us, by God" and returned to his house with his weapons and son.

The decedent died shortly thereafter, at 12:35 p.m. According to the medical examiner, some of the bullets entered the decedent's arm and then reentered his torso, making it difficult to calculate an exact number of shots. Other bullets entered the decedent's back. The medical examiner testified that there were gunshot wounds in the upper part of the decedent's buttocks, going from left to right. There were also two gunshot wounds in the decedent's torso. The lower wound was fatal, resulting from a "straight-on shot" into the decedent's back that went through his lung and into his heart.

Defendant was eventually taken into custody and charged with first-degree murder. At trial, Defendant testified that the decedent was pointing the AR-15 at Brandon's head and he shot the decedent "out of instinct, to protect my son." At the close of all the evidence and after the parties' arguments, the trial court instructed the jury on, *inter alia*, self-defense and defense of a family member. On 8 August 2012, Defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. He gave notice of appeal that same day.

Discussion

Defendant makes two arguments on appeal. First, he contends that the trial court abused its discretion by excluding the expert testimony offered by Defendant regarding the doctrine of "use of force," in violation of his right to present a defense. Second, Defendant asserts that the trial court erred by preventing him from introducing evidence of the decedent's "proclivity toward violence based on his reputation and his previous violent actions." We find no error.

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1. The shots were fired in 1.82 seconds.

[1] *I. Expert Witness Testimony on Use of Force*

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. . . . In this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

A. Voir Dire

On 30 July 2012, the State filed a motion *in limine* to exclude the testimony of Dave F. Cloutier. A *voir dire* hearing on that motion was held at trial. During the hearing, Cloutier testified on the "science" of "use of force" as applied to the facts of this case. Specifically, he discussed the concepts of (1) "reaction time," (2) an individual's response to perceived lethal and nonlethal force, (3) "force variables," (4) "preattack cues," and (5) "perceptual narrowing." Cloutier described "reaction time" as "the time it takes [to react] once the brain has perceived a threat — [the perception of such a threat is] usually visual, by the eyes, although it could be with other senses."[2] He defined "force variables" as

> circumstances and events that would . . . influence someone's decision of a use of force that was necessary to overcome a perceived threat. That could include the actual weapons involved, the number of weapons, the number of individuals, the environment, the time of day, the lighting, any number of variables.

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2. He elaborated: "[B]y the time the individual perceives a threat, recognize[s] it as a threat, and makes the decision to begin to use some technique, tactic, or method to either flee or fight[, i]t usually takes the average person about three-quarters of a second to begin to react to some stimulus that they perceive as a threat. So we utilize that reaction time in analyzing these various cases."

"Pre-attack cues" are "those exhibitions by an individual which an individual would actually perceive or view and make the assumption that an attack was likely." For example, "a glaring look in [an individual's] face, a clinched jaw, . . . clinched fist," or bringing a weapon up as if to fire. Finally, "perceptual narrowing" is "the reason people have a tendency to not have a total recall of what actually may have happened [during an altercation]." According to Cloutier, perceptual narrowing could result in difficulty remembering, for example, "the number of shots that may have been fired in an actual lethal encounter."

Regarding his experience and training in the field, Cloutier testified that he had worked in "use of force" since January of 1991. At the time of the trial, he was a "private citizen" who provided "expert witness services in regards to use of force . . . ." Before that, he worked for the North Carolina Department of Justice as an instructor "for subject control and arrest techniques for law enforcement training . . . " and served in the military. He holds a bachelor of science degree in criminal justice from North Carolina Wesleyan College and is a graduate of the FBI National Academy. He has held certifications in (1) firearms instruction, (2) subject control and arrest techniques, (3) specialized subject control, and (4) unarmed self-defense. At the time of trial, however, he was certified only as an "FBI defensive tactics instructor . . . ." Before the trial, Cloutier had been admitted as an expert approximately twenty-two times in state and federal court. Cloutier does not have a Ph.D or any medical degree.

Applying the use of force doctrine to the facts in this case, Cloutier offered the following observations: (1) The decedent exhibited a number of pre-attack cues that might have indicated a forthcoming assault. (2) "[A]ge, gender, size, environment, use of a weapon, type of weapon, number of weapons, and . . . number of subjects" were "use of force variables" present in this case and, along with the pre-attack cues, these factors were "consistent with exhibition by an individual that an attack was likely imminent." (3) The rounds fired at the decedent were fired in "somewhere around 1.8 seconds . . . [, meaning] it's very possible and likely that during the course of firing in that 1.8 seconds that [the decedent] could have, in fact, [reacted and] turned 90 to 180 degrees, or, in fact, could have turned 360 degrees," accounting for the injuries in his side and back. In addition, (4) Defendant was possibly affected by perceptual narrowing.

When Cloutier was questioned about the scientific basis for his opinions, he testified that his knowledge came from published articles in the field of use of force and the training he received "by some of

those authors and studies that I have myself been involved in . . . .” He explained that the “Justice Academy” uses “a number of tests . . . to look at various principles of use of force . . . .” According to Cloutier, this information is regularly relied on by people in the field. When asked to explain the reliability of the information described in his testimony, Cloutier explained:

> The tests, for example, that I have been a part of performing and been involved in with the Justice Academy . . . measure the physiological results of an individual under stress and their reaction time; once they perceive a threat, how long it takes to react and what type of reaction they have. Those results of those studies that we have performed at the Justice Academy are consistent with the studies that have been performed and published on a national basis.

According to Cloutier, these tests have “remained consistent over time.” When asked to describe the “known or potential rate of error,” however, Cloutier admitted that he did not know.[3]

At the end of the hearing, the trial court sustained the State’s objection and excluded Cloutier’s testimony in its entirety. The court pointed out that (1) much of Cloutier’s report constituted impermissible witness bolstering, (2) certain of Cloutier’s opinions were based on medical knowledge that he was not qualified to discuss, (3) Cloutier’s opinion on use of force variables would not be helpful to the jury because most individuals are able to recognize pre-attack cues and other use of force variables, and (4) Cloutier is not competent to testify about reaction times. In addition, the court determined that Cloutier’s “testimony [was] not based on sufficient facts or data. . . . [,] not the product of reliable principles or methods. . . . [, and] simply a conclusory approach that [could not] reasonably assess for reliability.” The court noted that Cloutier’s testimony had not been subject to peer review, Cloutier had no knowledge of a potential rate of error regarding any of the use of force factors, and Cloutier did not recognize or apply the variables that could have affected his opinions in the case. As a result, the court concluded that Cloutier’s “opinions . . . [were] . . . based on speculation. He[was] just guessing and overlooking a very important part of what could very well affect his opinions in this case.” It also found, “[n]otwithstanding all those findings,” that the probative value of Cloutier’s testimony was “substantially outweighed by the danger of unfair prejudice,

3. Cloutier later stated: “I have not done[a] statistical analysis on any of these studies or read a statistical analysis.”

confusion of the issues, or misleading the jury" under Rule 403 of the North Carolina Rules of Evidence.

B. Legal Background

Rule 702 states, in pertinent part, that

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

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013). Rule 702(a) was amended to read as quoted above, effective 1 October 2011. 2011 N.C. Sess. Laws 400, § 1(c) (S.B. 33); 2011 N.C. Sess. Laws 283, § 1.3 (H.B. 542). The earlier version of the rule did not include the criteria listed in subsections (1)–(3), but was otherwise the same. *See id.*

Though our appellate courts have not addressed in detail the significance of the October 2011 amendment to Rule 702, this Court has noted that the current, amended "language . . . implements the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,[] 125 L. Ed. 2d 469 (1993)." *Wise v. Alcoa, Inc.*, __ N.C. App. __, __ n.1, __ S.E.2d __, __ n.1 (2013); *see also State v. Hudson*, __ N.C. App. __, 721 S.E.2d 763 (2012) (unpublished opinion), *available at* 2012 WL 379936. That observation comports with the bill analysis provided to the Senate Judiciary Committee which reviewed the amendment. *See* Committee Counsel Bill Patterson, 2011–2012 General Assembly, *House Bill 542: Tort Reform for Citizens and Business* 2–3 n.3 (8 June 2011) ("As amended, Rule 702(a) will mirror Federal Rule 702(a), which was amended in 2000 to conform to the standard outlined in *Daubert* . . . ."); *see generally* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 589, 125 L. Ed. 2d at 469. This new language represents a departure from our previous understanding of Rule 702, which eschewed the Supreme Court's decision in *Daubert*. *Howerton*, 358 N.C. at 469, 597 S.E.2d at 693 ("North Carolina

is not, nor has it ever been, a *Daubert* jurisdiction."). Given the changes wrought by our legislature, however, it is clear that amended Rule 702 should be applied pursuant to the federal standard as articulated in *Daubert*.

In the *Daubert* case, the United States Supreme Court defined a gatekeeping role for trial judges. *Daubert*, 509 U.S. at 597, 125 L. Ed. 2d at 485 ("We recognize that [such a role], no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations."). Accordingly, an expert must first base his testimony on "scientific knowledge," which "implies a grounding in the methods and procedures of science," in order for that testimony to be admissible. *Id.* at 590, 125 L. Ed. 2d at 480–81. The Court explained this requirement in detail as follows:

> [T]he word "knowledge" connotes more than subjective belief or *unsupported speculation*. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds. . . . [I]n order to qualify as "scientific knowledge," an inference or assertion *must be derived by the scientific method*.[4] Proposed testimony must be supported by appropriate validation — *i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id. at 590, 125 L. Ed. 2d at 481 (emphasis added). Second, an expert's testimony must assist the trier of fact to understand the evidence or determine a fact in issue. *Id.* at 591, 595, 125 L. Ed. 2d at 481, 483–84. "The focus, of course, must be solely on *principles and methodology*, not on the conclusions that they generate." *Id.* at 595, 125 L. Ed. 2d at 484 (emphasis added).

It is the trial court's responsibility to determine "whether the expert is proposing to testify to (1) scientific knowledge" and whether that knowledge "(2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592, 125 L. Ed. 2d at 482. In deciding whether the proffered scientific theory or technique will assist the trier of fact, the trial court may consider, among other things, (1) "whether [a theory

4. The "scientific method" is "[a]n analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation." *Black's Law Dictionary* 1463–64 (9th ed. 2009).

or technique] can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation," and (4) whether the theory or technique is generally accepted as reliable in the relevant scientific community. *Id.* at 593–94, 125 L. Ed. 2d at 482–83. This inquiry is "a flexible one," *id.* at 594, 125 L. Ed. 2d at 483–84, and remains reviewable under the abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147, 139 L. Ed. 2d 508, 519 (1997).

C. Analysis

Defendant argues that the trial court erroneously excluded Cloutier's testimony under Rule 702 and, in doing so, abused its discretion. Specifically, Defendant asserts that "use of force is a science," based on scientific principles and utilized by other experts. He states that concepts like "reaction time" are based on "reliable" studies, which were cited by Cloutier, and points out that Cloutier unearthed a number of "use of force variables that came into play in this situation. . . . Most important[ly], Cloutier explained that [the decedent] could have turned 90 to 180 degrees in 1.8 seconds," the amount of time it took Defendant to fire the shots. Defendant argues that this fact, in particular, could have assisted the jury in determining that Defendant used "defensive force" in the confrontation with the decedent. Defendant also argues that expert testimony "should be liberally admitted" and that the trial court "unfairly interject[ed] itself into the litigation" and disregarded the liberal admission precept. In conjunction with the above argument, Defendant contends that the trial court's decision to exclude Cloutier's testimony violated his constitutional right to present a defense. We disagree.

(1) Rule 702

In *Joiner*, the United States Supreme Court reviewed a trial court's application of the *Daubert* test. 522 U.S. at 136, 139 L. Ed. 2d at 508. The respondent-employee worked as an electrician for the petitioner-employer. *Id.* at 139, 139 L. Ed. 2d at 514. By expert testimony, the employee linked the development of his cancer to his exposure to certain chemicals used by his employer. *Id.* at 139–40, 139 L. Ed. 2d at 514. In providing that testimony, the experts relied on a number of specific scientific studies. *Id.* at 143–44, 139 L. Ed. 2d at 517. Nonetheless, the trial court excluded the proffered testimony on grounds that it did not rise above "subjective belief or unsupported speculation." *Id.* at 140, 139 L. Ed. 2d at 515. On appeal, the circuit court reversed the trial court,

citing a general "preference" for the admission of expert testimony.[5] *Id.* The United States Supreme Court reversed that decision on writ of *certiorari* and affirmed the trial court's original decision to exclude the expert testimony. *Id.* at 141, 139 L. Ed. 2d at 515.

In his argument to the Supreme Court, the employee asserted that the trial court's disagreement with the experts' conclusions was error because the experts had relied on the specific *principles* and *methodology* used in the cited studies, pursuant to the requirements laid down in *Daubert*. *Id.* at 146, 139 L. Ed. 2d at 518. The Supreme Court overruled that argument and stated that, while the focus of a trial court's analysis must be on principles and methodology,

> conclusions and methodology are not entirely distinct from one another. . . . [*N*]*othing* . . . *requires* a [trial court] to admit opinion evidence that is connected to existing data only by the *ipse dixit*[6] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146, 139 L. Ed. 2d at 519 (emphasis added). Citing the highly deferential standard afforded to a trial court's decision to exclude or admit expert testimony, the Court concluded that the trial court did not abuse its discretion in excluding the employee's expert testimony and in determining that the analytical gap between the data and the opinion in that case was too great. *Id.*

In this case, just as in *Joiner*, the trial court determined that there was too great an analytical gap between the authorities cited by Cloutier and his offered opinion. Specifically, the court concluded that Cloutier's testimony was not based on sufficient facts or data or the product of reliable principles and methods. The trial court also noted that (1) the testimony served as "simply a conclusory approach that cannot reasonably assess for reliability" and (2) Cloutier had failed to provide any known rate of error or show that any of the referenced studies were the subject of peer review. For those reasons, the trial court determined that Cloutier's testimony was merely "based on speculation" and commented that "[Cloutier] is just guessing and overlooking [variables that] could . . . affect his opinions in this case."

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5. Such "preference" is not unlike the liberal admission precept invoked by Defendant in this case.

6. *Ipse dixit* is Latin for "he himself said it" and defined as "[s]omething asserted but not proved[.]" *Black's Law Dictionary* 905 (9th ed. 2009).

Defendant contests the trial court's conclusions and asserts that it abused its discretion in coming to those conclusions, but does not show how the court's decision was arbitrarily or manifestly unreasonable. Rather, he argues for the reasonableness of a *different* conclusion based on the same evidence.[7] This demonstrates a misunderstanding of the abuse of discretion standard.

The federal courts have traditionally granted "a great deal of discretion" to the trial court when determining whether expert testimony is admissible under *Daubert*. *See*, *e.g.*, *U.S. v. Dorsey*, 45 F.3d 809 (4th Cir. 1995); *Maryland Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780 (4th Cir. 1998) ("*Daubert* clearly contemplates the vesting of significant discretion in the district court with regard to the decision to admit expert scientific testimony."). As the State points out in its brief, Cloutier provided little data to support the reliability of his proposed methodology. Though Cloutier testified that (1) use of force has been "tested," (2) publications exist in the field,[8] and (3) the theory is "relied upon regularly," he provided no substantive reasons — no specific scientific knowledge, methods, or procedures — to support those assertions. Indeed, unlike the experts in *Joiner*, Cloutier was not even able to cite a single specific study, merely referring to the existence of studies and their authors generally. In addition, when the court asked about the relevant "rate of error," Cloutier admitted that he knew nothing about that factor or how it related to his opinions.

A review of the trial transcript indicates that, in excluding Cloutier's testimony, the trial court properly applied the standard laid down by the Supreme Court in *Daubert*. The court determined that Cloutier's testimony was firmly within the realm of common knowledge and would not be helpful to the jury. The Court pointed out that Cloutier completely lacked medical credentials and provided little evidence regarding the principles or methodology used to come to his conclusions. Therefore, even if we were to assume that the doctrine of "use of force" constitutes scientific knowledge,[9] we see no reason to conclude that the trial court

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7. We also note that Defendant does not address the trial court's determination that the testimony is inadmissible under Rule 403.

8. Cloutier stated that he had read and even participated in some of the studies leading to these publications. Nevertheless, he was completely unable to provide details regarding their content.

9. We do not offer an opinion as to whether it does. We note, however, that Cloutier offered scant evidence to support that fact *in this particular case*. Merely referencing scientific studies and explaining the meaning of apparent scholarly terms like "perceptual narrowing" – without providing a more substantial basis on which to ground one's opinion — does not fit with the *Daubert* Court's intent that expert testimony be based on *scientific knowledge*.

was manifestly unreasonable in determining that Cloutier's knowledge of that doctrine — including the way an individual reacts in a confrontation or the fact that an individual might turn away when a gun is fired — was not helpful to the jury. *See generally Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991) ("When the jury is in as good a position as the expert to determine an issue, the expert's testimony is properly excludable because it is not helpful to the jury.") (citation omitted). In our view, the court's decision was well-reasoned, especially given the *Daubert* requirements invoked by amended Rule 702. Therefore, Defendant's first argument is overruled, and we affirm the trial court's decision to exclude Cloutier's testimony under Rule 702.

(2) Right to Present a Defense

Defendant also contends that the exclusion of Cloutier's testimony under Rule 702 violated his constitutional right to present a defense under the Sixth Amendment of the United States Constitution and Article I, section 23 of the North Carolina Constitution. We disagree.

The right to present a defense is not absolute. *U.S. v. Prince-Oyibo*, 320 F.3d 494, 501 (4th Cir. 2003). Criminal defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the rules of evidence. *See id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 410, 98 L. Ed. 2d 798 (1988) ("The accused does not have an unfettered Sixth Amendment right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.") (brackets omitted)). Indeed, only rarely has the Supreme Court "held that the right to present a complete defense [is] violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, __ U.S. __, __, 186 L. Ed. 2d 62, 66 (2013). Because we have determined that the trial court excluded Cloutier's testimony within the bounds of our rules of evidence, we hold that Defendant's constitutional right to present a defense was not violated. Defendant's second argument is therefore overruled.

II. Character Evidence

[2] Defendant also argues that the trial court erred in excluding the testimony of Dr. Jerry Brittain, who addressed the decedent's alleged proclivity toward violence. We disagree.

A. Voir Dire

At trial, Defendant called Dr. Brittain to the stand as a lay witness. The State objected, and the trial court conducted a *voir dire* examination.

On *voir dire*, Dr. Brittain discussed meetings he held with the decedent in June and July of 2011, approximately one year before the decedent's death. Referencing his notes from those meetings, Dr. Brittain testified that the decedent was angry and frustrated with many "areas" of his life. By his second meeting with the decedent, Dr. Brittain had begun "to surmise" that the decedent was dealing with "aggression," "thoughts of violence," and "conflict that he had with the people that were around him." In that meeting, Dr. Brittain and the decedent discussed "the violence," and Dr. Brittain stressed the need for the decedent to avoid being either the victim or the perpetrator in a confrontation. Dr. Brittain also referred to the decedent as "a very angry man," but noted that he was taking his medication, "ha[d] not perpetrated violence," and, in the decedent's words, was "trying to not become angry and harm someone." When asked about the source of the decedent's anger, Dr. Brittain testified that it "permeated all of his life," but noted that the source was not specifically related to Defendant, who was not discussed during the meetings.

At the conclusion of *voir dire*, the trial court excluded Dr. Brittain's testimony in its entirety on relevance grounds and under Rules 403 and 404(a)(2) of the North Carolina Rules of Evidence.

B. Legal Background and Analysis

Defendant argues that the trial court erred in excluding Dr. Brittain's testimony, "[s]imply put, [because] a violent man is more likely to be the aggressor than a peaceable man." Defendant also argues that this error prevented him from offering important evidence in his defense and, thus, "denied him his constitutional right to present a defense." We are unpersuaded.

(1) Rule 404(a)(2)

Rule 404 provides, in pertinent part, that:

> (a) . . . Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> . . .
>
> (2) . . . Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the

> victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

N.C. Gen. Stat. § 8C-1, Rule 404.

Character evidence is evidence of "[t]he peculiar qualities impressed by nature or by habit on the person, which distinguish him from others." *Bottoms v. Kent*, 48 N.C. (3 Jones) 154, 160 (1855). A person's character "can only be known indirectly . . . by inference from acts. A witness called to prove them, can only give the opinion which he has formed by his observations of the conduct of the person under particular circumstances . . . ." *Id.* As distinct from reputation, "character is what a man *is*" and "reputation is what others *say* he is." Kenneth S. Broun, 1 *Brandis & Broun on North Carolina Evidence* 253 (6th ed. 2004) (emphasis in original).

"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). Such evidence may be admitted, however, when testimony regarding a *pertinent character trait* of the victim (here, the decedent) is offered by the defendant in a criminal case. N.C. Gen. Stat. § 8C-1, Rule 404(a)(2). In cases where self-defense is at issue, evidence of a victim's violent or dangerous character may be admitted under Rule 404(a)(2) when "(1) such character was known to the accused, or (2) the [other] evidence of the crime is *all circumstantial* or the nature of the transaction is in doubt." *State v. Winfrey*, 298 N.C. 260, 262, 258 S.E.2d 346, 347 (1979) (emphasis added); *see also State v. Blackwell*, 162 N.C. 672, 78 S.E. 316 (1913) ("[Evidence] is . . . competent to show the character of the deceased as a violent and dangerous man when the [remaining] evidence is *wholly circumstantial* and the character of the encounter is in doubt.") (emphasis added). This is because the evidence of the victim's violent character "tends to shed *some light* upon who was the aggressor since a violent man is more likely to be the aggressor than is a peaceable man." *Winfrey*, 298 N.C. at 262, 258 S.E.2d at 348 (emphasis added).

In this case, the court excluded Dr. Brittain's testimony under Rule 404(a)(2) because the witness "didn't testify as to any trait or character. He was simply testifying as to a fact. . . . He . . . was merely reciting what the facts were when the victim presented himself [during the meetings]." Defendant argues, however, that Dr. Brittain's testimony should have been admitted pursuant to *State v. Everett*, 178 N.C. App. 44,

630 S.E.2d 703 (2006), *affirmed*, 361 N.C. 217, 639 S.E.2d 442 (2007). In that case, the defendant, arguing that she killed the victim in self-defense, presented evidence that the victim had committed a separate violent act. *Id.* at 52, 630 S.E.2d at 708. The trial court excluded that testimony as irrelevant. *Id.* at 50, 630 S.E.2d at 707. We reversed the trial court's decision under *Winfrey* and Rule 404(a)(2) and held that the evidence of the violent act was relevant and admissible, in part, because it was known by the defendant. *Id.* Defendant argues under *Everett* that, "[w]ithout the testimony from Dr. Brittain, the jury was unable to understand how [the decedent] was the aggressor. This evidence established, through specific examples, that [the decedent] was a violent man and likely was the aggressor. The exclusion of this evidence by the trial court was error." We disagree.

Dr. Brittain's testimony — as the trial court noted in excluding it under Rule 404(a) — does not constitute evidence of the decedent's character for violence. When asked about his meetings with the decedent, Dr. Brittain testified to the fact that the decedent was an angry person who had thoughts of violence. He did not, however, testify to his opinion that the decedent was, inherently, a man of violent character or even a violent person as distinguished from others. In fact, contrary to Defendant's argument on appeal, Dr. Brittain affirmed on cross-examination that "there was no evidence that [the decedent] was actually committing any acts of violence[.]" Rather, "[h]e was just generally frustrated at the system." Because Rule 404(a)(2) only allows testimony regarding a pertinent character trait, the trial court did not err in excluding Dr. Brittain's testimony as inadmissible on that basis.

To the extent that Dr. Brittain's testimony could be construed as character evidence, however, we note that this case is distinct from *Everett*. In *Everett*, the evidence of the victim's violent act fulfilled one of the *Winfrey* requirements — it was known by the defendant — and, therefore, increased the likelihood that the defendant acted out of self-defense. Dr. Brittain's testimony met neither requirement. First, it failed to show that Defendant was aware of any anger issues or the alleged violent nature of the decedent. Indeed, Dr. Brittain clearly stated that the source of the decedent's anger was not Defendant and that Defendant was not even discussed. Second, there is ample direct evidence regarding the altercation between the decedent and Defendant. The altercation was recorded on Defendant's tape recorder and was the subject of eyewitness testimony. Such evidence is not circumstantial and, therefore, does not allow the trial court to admit the evidence under Rule 404(a)(2). Accordingly, Defendant's argument is overruled.

(2) Rules 401, 402, and 403

Defendant also argues that the trial court erred in excluding Dr. Brittain's testimony as to Defendant's character for violence because "[the decedent's alleged] violent character is relevant as it relates to whether [he] was the aggressor" and is not unfairly prejudicial under Rule 403 because "[i]ts only prejudice to the State was its relevance to the defense." This argument is without merit.

Rule 401 of the North Carolina Rules of Evidence states that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (emphasis added). Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. "We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

Because we have already determined that the trial court properly excluded Dr. Brittain's testimony as not admissible under Rule 404(a)(2), we need not address these alternative bases for exclusion. Nonetheless, we note that Defendant's argument does not provide any reason to believe that Judge Albright acted arbitrarily or was manifestly unreasonable in determining that "any probative value of this evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Defendant's argument is overruled.

(3) Constitutional Right to Present a Defense

As a part of his preceding arguments, Defendant contends that the trial court's exclusion of Dr. Brittain's testimony requires a new trial because it violated his constitutional right to present witnesses in his own defense under Article VI of the United States Constitution and Article 1, Section 23 of the North Carolina Constitution. We disagree.

As we noted in section I(C)(2), the right to present a defense is not absolute and does not apply when a trial court properly deems evidence inadmissible under the rules of evidence. Because we have determined that Dr. Brittain's testimony was properly excluded by the trial court under Rule 404(a)(2), this argument is overruled.

NO ERROR.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA
v.
LUCIUS ELWOOD McLEAN

No. COA13-693

Filed 21 January 2014

Pretrial Proceedings—defense motion for DNA testing—absence of DNA—not significant to defendant's defense

The trial court did not err in an attempted first-degree murder case by denying defendant's motion for DNA testing pursuant to N.C.G.S. § 15A-267(c). The absence of defendant's DNA on the shell casings at issue, if established, would not have had a logical connection or have been significant to defendant's defense that he was in Maryland at the time of the shooting. Furthermore, to the extent that defendant's motion sought to establish a lack of DNA evidence on the shell casings, such a motion was not proper under N.C.G.S. § 15A-267(c).

Appeal by defendant from judgments entered 21 August 2012 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 6 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General Ward Zimmerman, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Following final judgments as to the charges against him, Lucius Elwood McLean ("Defendant") appeals a pre-trial order entered 4 March 2010 by Judge Ronald E. Spivey in Guilford County Superior Court. The challenged order denied Defendant's pre-trial motion for DNA testing pursuant to N.C. Gen. Stat. § 15A-267(c) (2013). Defendant contends that the trial court erred as a matter of law in denying his motion because the absence of his DNA on shell casings found at the scene, if established, would have been relevant to the State's investigation and material to his defense. For the following reasons, we find no error and affirm the trial court's order.

I. Factual & Procedural History

On 20 August 2012, Defendant was convicted on two counts of attempted first-degree murder, two counts of assault with a deadly weapon with the intent to kill inflicting serious injury, one count of discharging a firearm into an occupied building, and one count of possession of a firearm after having been convicted of a felony.[1] The evidence presented at trial tended to show the following.

On 16 April 2008, Defendant agreed to rent commercial property located at 2801 Patterson Avenue in Greensboro from Stuart Elium ("Mr. Elium"). Defendant indicated that he needed the property to open an arcade. Defendant gave Mr. Elium a down payment and entered the space. Mr. Elium testified that Defendant arrived at their meeting in a "bronzish Jaguar."

Immediately next door to Defendant's property was an established night club operated by Reginald Green ("Mr. Green") called "Club Touch." Mr. Green also rented from Mr. Elium. Club Touch generally operated between 10 p.m. and 2 a.m. and served liquor. Derry George ("Mr. George") was the club's manager. Robert Willis ("Mr. Willis") and Mark Stephens ("Mr. Stephens") worked security.

On 17 April 2008, Mr. George arrived for work between 7 and 8 p.m. and noticed a group of men sitting outside the club next to Defendant's property. When Mr. George went inside Club Touch, he noticed that a break-in had occurred and that equipment had been stolen. Mr. George called the police, who investigated the break-in and questioned the men sitting outside Defendant's property. The men told the police that they were waiting on someone to come let them into Defendant's building.

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1. Defendant stipulated to a prior felony conviction at trial.

An hour or so later, Defendant arrived on the scene and spoke to Mr. George about the incident. Mr. George testified that Defendant's men were upset about being questioned in connection to the break-in, so Mr. George wanted to let Defendant know that there were no hard feelings. Defendant was cordial to Mr. George and the two talked about Defendant's plan for opening a business next door. Defendant told Mr. George that he wanted to open a "2 to 6"—meaning that Defendant's establishment would be open from 2 a.m. to 6 a.m. and be a place where Club Touch's patrons could go after the club closes. After their conversation, Mr. George telephoned Mr. Green to inform him of Defendant's plans and expressed concern that Defendant's proposed business might affect Club Touch's liquor license.

At around 10 p.m. that same night, Defendant and his men placed balloons and a sign outside their building that read "The Party is Here" and played music loudly from their establishment. Mr. George indicated that Defendant arrived that evening in a "gold-colored" Jaguar. Mr. George and Mr. Willis testified that as the night was coming to an end, Defendant and his men approached Club Touch and yelled, "We're hood around here" and "It's hood out here. Going to be real."

The next morning, Mr. Green called Mr. Elium to discuss what had happened. Thereafter, Mr. Elium informed Defendant that their rental arrangement was not going to work out. Mr. Elium returned Defendant's money, reclaimed the keys to the property, and assisted Defendant in vacating the premises.

On 20 April 2008, at approximately 2:45 a.m., multiple cars arrived at Club Touch, circled around the back of the club, and pulled up to the entrance. Among the cars was Defendant's gold Jaguar. Mr. George, Mr. Willis, and Mr. Stephens were all standing at the front door.

Mr. George, Mr. Willis, and Mr. Stephens testified that Defendant emerged from the gold Jaguar and asked for the owner of the club. During a heated exchange, Defendant stated, "It's real" and "If I can't have my club open, y'all can't have y'all's open." Mr. Willis testified that upon hearing these words, he laughed at Defendant. Thereafter, Defendant stated, "Man, it's real out here . . . you think I'm playing." Defendant then popped his trunk, retrieved a long black SKS rifle, and said, "Oh, you're not scared." Defendant then cocked the gun and stated, "Oh, you're really not going to run." At that point, Mr. George and Mr. Willis retreated into the Club for cover, and Mr. Stephens retreated to his pickup truck in the parking lot.

Thereafter, multiple shots were fired into the club from outside the entryway. Mr. George was shot in the hand and in the side of his body. Mr. Willis was shot in the leg. Another man from Defendant's entourage opened fire on the club with a handgun. After opening fire on the club, Defendant and his entourage fled the scene.

Police arrived on the scene around 3:15 a.m. and began their investigation. Six 7.62 caliber shell casings consistent with an SKS rifle and twelve .45 caliber shell casings were recovered from the crime scene. The guns were never found. In the days that followed, Mr. George, Mr. Willis, and Mr. Stephens all identified Defendant as the shooter in a photo array with near certainty. They testified to the same in open court.

On 24 April 2008, police stopped Defendant's sister in the gold Jaguar and seized the vehicle. During an inventory of the vehicle, police recovered a live 7.62 caliber bullet from underneath the passenger seat. No identifiable fingerprints were found on the bullet. After processing the vehicle, the police called Defendant's sister to retrieve it. However, Defendant's sister failed to pick the vehicle up and it was released to a local auto dealer.

On 10 July 2008, police received information that Defendant had been spotted at a local apartment complex. Acting on this information, the police were able to locate and stop Defendant, who was driving the same gold Jaguar.[2] Thereafter, Defendant was arrested and taken into custody.

Prior to trial, Deputy Sheriff James Swaringen ("Deputy Swaringen") was transporting Defendant from the courthouse to the jail when he overheard a conversation Defendant had with another prisoner. Deputy Swaringen testified that Defendant stated, "I can't believe they have me over here for this. I shot the guy in the calf and there wasn't even an exit wound and they've had me sitting up here for 35 months for this? They're just trying to see if I crack being up here so long."

On 20 January 2010, Defendant moved the trial court pursuant to N.C. Gen. Stat. § 15A-267(c) for pre-trial DNA testing of the shell casings recovered from the crime scene. Specifically, Defendant's written motion indicated that he wanted "to test the shell casings to see if there is any DNA material on the shell casings that may be compared to the Defendant." Defendant's written motion requested DNA testing on he following grounds:

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2. It is unclear from the record how or when Defendant reacquired the same gold Jaguar after it was released by the police to a local auto dealer.

1. The Defendant is charged with attempted 1st Degree Murder in that it is alleged on or about April 20th in the early morning hours that the Defendant fired shots into a club in Greensboro injuring three people. Numerous shell casings were found from the weapon discharged outside the club on April 20, 2008.

2. The Defendant intends to plead not guilty and contends that he did not discharge a firearm.

3. The Defendant would like to test the shell casings to see if there is any DNA material on the shell casings that may be compared to the Defendant.

At the motion hearing, counsel for Defendant argued as follows:

> It's my understanding that the State has these shell casings in their custody. We've talked about a plea bargain in this case. There's not going to be a plea bargain in this case. My client says he's not guilty of this offense. In order to pursue all efforts to show that he's not guilty, I'd like to have the opportunity to test these shell casings. There may or may not be DNA on the shell casings, but we won't know until we test them; until we try. So we'd like to have the opportunity to test those shell casings to see if there's any DNA evidence on there and have it compared to [Defendant's]. So that's what—I think that's a reasonable request, Your Honor.

Defendant also moved the trial court to order other discovery including fingerprint testing on the shell casings at issue. At the motion hearing, counsel for Defendant indicated that no fingerprint testing had been performed on the shell casings to date.

By order dated 4 March 2010, the trial court denied Defendant's motion for pre-trial DNA testing. In the same order, the trial court ordered that the shell casings at issue be subjected to fingerprint testing "to determine what fingerprint evidence, if any, was present and whether or not any fingerprint evidence found on those shell casings match the Defendant's prints." No fingerprints were found.

Thereafter, Defendant was tried and convicted on all counts and sentenced to two consecutive terms of 251 to 311 months in prison for the attempted first-degree murder convictions and to concurrent sentences for the remaining convictions. Defendant gave timely notice of appeal in open court.

II. Jurisdiction

Defendant's post-judgment appeal of the trial court's order denying Defendant's motion for DNA testing lies of right to this court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013). *See also* N.C. Gen. Stat. § 15A-270.1 (2013).

III. Analysis

The only question presented to this Court by Defendant's appeal is whether the trial court erred in its application of N.C. Gen. Stat. § 15A-267(c). Defendant contends that pursuant to the cited statute, the trial court was required to order pre-trial DNA testing on shell casings found at the crime scene. We disagree.

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen*, Ltd. P'ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

N.C. Gen. Stat. § 15A-267(c) provides:

> Upon a defendant's motion made before trial in accordance with [N.C. Gen. Stat. §] 15A-952, the court shall order the Crime Laboratory or any approved vendor that meets Crime Laboratory contracting standards to perform DNA testing . . . upon a showing of all of the following:
>
> (1) That the biological material is relevant to the investigation.
>
> (2) That the biological material was not previously DNA tested or that more accurate testing procedures are now available that were not available at the time of previous testing and there is a reasonable possibility that the result would have been different.
>
> (3) That the testing is material to the defendant's defense.

See also N.C. Gen. Stat. § 15A-269(a) (2013) (outlining similar requirements for a post-conviction motion for DNA testing). Accordingly, by the plain language of this statute, the burden is on Defendant to make the required showing under subsections (1), (2), and (3) before the trial court. Absent the required showing, the trial court is not statutorily

obligated to order pre-trial DNA testing. *Cf. State v. Foster*, ___ N.C. App. ___, ___, 729 S.E.2d 116, 120 (2012) (describing the required showing of materiality in the post-conviction context as a "condition precedent to a trial court's statutory authority to grant a motion under [N.C. Gen. Stat.] § 15A-269").

Here, Defendant failed to establish the required showing under N.C. Gen. Stat. § 15A-267(c)(1) and (3) in his written motion and before the trial court at the motion hearing.[3] Defendant's written motion stated in cursory fashion that "Defendant intends to plead not guilty and contends that he did not discharge a firearm" and that "Defendant would like to test the shell casings to see if there is any DNA material on the shell casings that may be compared to Defendant." At the motion hearing, defense counsel added: "[i]n order to pursue all efforts to show that he's not guilty . . . we'd like to have the opportunity to test those shell casings to see if there's any DNA evidence on there and to have it compared to [Defendant's]." Thus, before the trial court, Defendant failed to sufficiently demonstrate how the absence of his DNA on the shell casings would be either relevant to the investigation or material to his defense at trial.

Before this Court, Defendant contends that the presence of biological material on the shell casings at issue would have been relevant to the investigation because "such biological material would tend to identify the actual perpetrator." Defendant further contends that the absence of his DNA on the shell casings, if established, would be material to his defense because such a showing would tend to identify someone else as the shooter and corroborate his alibi defense.[4] We address each in turn.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401. The State does not challenge Defendant's relevancy argument, and we find it sufficiently persuasive to satisfy the required showing under N.C. Gen. Stat. § 15A-267(c)(1). The presence of DNA evidence on a spent shell casing has some tendency to identify the person who fired the bullet.

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3. The State conceded at the hearing that the shell casings had not been previously tested for DNA, thereby satisfying the showing required by N.C. Gen. Stat. § 15A-267(c)(2).

4. At trial Defendant testified that he was in Maryland attending his cousin's grandmother's funeral at the time of the shooting. Defendant could provide no additional witnesses or evidence corroborating his alibi.

However, while we agree that the presence of DNA evidence on the shell casings at issue would be relevant to the investigation, we disagree that the absence of Defendant's DNA on the shell casings would be material to Defendant's alibi defense in this case.

As used in N.C. Gen. Stat. § 15A-269(a)(1), our Court has adopted the *Brady* definition of materiality. *See State v. Hewson*, ___ N.C. App. ___, ___, 725 S.E.2d 53, 56 (2012) (stating that evidence is "material" for purposes of N.C. Gen. Stat. § 15A-269(a)(1) if "there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation" (quotation marks and citations omitted)). While such a standard is appropriate when evaluating motions made in the post-trial context pursuant to N.C. Gen. Stat. § 15A-269, we find that such a standard is inappropriate when evaluating pre-trial motions made pursuant to N.C. Gen. Stat. § 15A-267(c). Whether a particular piece of DNA evidence would have influenced the outcome of a trial can only be determined after the trial is completed and the judge has had an opportunity to compare that DNA evidence against the cumulative evidence presented at trial.[5] Accordingly, for purposes of applying N.C. Gen. Stat. § 15A-267(c)(3), we resort to the plain meaning of "material" and hold that biological evidence is material to a defendant's defense where such biological evidence has "some logical connection" to that defense and is "significant" or "essential" to that defense. *Black's Law Dictionary* 998 (8th ed. 2004).

Here, we hold that the absence of Defendant's DNA on the shell casings at issue would not be material to his alibi defense. At the outset, we note that a showing of materiality under N.C. Gen. Stat. § 15A-267(c)(3) carries a higher burden than a showing of relevancy under N.C. Gen. Stat. § 15A-267(c)(1). Thus, while the presence of DNA evidence may have relevance to an investigation, it does not follow that such evidence is necessarily material to a defendant's defense at trial.

Defendant contends that the absence of his DNA and a positive showing of someone else's DNA on the shell casings would be material to his alibi defense because it would have "tended to show that someone

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5. Although Defendant waited until after he was convicted to appeal in the instant case, our General Assembly has provided a right to appeal pre-trial orders denying motions for DNA testing on an interlocutory basis. *See* N.C. Gen. Stat. § 15A-270.1 (2013) ("The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal."). In such situations, it would be difficult if not impossible for this Court to determine whether disclosure of a DNA test result would have a reasonable probability of changing a jury's verdict.

other than [Defendant] fired the SKS assault rifle[.]"[6] However, the absence of Defendant's DNA from the shell casings would only provide evidence of his absence from the scene if one would otherwise expect to find his DNA on the shell casings in such a situation.[7] Even then, such evidence would only justify the inference that Defendant was absent—it would not provide "essential" or "significant" evidence corroborating Defendant's alibi. Accordingly, we hold that the absence of Defendant's DNA on the shell casings at issue, if established, would not have a logical connection or be significant to Defendant's defense that he was in Maryland at the time of the shooting.

Furthermore, we note like its counterpart in the post-conviction setting, N.C. Gen. Stat. § 15A-267(c) outlines a procedure for the DNA testing of "biological material," not evidence in general. *Cf. State v. Brown*, 170 N.C. App. 601, 609, 613 S.E.2d 284, 288–89 (2005) ("[N.C. Gen. Stat. § 15A-269(a)] provides for testing of 'biological evidence' and not evidence in general. Since defendant desires to demonstrate a lack of biological evidence, the post-conviction DNA testing statute does not apply." (internal citation omitted)), *superseded by statute on other grounds as stated in State v. Norman*, 202 N.C. App. 329, 332–33, 688 S.E.2d 512, 515 (2010). Here, the purpose of Defendant's request for DNA testing is to demonstrate the absence of his DNA on the shell casings at issue. By its plain language, N.C. Gen. Stat. § 15A-267(c) contemplates DNA testing for ascertained biological material—it is not intended to establish the absence of DNA evidence. It is unknown in this case if there is any biological material that may be tested on the shell casings. Indeed, at the motion hearing, defense counsel stated "[t]here may or may not be DNA on the shell casings, but we won't know until we test them; until we try." Thus, to the extent that Defendant's motion sought to establish a lack of DNA evidence on the shell casings, we hold that such a motion is not proper under N.C. Gen. Stat. § 15A-267(c).

IV. Conclusion

For the foregoing reasons, we affirm the order of the trial court denying Defendant's motion under N.C. Gen. Stat. § 15A-267(c) for pretrial DNA testing.

Affirmed.

Judges ROBERT C. HUNTER and CALABRIA concur.

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6. Defendant's contention assumes the presence of biological material on the shell casings—a premise that has not been established in this case.

7. Such an expectation is undermined by the fact that shooting a gun does not require one to load or handle bullets.

STATE OF NORTH CAROLINA
v.
AUDRA LINDSEY SMATHERS

No. COA13-496

Filed 21 January 2014

1. Search and Seizure—community caretaking doctrine—recognized in North Carolina

The community caretaking doctrine is formally recognized as an exception to the warrant requirement of the Fourth Amendment in North Carolina. The State has the burden of proving that a search or seizure within the meaning of the Fourth Amendment has occurred, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown, and that the public need or interest outweighs the intrusion upon the privacy of the individual. Imminent danger to life or limb is not a required element of the test.

2. Search and Seizure—Fourth Amendment—community caretaking exception—requirements satisfied

The three elements of the community caretaking exception to the Fourth Amendment were satisfied in a driving while impaired case. Applying the exception narrowly, it was uncontested that the traffic stop was a seizure under the meaning of the Fourth Amendment; there was an objectively reasonable basis under the totality of the circumstances to conclude that the seizure was predicated on the community caretaking function of ensuring the safety of defendant and her vehicle; and there was a public need and interest in having the officer seize defendant that outweighed her privacy interest in being free from the intrusion. The officer was able to identify specific facts which led him to believe that help may have been needed, rather than a general sense that something was wrong.

Appeal by defendant from judgment entered 28 July 2012 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 9 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

Leslie C. Rawls for defendant-appellant.

HUNTER, Robert C., Judge.

Audra Lindsey Smathers ("defendant") appeals from judgment entered pursuant to her *Alford* plea to driving while impaired. Specifically, defendant challenges the order entered by the trial court denying her motion to suppress evidence gathered during a traffic stop. On appeal, defendant argues that the trial court erred by denying her motion because the officer had neither reasonable suspicion nor probable cause to seize her, and the seizure was unreasonable under the Fourth Amendment.

After careful review, we affirm the trial court's order.

Background

The facts of this case are largely undisputed. Shortly after 10:00 p.m. on 27 May 2010, Transylvania Sheriff's Deputy Brian Kreigsman ("Officer Kreigsman") was traveling down Highway 280 in the interior lane adjacent to the center turning lane roughly one car length behind defendant, who was driving a red Corvette in the right lane. Defendant was traveling at speeds close to the posted limit of 45 miles per hour, and Officer Kreigsman did not observe anything illegal or suspicious about her driving.

Officer Kreigsman then saw a large animal run in front of defendant's vehicle. Defendant struck the animal, causing her vehicle to bounce and produce sparks as it scraped the road. Officer Kreigsman pulled his police cruiser behind defendant, who had decreased her speed to about 35 miles per hour, and activated his blue lights. He testified that because he knew Corvettes have a fiberglass body, he stopped defendant to ensure that she and the vehicle were "okay." Defendant continued without stopping after Officer Kreigsman activated his blue lights, so he turned on his siren; defendant continued for about 1.1 to 1.2 miles before stopping.[1] Officer Kreigsman called in for backup after defendant did not immediately stop her vehicle and relayed over the radio that he was making a stop because the vehicle had struck an animal. Deputy Justin Bell ("Deputy Bell") arrived shortly thereafter with other officers.

1. Officer Kreigsman testified that this procedure was not uncommon due to "blue light bandits" in the area who would impersonate police officers by attaching blue lights to their vehicles. It is uncontested that defendant's continued driving did not produce reasonable suspicion of illegal activity.

Once stopped, Officer Kreigsman approached the driver's side of the vehicle and saw defendant crying. She and her passenger told Officer Kreigsman that they had hit a dog. He examined defendant's vehicle and saw that the front had been cracked and damaged, presumably by the collision with the animal. Both Officer Kreigsman and Deputy Bell detected the scent of alcohol coming from defendant. Officer Bell noticed that she also had glassy eyes and slurred speech. He conducted roadside sobriety tests, which defendant failed. After failing the field tests, defendant submitted to roadside breath tests, which produced a positive indication of alcohol consumption. Defendant was then taken into custody and charged with driving while impaired. Later testing showed that her blood alcohol concentration was .18.

Defendant pled guilty to the charge of driving while impaired in District Court and appealed to the Superior Court. She moved to suppress all evidence gathered from Officer Kreigsman's stopping of her vehicle on the ground that he had neither probable cause nor reasonable suspicion to seize her and that the seizure was unreasonable under the Fourth Amendment. The trial court denied defendant's motion. Defendant entered an *Alford* plea on 20 December 2012 and appealed in open court from the judgment and ruling on her motion to suppress.

Discussion

I. The Community Caretaking Doctrine

[1] Defendant's sole argument on appeal is that the trial court erred by denying her motion to suppress. Specifically, she claims that Officer Kreigsman had neither probable cause nor reasonable suspicion to seize her, and the seizure was unreasonable under the totality of the circumstances, thereby violating the Fourth Amendment. The State concedes that Officer Kreigsman had neither probable cause nor reasonable suspicion to seize defendant, but instead asks this Court to adopt a version of the "community caretaking" doctrine to affirm the trial court's order. After careful review, we formally recognize the community caretaking doctrine as an exception to the warrant requirement of the Fourth Amendment, and we hold that Officer Kreigsman's seizure of defendant falls under this exception. Therefore, we affirm the trial court's order denying defendant's motion to suppress.

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).

The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Traffic stops are recognized as seizures under both constitutions. *See State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) ("A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief.") (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979)). Although a warrant supported by probable cause is typically required for a search or seizure to be reasonable, *State v. Phillips*, 151 N.C. App. 185, 191, 565 S.E.2d 697, 702 (2002), traffic stops are analyzed under the "reasonable suspicion" standard created by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). *Styles*, 362 N.C. at 414, 665 S.E.2d at 439. "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification." *Id.* (citation and quotation marks omitted). "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)). "When a defendant in a criminal prosecution makes a motion to suppress evidence obtained by means of a warrantless search, the State has the burden of showing, at the suppression hearing, how the [warrantless search] was exempted from the general constitutional demand for a warrant." *State v. Nowell*, 144 N.C. App. 636, 642, 550 S.E.2d 807, 812 (2001).

Here, the trial court concluded, and the State concedes, that no reasonable articulable suspicion of criminal activity existed when defendant was seized. Officer Kreigsman's seizure of defendant was not predicated on criminal investigation or prevention of any kind; rather, he was checking to make sure that defendant and her vehicle were "okay" after hitting a large animal. Thus, the trial court did not apply the *Terry* doctrine, but instead utilized an unspecified "balancing test" to conclude that a seizure was made on defendant, but the seizure was "justified under the situation as observed by Officer Kreigsman." In so concluding, the trial court rejected defendant's contention that the stop was arbitrary and unreasonable, but also rejected the State's argument

that the community caretaking exception was applicable, noting that the doctrine has not yet been explicitly recognized in North Carolina. We find that the generic "balancing test" applied by the trial court is not one of the "specifically established and well-delineated exceptions" which would otherwise render Officer Kreigsman's warrantless seizure of defendant constitutional. *See State v. Grice*, __ N.C. App. __, __, 735 S.E.2d 354, 356-57 (2012) ("As a general rule, searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (citation and quotation marks omitted). These exceptions, such as exigent circumstances, *Nowell*, 144 N.C. App. at 643, 550 S.E.2d at 812, or the automobile exception, *State v. Corpening*, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894 (1993), are unhelpful here, because they apply only to situations where officers are investigating or preventing criminal activity. Thus, we address the State's alternative argument – that this Court should recognize some variant of the community caretaking exception to affirm the order denying defendant's motion to suppress.

So far, North Carolina courts have only referenced the community caretaking exception in the limited context of impounding abandoned vehicles. *See State v. Phifer*, 297 N.C. 216, 219, 254 S.E.2d 586, 587 (1979) ("In the interests of public safety and as part of what the Court has called 'community caretaking functions,' automobiles are frequently taken into police custody.") (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368-69, 49 L. Ed. 2d 1000, 1002 (1976)); *see also State v. Peaten*, 110 N.C. App. 749, 752-53, 431 S.E.2d 237, 239 (1993). Application of this doctrine outside the context of vehicle impoundment, specifically in regard to the seizure of citizens, is a matter of first impression. As such, an overview of how the exception has developed in similar contexts by courts in other jurisdictions is helpful to our determination here.

The community caretaking exception was established by the United States Supreme Court in *Cady v. Dombrowksi*, 413 U.S. 433, 37 L. Ed. 2d 706 (1973). In *Cady*, the Supreme Court held that the warrantless search of the defendant's vehicle after impoundment did not violate the Fourth Amendment because the vehicle was damaged and constituted a nuisance on the highway, the defendant could not arrange for the vehicle to be moved, and the standard police procedure of impounding the vehicle and searching it was reasonable under the circumstances to promote public safety. *Cady*, 413 U.S. at 443, 447-478, 37 L. Ed. 2d at 715-18. The Court reasoned that:

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady, 413 U.S. at 441, 37 L. Ed. 2d at 714-15.

Since the Supreme Court's decision in *Cady*, a large majority of state courts have recognized the community caretaking doctrine as a valid exception to the warrant requirement of the Fourth Amendment. *State v. Moats*, 403 S.W.3d 170, 187, n. 8 (Tenn. 2013); *see, e.g.*, *Commonwealth v. Evans*, 764 N.E.2d 841, 843 (Mass. 2002); *State v. Martinez*, 615 A.2d 279, 281 (N.J. Super. Ct. App. Div. 1992). The overarching public policy behind this widespread adoption is the desire to give police officers the flexibility to help citizens in need or protect the public even if the prerequisite suspicion of criminal activity which would otherwise be necessary for a constitutional intrusion is nonexistent.

> The doctrine recognizes that, in our communities, law enforcement personnel are expected to engage in activities and interact with citizens in a number of ways beyond the investigation of criminal conduct. Such activities include a general safety and welfare role for police officers in helping citizens who may be in peril or who may otherwise be in need of some form of assistance.

*Ullom v. Mille*r, 705 S.E.2d 111, 120-23 (W.Va. 2010) (holding that an officer's seizure of the defendant was reasonable under the community caretaking exception where the officer saw the defendant's vehicle on the side of a dirt road at dusk with its parking lights on, the officer had a sense that something was wrong, and the "road safety check" that constituted the seizure was based solely on safety and welfare considerations); *see also State v. Deneui*, 775 N.W.2d 221, 242 (S.D. 2009)

("Modern society has come to see the role of police officers as more than basic functionaries enforcing the law. From first responders to the sick and injured, to interveners in domestic disputes, and myriad instances too numerous to list, police officers fulfill a vital role where no other government official can."). As these courts have demonstrated, there are countless situations where government intrusion into individual privacy for the purposes of rendering aid is reasonable, regardless of whether criminal activity is afoot. We find the analysis utilized by these courts persuasive, and we can identify no reason why the community caretaking exception should not apply in North Carolina when it has been recognized by the United States Supreme Court and widely adopted by a majority of state courts throughout the country.

Thus, we now formally recognize the community caretaking exception as a means of establishing the reasonableness of a search or seizure under the Fourth Amendment. *See State v. Browning*, 28 N.C. App. 376, 379, 221 S.E.2d 375, 377 (1976) (adopting a new rule of law based on well-reasoned decisions in other jurisdictions that was consistent with, although not directly supported by, precedent from the North Carolina Supreme Court). In recognizing this exception, we must apply a test that strikes a proper balance between the public's interest in having officers help citizens when needed and the individual's interest in being free from unreasonable governmental intrusion. *See State v. Scott*, 343 N.C. 313, 327, 471 S.E.2d 605, 613-14 (1996) ("In creating exceptions to the general [warrant requirement], this Court must consider the balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.") (citation and quotation marks omitted).

Despite its wide recognition, "[n]o single set of specific requirements for applicability of the community caretaker exception has been adopted by a majority of those states recognizing the exception." *Ullom*, 705 S.E.2d at 122.

Courts are split as to how the community caretaking doctrine should be classified from a Fourth Amendment perspective. A minority of jurisdictions characterizes community caretaking activities as consensual police-citizen encounters which do not rise to the level of "searches" or "seizures" under the Fourth Amendment. *See Moats*, 403 S.W.3d at 182, 187 n. 8 ("[T]he community caretaking function exists [in Tennessee] within the third tier of consensual police-citizen encounters that do not require probable cause or reasonable suspicion[.]"). However, North Carolina courts, as well as most courts in other jurisdictions, recognize that police interactions with citizens that do not amount to "searches" or

"seizures" under the meaning of the Fourth Amendment do not trigger its safeguards. *See State v. Sugg*, 61 N.C. App. 106, 108-9, 300 S.E.2d 248, 250 (1983); *see also People v. Luedemann*, 857 N.E.2d 187, 198-99 (Ill. 2006). Thus, we need not create an exception to the Fourth Amendment under the community caretaking doctrine to justify already permissible police-citizen interactions. *See State v. Isenhour*, 194 N.C. App. 539, 544-45, 670 S.E.2d 264, 268-69 (2008) (holding that reasonable suspicion was not required to justify an interaction that did not amount to a seizure under the Fourth Amendment).

There are also competing viewpoints as to the manner in which the subjective motivation of an officer should be taken into account when applying the community caretaking exception. A primary concern amongst courts which apply these tests is that the community caretaking exception not serve as pretext for impermissible criminal investigation. *See*, *e.g.*, *Com. v. Waters*, 456 S.E.2d 527, 530 (Va. Ct. App. 1995) ("No seizure, however limited, is a valid exercise of the community caretaking function if credible evidence indicates that the stop is a pretext for investigating criminal activity."). Some courts, like those in the state of Washington, have adopted tests which contain both objective and subjective requirements and only allow a search or seizure if the officer's motivation is not primarily related to criminal investigation. *See State v. Angelos*, 936 P.2d 52, 54 (Wash. Ct. App. 1997) ("[T]he [government] must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to render aid or assistance. The search must not be primarily motivated by intent to arrest and seize evidence.") (citation and quotation marks omitted). Other courts, like the Fourth Circuit and the Wisconsin Supreme Court, hold that a warrantless search or seizure will be upheld if there is an objectively reasonable basis for the community caretaking action, regardless of a coinciding subjective intent on the officer's part to investigate crime. *See State v. Kramer*, 759 N.W.2d 598, 608 (Wis. 2009) ("[W]e conclude that the 'totally divorced' language from Cady does not mean that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function. Rather, we conclude that in a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns."); *United States v. Newbourn*, 600 F.2d 452, 456 (4th Cir. 1979) ("An interest in furthering a criminal investigation supplements justifiable concern about hazards presented by an automobile's contents; it does not negate it, and *Cady* supports the warrantless intrusion. Thus the warrantless search should be upheld, whatever

the policeman's subjective state of mind[,] if the objective facts present a reasonable basis for a belief that there is a potential danger similar to or greater than that presented in *Cady*, which danger should be inactivated.").

The North Carolina Supreme Court, in two relatively recent opinions, has made clear that the subjective mentality of a police officer will not make a seizure under the *Terry* doctrine unconstitutional if the intrusion was objectively reasonable under the totality of the circumstances. *See State v. Barnard*, 362 N.C. 244, 248, 658 S.E.2d 643, 645 (2008) (noting that "[t]he constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation" in holding that an officer's subjective mistake of law did not cause a traffic stop to be unconstitutional where there was articulable, reasonable suspicion that the individual was violating a different, actual law), *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198 (2008); *State v. Heien*, 366 N.C. 271, 283, 737 S.E.2d 351, 359 (2012) (holding that where an officer's subjective mistake of law was itself objectively reasonable, there may still be reasonable suspicion to justify a warrantless traffic stop). Thus, in keeping with the "foundational principle" recognized by our Supreme Court that the Fourth Amendment requires only that an officer's actions be "objectively reasonable in the circumstances," *Heien*, 366 N.C. at 278, 737 S.E.2d at 356 (citation omitted), we adopt an objective method of inquiry into the purpose of a seizure in the community caretaking context. The public safety concerns which underlie the community caretaking exception are not mutually exclusive of criminal prevention and investigation, and therefore we decline to formulate a test where existence of the latter negates the former. As the Wisconsin Supreme Court aptly noted, "to interpret . . . [*Cady*] to mean that an officer could not engage in a community caretaker function if he or she had any law enforcement concerns would, for practical purposes, preclude police officers from engaging in any community caretaker functions at all. This result is neither sensible nor desirable." *Kramer*, 759 N.W.2d at 609.

After assessing the analytical methods developed by courts in other jurisdictions, we find that the current three-pronged test used by courts in Wisconsin in applying the community caretaking exception provides a flexible framework within which officers can safely perform their duties in the public's interest while still protecting individuals from unreasonable government intrusions. *See State v. Anderson*, 417 N.W.2d 411, 414 (Wis. Ct. App. 1987), *rev'd on other grounds*, 454 N.W.2d 763 (Wis. 1990); *Kramer*, 759 N.W.2d at 608. Under this test, which we now adopt, the State has the burden of proving that: (1) a search or seizure within the

meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual. *See Anderson*, 417 N.W.2d at 414; *Kramer*, 759 N.W.2d at 608. Relevant considerations in assessing the weight of public need against the intrusion of privacy include, but are not limited to:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Anderson, 417 N.W.2d at 414. We note that many courts which apply a similar balancing test place great weight on the exigency of the situation, with some holding that only imminent danger to life or limb can outweigh the individual's privacy interest. *See*, *e.g.*, *Provo City v. Warden*, 844 P.2d 360, 364-65 (Utah Ct. App. 1992), *aff'd*, 875 P.2d 557 (Utah 1994). Because such a requirement may prevent aid in situations where danger to life and limb may not be imminent, but could be prevented by swift action,[2] we decline to make imminent danger to life or limb a required element of our test. However, we agree with the proposition espoused by many courts that this exception should be applied narrowly and carefully to mitigate the risk of abuse. *See*, *e.g.*, *State v. Rinehar*t, 617 N.W.2d 842 (S.D. 2000); *Wright v. State*, 7 S.W.3d 148 (Tex. Crim. App. 1999); *see also United States v. Dunbar*, 470 F. Supp. 704, 708 (D. Conn. 1979) ("The investigative stop authority announced in *Terry v. Ohio* has led to cases where the officer says, 'He looked suspicious.' The Fourth Amendment stands against initiating a new line of cases in which the officer says, 'I thought he was lost.' ") (citation and quotation omitted), *aff'd*, 610 F.2d 807 (2d Cir. 1979).

[2] Having set out a community caretaking exception that we feel properly frames our inquiry into the reasonableness of a search or seizure under the Fourth Amendment, we must apply our rule to the facts of this case. After careful review, we hold that all three elements are met. First, it is uncontested that the traffic stop was a seizure under the meaning of the Fourth Amendment. *See Styles*, 362 N.C. at 414, 665 S.E.2d at

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2. For example, where an officer executes a search or seizure to fix a gas leak before an explosion might have occurred.

439. Second, given that Officer Kreigsman witnessed defendant strike a large animal and saw sparks fly when her car struck the road, there was an objectively reasonable basis under the totality of the circumstances to conclude that the seizure was predicated on the community caretaking function of ensuring the safety of defendant and her vehicle. Third, as discussed below, we find that the public need and interest in having Officer Kreigsman seize defendant outweighed her privacy interest in being free from the intrusion.

The facts that weigh in favor of defendant are as follows. First, the trial court entered an uncontested finding of fact that defendant was only affected by the collision with the animal at the point of impact. According to Officer Kreigsman, at that moment "a little bit of sparks [came] from the rear end where the car struck the roadway. And then the car continued on." Officer Kreigsman followed defendant at a steady speed for almost two miles without noticing anything which indicated that defendant was injured or otherwise unfit to drive, or that the vehicle itself could not be operated safely. Although later inspection revealed that the front of defendant's car was damaged by the collision, Officer Kreigsman was unaware of this fact at the time he executed the seizure. Thus, the circumstances lacked an exigency that would weigh in favor of police intervention. Second, this was a substantial intrusion on defendant's liberty. Unlike a situation where an officer might approach an already stopped vehicle to check on its occupants, Officer Kreigsman interrupted defendant's mobility by executing a traffic stop, using his blue lights and siren as displays of overt authority to do so. The United States Supreme Court has noted that traffic stops may create "substantial anxiety" and may be brought about by an "unsettling show of authority;" further, they "interfere with freedom and movement" and are "inconvenient." *Delaware v. Prouse*, 440 U.S. 648, 657, 59 L. Ed. 2d 660, 666 (1979). Thus, the "possibly unsettling show of authority," *id.*, used to seize defendant, in addition to the interruption of her freedom to travel, weigh in favor of defendant's argument that the seizure was unreasonable.

Although these factors support defendant's argument, we hold that the public's need and interest in Officer Kreigsman's actions outweigh defendant's competing privacy interest. First, the seizure occurred at nighttime in what was described by Officer Kreigsman as a rural and dimly lit stretch of road. Since there was a lower probability that defendant could have gotten help from someone if she needed it, compared to if she had a similar collision during the day time in a highly populated area, this setting weighs in favor of the State's argument that the public

need or interest was furthered by Officer Kreigsman's conduct. Second, Officer Kreigsman witnessed defendant strike a large animal with her vehicle and saw sparks when the car bounced on the road. Thus, he was able to identify specific facts which led him to believe that help may have been needed, rather than a general sense that something was wrong. Finally, defendant was operating a vehicle when she was seized rather than enjoying the privacy of her home. As this Court has noted, "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects . . . . It travels public thoroughfares where both its occupants and its contents are in plain view." *State v. Francum*, 39 N.C. App. 429, 432, 250 S.E.2d 705, 707 (1979) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590, 41 L. Ed. 2d 325, 335 (1974)). Thus, the lessened expectation of privacy weighs in favor of the State's argument that the seizure was reasonable.

N.C. Gen. Stat. § 20-4.01(33b) defines a "reportable crash" as one resulting in death or injury to a human being or in property damage of over $1000.00. N.C. Gen. Stat. § 20-4.01(4b) defines a "crash" as "[a]ny event that results in an injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident and crash and their cognates are synonymous." N.C. Gen. Stat. § 20-166.1(e) states that the "appropriate law enforcement agency must investigate a reportable accident." In addition to the other factors that weigh in favor of the State, these statutes underscore the significance of the public interest involved. Based upon Officer Kreigsman's statutory duty under section 20-166.1(e), he had an objectively reasonable basis to seize defendant in order to ascertain the nature and extent of the damage to defendant's vehicle. Thus, when considering this statutory duty along with all of the other factors that support the public need and interest in Officer Kreigsman's actions, the scales are tipped in favor of the State.

After weighing these facts, keeping in mind the general principle that the community caretaking exception should be applied narrowly to prevent potential abuses, we hold that the public need and interest did outweigh defendant's privacy interest in being free from government seizure here. Thus, because the stop fits into the community caretaking exception as we apply it, it was reasonable under the Fourth Amendment.

Conclusion

After careful review, we recognize the community caretaking doctrine as a valid exception to the warrant requirement of the Fourth

Amendment and hold that Officer Kreigsman's seizure of defendant fits into this exception as we apply it. Thus, we affirm the trial court's order denying defendant's motion to suppress.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
JOSHUA ANDREW STEPP

No. COA13-46

Filed 21 January 2014

Homicide—first-degree murder—failure to instruct on affirmative defense—accepted medical purpose—new trial

The trial court committed reversible error by failing to instruct the jury on the affirmative defense of "accepted medical purpose" as provided in N.C.G.S. § 14-27.1(4) for the predicate felony on which the jury based its first-degree murder conviction. Defendant was entitled to a new trial.

Judge STEPHENS concurring in separate opinion.

Judge BRYANT dissenting in separate opinion.

Appeal by Defendant from judgment entered 13 September 2011 by Judge W. Osmond Smith III, in Wake County Superior Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton and Sherri Horner Lawrence, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant.

DILLON, Judge.

Joshua Andrew Stepp (Defendant) appeals from a judgment sentencing him to lifetime imprisonment, based on a jury verdict finding him guilty of first-degree murder, under the felony murder rule, for the death of his ten-month old stepdaughter Cathy.[1] We conclude Defendant is entitled to a new trial based on the trial court's failure to instruct the jury on an affirmative defense to the underlying felony, which supported the first-degree murder conviction.

I: Background

On the night of 8 November 2009 at approximately 8:50 P.M., Defendant placed a 911 call from his Wake County apartment, where he resided with three other people: Brittany Yarley ("Ms. Yarley"), his wife of six months; Cathy, Ms. Yarley's ten-month old daughter; and Defendant's four-year old daughter.

A: Physical Evidence at the Scene

Police officers and EMS responded to Defendant's 911 call and discovered that Cathy had no pulse and was not breathing. The responders attempted resuscitation and were able to get a pulse in the ambulance before Cathy went into cardiac arrest. When Cathy arrived at Wake Medical Center, she had no vital signs. Cathy's pupils were fixed and dilated, indicating brain death; Cathy was declared dead fifteen minutes after her arrival.

In a trash can at the apartment the officers found a urine-soaked diaper, three diapers containing baby wipes, feces, and blood, and empty rum, whiskey, and beer bottles. Blood and feces were visible in a number of locations throughout the apartment. Blood was also found on Defendant's underwear. Defendant smelled of alcohol.

B: Cathy's Injuries

During the course of the evening, Cathy sustained injuries to her head and back as well as to her rectal and genital areas. Her head and back injuries included several bruises, a broad abrasion on her forehead, lacerations in her mouth, and hemorrhaging in her brain and retinas. Cathy's rectal injuries included bruising and several deep and superficial tears in and around her anal opening.

The injuries to her genital area, which were less severe than those in her rectal area, included two superficial tears on the forward portion

1. Cathy is a pseudonym.

and a single wider tear at the rear portion. However, there was no evidence of injuries indicating deep penetration; and her hymen was intact.

II: The Trial

On 30 November 2009, Defendant was indicted on charges of first-degree murder and first-degree sexual offense. The matter came on for trial at the 18 July 2011 criminal session of Wake County Superior Court.

A: State's Evidence

At trial, the State offered the testimonies of a number of medical witnesses, which tended to show as follows: Cathy's head injuries were likely caused by multiple blows which were consistent with non-accidental trauma "caused by an abusive person." Her rectal injuries were consistent with the introduction of a penis or other object that penetrated the anus but most likely *not* by a single finger wrapped in a wipe. Her genital injuries may have been caused by a finger or an object, and were also consistent with an adult attempting, unsuccessfully, to insert his penis into her vagina.

B: Defense Evidence

Defendant testified in his own behalf and offered the testimonies of other witnesses, including experts, which tended to show as follows: Defendant was a member of the Army Reserves, having resigned from active duty after completing a tour in Iraq. He suffered from post-traumatic stress disorder and alcohol dependency. Ms. Yarley was also an Army reservist, who worked at Fort Bragg.

During the day of 8 November 2009, Defendant took four Vicodin capsules and drank several shots of liquor and cans of beer. He spent the afternoon at a sports bar where he continued drinking. Because Ms. Yarley was scheduled to work the night shift on that day, Defendant returned to the apartment at 7:25 P.M. to watch the children for the evening. Upon his return, Cathy was crying and screaming; and Ms. Yarley noticed that Defendant was lethargic and stumbling.

After Ms. Yarley's departure, Defendant ate dinner and then attempted to calm Cathy down by holding her and giving her a bottle. He then placed Cathy on the floor of his bedroom closet and walked away to escape the sound of her crying. Defendant returned to her, grabbed her by the back of the head, and rubbed her face into the carpet. Cathy's face became raw and began to bleed, and she cried even harder. Defendant used a damp washcloth to dab the blood and then carried Cathy into the living room, put Vaseline on her face, and laid her down on the living

room floor. This episode occurred at approximately 8:00 P.M., which was the time that, according to a defense witness, Defendant's blood alcohol level likely peaked at 0.141%.

Moments later, Defendant opened Cathy's diaper and discovered that it was full of feces. Cathy flailed and screamed as Defendant tried to clean her with a baby wipe. Defendant wiped aggressively to get the feces and urine off of Cathy's body. Cathy began bleeding from her anus, and Defendant tried to stop the bleeding with a baby wipe. A few minutes later, Cathy was still bleeding and had defecated again. Defendant cleaned Cathy again with a baby wipe and put on a second fresh diaper. However, the second diaper became soiled, and Defendant cleaned and changed Cathy a third time.

Cathy continued to scream and cry. Defendant then grabbed some toilet paper, wet it, and put it in Cathy's mouth in an attempt to stop the screaming. However, Cathy started gagging. Defendant was unable to retrieve the toilet paper from Cathy's mouth with his fingers; so he picked Cathy up, shook her, and hit her on her back to try to dislodge the toilet paper. He was then able to pull the toilet paper out of Cathy's mouth with his fingers; however, by this time, Cathy was barely breathing. Moments later, Cathy stopped breathing, whereupon Defendant made the 911 call.

The testimonies of Defendant's witnesses tended to show that Defendant suffered from substance abuse issues and post-traumatic stress disorder caused by his military service, conditions which affected his impulse control and decision making; that on the evening in question, he had trouble coping with Cathy's crying; and that his intentions all along were to stop Cathy from crying. Regarding Cathy's injuries, one defense medical witness testified that he had frequently seen vaginal and rectal tears caused by parents using force to clean feces, and that Cathy's injuries to her rectal and genital areas were consistent with harsh cleaning with a finger and baby wipes and were *not* consistent with a sexual assault.

C: Closing Arguments

During closing arguments, the State asserted that the jury should find Defendant guilty of first-degree murder. The State contended that Defendant's acts involved premeditation and deliberation. Alternatively, the State contended that Defendant was guilty of first-degree murder based on the felony murder rule, as the evidence showed that Defendant had either raped or attempted to rape Cathy, or otherwise committed a sexual offense upon Cathy.

Defendant admitted that he was responsible for Cathy's death, but contended that he had not acted with premeditation and deliberation due to his condition, nor had he sexually assaulted Cathy in any way; and, therefore, Defendant asserted the jury should consider returning a guilty verdict for second degree murder.

D: The Verdict and Judgment

The jury found Defendant guilty of first-degree murder. Specifically, the verdict sheet submitted to and answered by the jury stated as follows:

> We, the jury, return as our unanimous verdict that the defendant is:
>
> _X_ Guilty of first degree murder
>
> If you find the defendant guilty of first degree murder, is it:
>
> A. On the basis of malice, premeditation, and deliberation?
>
> ANSWER: NO
>
> B. Under the first degree felony murder rule in the perpetration of rape of a child by an adult?
>
> ANSWER: NO
>
> C. Under the first degree felony murder rule in the attempted perpetration of rape of a child by an adult?
>
> ANSWER: NO
>
> D. Under the first degree felony murder rule in the perpetration of sexual offense with a child by an adult?
>
> ANSWER: YES
>
> If you find the defendant guilty of first degree murder under the first degree felony murder rule in the perpetration of a sexual offense with a child by an adult, is it:
>
> 1. Based upon a sexual act of anal intercourse?
>
> ANSWER: NO
>
> 2. Based upon a sexual act of penetrating by an object into the genital opening of the alleged victim?
>
> ANSWER: YES

3. Based upon a sexual act of penetration by an object into the anal opening of the alleged victim?

ANSWER: NO

__ Guilty of second degree murder[2]

__ Not guilty

Based on the jury's verdict, the trial court imposed a sentence of life imprisonment without parole. From this judgment, Defendant appeals.

III: Analysis

In Defendant's sole argument on appeal, he contends the trial court committed reversible error by failing to instruct the jury on an affirmative defense to the predicate felony on which the jury based its first-degree murder conviction. We agree.

As reflected by its responses to the issues presented on the verdict sheet, the jury convicted Defendant of first-degree murder based *solely* on its determination that Defendant was also guilty of committing a "sexual offense with a child" in violation of N.C. Gen. Stat. § 14-27.4 (2011), a Class B1 felony which proscribes, *inter alia*, the engagement of a "sexual act" with a child by an adult. Further, the jury concluded that Defendant was guilty of committing this offense based *solely* on its determination that Defendant had committed a "sexual act," as defined in N.C. Gen. Stat. § 14-27.1(4) (2011), upon Cathy by penetrating her *genital* opening with an object.[3]

N.C. Gen. Stat. § 14-27.1(4) (2011), defines "sexual act," in relevant part, as:

> . . . the penetration, however slight, by any object into the genital . . . opening of another person's body: provided,

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2. Having convicted Defendant of first-degree murder, the jury did not reach the question of Defendant's guilt of second degree murder.

3. Though the jury could have found Defendant guilty of first-degree murder based on either premeditation and deliberation *or* based on a finding that Defendant *either* had vaginal intercourse or attempted to have vaginal intercourse with Cathy, the jury found Defendant *not guilty* based on these theories. Further, the jury could have found that Defendant committed a "sexual act" by penetrating Cathy's *anal* opening with either his penis or another object; however, the jury found Defendant *not guilty* of felony sexual offense based on these theories as well. Accordingly, our review *must* be limited to the evidence regarding the penetration of Cathy's *genital* opening with an object, and, for the reasons stated herein, we must view this evidence in the light most favorable to Defendant.

> that *it shall be an affirmative defense that the penetration was for accepted medical purposes.*

Id. (emphasis added). The "penetration" of the female "genital opening" is accomplished when the defendant has caused an object to enter the labia without entering the vagina, *see State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 384 (2006); and an "object" can be, not only an inanimate object, but also a human body part, such as a finger, *see State v. Lucas*, 302 N.C. 342, 345, 275 S.E.2d 433, 436 (1981).

At trial, Defendant admitted that he penetrated Cathy's genital opening with his finger; however, he requested an instruction on the affirmative defense provided by N.C. Gen. Stat. § 14-27.1(4), that he penetrated her genital opening for "accepted medical purposes." Defendant based his request on the evidence tending to show that he penetrated Cathy's genital opening with his finger wrapped in a wipe for the purpose of cleaning feces and urine during the course of changing her diapers and that this purpose is an "accepted medical purpose." However, the trial court denied the request, to which Defendant properly excepted.

A: Defendant was Entitled to the Instruction

We believe that Defendant was entitled to have the jury instructed on the affirmative defense for "accepted medical purpose" as provided in N.C. Gen. Stat. § 14-27.1(4).

We have held that "[f]or a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when 'the evidence [is] viewed in the light most favorable to the defendant." *State v. Hudgins*, 167 N.C. App. 705, 711, 606 S.E.2d 443, 446 (2005) (citation and quotation marks omitted). The burden rests with Defendant to establish the affirmative defense. *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975) (describing an affirmative defense as "one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * * ").

In his brief, Defendant points to evidence that, when viewed in the light most favorable to him, supports giving the instruction. Specifically, he points to his own testimony that he digitally penetrated Cathy's genital opening for the purpose of cleaning feces and urine during diaper changes. He points to the testimony of his medical expert who stated that Cathy's injuries to her genital opening were consistent with Defendant's stated purpose. For example, this witness testified as follows:

> The source of the [genital] injuries were – again, by the information that I was provided, Mr. Stepp in his testimony has admitted to trying to clean a poopy diaper in a very rough way using wipes, his fingers, and in a way that was consistent with this type of trauma. This was harsh, harsh physical trauma in cleaning out a diaper. I have seen more cases than I would like of parents trying to clean out poopy diapers and how difficult it is to get stool out of the vaginal and rectal areas on occasion, and the kind of force that they have to use sometimes. This was excessive, but it is consistent with a digital attack, if you will, on those areas there.

He points to the evidence presented by the State regarding the soiled diapers and wipes found by the police at the apartment. He points to the testimonies of the State medical experts that the injuries to the genital opening were more superficial in nature – in that there was no evidence of deep penetration or that the hymen was broken - and could have been caused by fingers.

Neither party cites to a case in which a North Carolina court has construed the phrase "accepted medical purposes" as contained in N.C. Gen. Stat. § 14-27.1(4). We believe that when the Legislature defined "sexual act" as the penetration of a genital opening with an object, it provided the "accepted medical purposes" defense, in part, to shield a parent[4] — or another charged with the caretaking of an infant — from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning feces and urine from the genital opening with a wipe during a diaper change. To hold otherwise would create the absurd result that a parent could not penetrate the labia of his infant daughter to clean away feces and urine or to apply cream to treat a diaper rash without committing a Class B1 felony, a consequence that we do not believe the Legislature intended.

Though not controlling on our resolution of this issue, we do find decisions from other jurisdictions, involving statutory language similar to "accepted medical purposes," instructive. For instance, the Texas Court of Criminal Appeals, that State's highest appellate court for criminal cases, handed down a decision on 6 November 2013 ordering a new trial for a defendant, convicted of sexual assaulting a child – where he admitted to digitally penetrating the genital opening of a three-year old

4. There is no language in N.C. Gen. Stat. § 14-27.1(4) which limits its application of the defense to acts performed by medical professionals.

girl for the purpose of applying medication for a diaper rash - because the trial court failed to instruct the jury on an affirmative defense provided in the Texas Penal Code, excusing "conduct [which] consisted of medical care for the child[.]" *Villa v. Texas*, 2013 Tex. Crim. App. LEXIS 1655 (2013) (interpreting Tex. Penal Code § 22.011(d) (2012)). On the same day it decided *Villa*, the Texas Court of Criminal Appeals also handed down *Cornet v. Texas*, 2013 Tex. Crim. App. LEXIS 1654 (2013), in which it held, as in *Villa*, that it was error not to instruct on the "medical care" defense, where a defendant was convicted of sexual assault based on digitally penetrating the genital opening of his step-daughter. However, unlike its holding in *Villa*, the court concluded that the error was harmless because the jury in *Cornet* also convicted the defendant of a second sexual assault count based on the defendant's oral contact with the child's anus during the same event.[5] *Id.* (reasoning that it "is inconceivable that the jury would have found [the defendant] guilty of causing the anus of the complainant to contact his mouth . . . had it believed his claim that he was providing medical care to the complainant [when he digitally penetrated her genital opening] during the same event").

In a case involving the prosecution of a defendant for digitally penetrating the genital opening of his young step-child — where the defendant admitted to the conduct, but contended that he did so for the purpose of applying salve to treat the child's diaper rash — the Oregon Court of Appeals held that it was reversible error for the trial court not to instruct the jury on an affirmative defense provided by statute which excused such conduct where the "penetration is part of a medically recognized treatment[.]" *Oregon v. Ketchum*, 206 Ore. App. 635, 138 P.3d 860, *review denied*, 341 Ore. 450, 143 P.3d 773 (2006) (quoting Or. Rev. Stat. § 163.412 (2003)). The court ordered a new trial, holding that the defense was not limited to the conduct of medical personnel. *Id.*

We believe the facts of our case are similar to the facts of *Villa* and *Ketchum* — where the courts ordered a new trial — because Defendant was convicted *solely* on a finding that he digitally penetrated Cathy's genital opening with an object.

In the present case, the State makes a number of arguments in support of the trial court's refusal to give the "accepted medical purpose" affirmative defense instruction. First, the State argues that Defendant failed to meet his evidentiary burden by failing to produce any evidence

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5. Under Tex. Penal Code § 21.011(d), the "medical care" defense is not available where the conduct involves contact of a genital opening by a defendant's mouth. *Id.*

to establish that penetrating the genital opening of an infant to clean out feces and urine is, in fact, an "accepted medical purpose," *citing State v. Hageman*, 307 N.C. 1, 27, 296 S.E.2d 433, 448 (1982) (stating that "in this State, we have traditionally placed the burden of production and persuasion on defendants who seek to avail themselves of affirmative defenses"). In other words, the State argues that though there was expert testimony suggesting that Defendant penetrated the genital opening to clean it, none of the experts ever expressly testified that Defendant's actions constituted an "accepted medical purpose."

We agree that there may be circumstances where a defendant would be required to offer direct evidence through the testimony of a medical expert to establish that certain conduct constitutes an "accepted medical purpose," rather than allowing a jury to infer it from the evidence. However, we do not believe that Defendant was required, in this instance, to offer direct evidence establishing that penetrating the genital opening of an infant for the purpose of cleaning the feces and urine during a diaper change constitutes an "accepted medical purpose." Our appellate courts have held on a number of occasions that, in the context of a criminal trial, direct evidence need not be provided to prove a fact if it otherwise is within the "common knowledge and experience" of the jury. *State v. Packer*, 80 N.C. 439, 441-42 (1879). In *Packer*, the defendant appealed his conviction for selling an "intoxicating liquor" where the evidence showed that he sold "port wine," but the State did not produce evidence that "port wine" was, in fact, an "intoxicating liquor." *Id.* In upholding the conviction, our Supreme Court held that "the jury could rightfully as to matters of common knowledge and experience, find without any testimony as to [whether "port wine" is an "intoxicating liquor."] *Id.*; *see also State v. Fields*, 201 N.C. 110, 114, 159 S.E. 11, 12 (1931); *State v. Payne*, 328 N.C. 377, 400, 402 S.E.2d 582, 595 (1991) (stating, in a prosecution for murder and rape, that "[i]t is common knowledge that homeowners do not change or replace carpets as frequently as once every several months"); *State v. Becker*, 241 N.C. 321, 326, 85 S.E.2d 327, 331 (1954) (stating, in a prosecution for manslaughter where there was testimony as to the defendant's driving speed and his distance from the victim, that "[i]t would seem as a matter of common knowledge and experience that it would have been a physical impossibility for the defendant to have stopped his car in so short a distance if at the time in question it was traveling at such a rate of speed"); *State v. Purdie*, 93 N.C. App. 269, 280, 377 S.E.2d 789, 795 (1989) (stating, in a prosecution for involuntary manslaughter, that "it is common knowledge that intoxication impairs the ability to drive").

We also believe this evidentiary issue is similar to those in cases involving professional malpractice, where we have stated that an exception to the rule requiring expert testimony to establish the professional standard of care is "where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care." *Russell v. DENR*, __ N.C. App. __, __, 742 S.E.2d 329, 333 (2013) (quoting *Handex v. Haywood*, 168 N.C. App. 1, 11, 607 S.E.2d 25, 31 (2005)). In conclusion, while there may be circumstances where expert testimony *may* be required to establish that certain conduct constitutes an "accepted medical purpose" pursuant to N.C. Gen. Stat. § 14-27.1(4), we believe that it is within the common knowledge and experience of the jury that penetrating the genital opening of an infant to clean feces and urine during a diaper change is an "accepted medical purpose."

The State next argues that the "accepted medical purpose" defense did not apply to the facts of this particular case. Specifically, the State contends that even if Defendant's *purpose* of cleaning the genital opening was an "accepted medical purpose," doing so *in a manner that causes injury* is not "accepted," and, therefore, Defendant was not entitled to the instruction. We believe the State's argument is misplaced. First, the plain language of the statute provides that the "medical purpose," and *not the manner*, must be "accepted." We do not believe that the Legislature intended to criminalize, as a Class B1 felony, an action by a doctor or a parent who penetrates a genital opening of a child under 13 years of age for an "accepted medical purpose," but does so in a negligent manner, thereby unintentionally causing injuries.[6]

The State further argues the following:

> By defendant's logic, a robber sticking a gun in a victim's vagina or anus to intimidate the victim would not be a sexual offense; torture by inserting objects into a person's genitals or anus would not be a sexual offense; a perpetrator forcefully punching and penetrating a victim's genitalia to harm and degrade them would not be guilty of a sexual offense; a caretaker forcefully penetrating a child in a rage would not be guilty of a sexual offense. By defendant's analysis, if in any of these scenarios, the

6. We do not imply that the evidence conclusively establishes that Defendant did not intend to cause the injuries to Cathy's genital opening. This is a matter for a jury to resolve. Rather, we believe that a jury *could* reasonably conclude from the evidence - when taken in the light most favorable to Defendant – that Defendant unintentionally caused Cathy's injuries to her genital opening while cleaning her.

> perpetrator merely claimed to be doing a medical check or administering medication, the "accepted medical purpose" instruction must be given upon request.

However, assuming *arguendo* any of the foregoing scenarios were properly before us, it stretches credulity to propose that these acts could ever be performed for an "accepted medical purpose." Further, as discussed above, the evidence relied upon by Defendant in this case consists of more than his self-serving assertion that he penetrated Cathy's genital opening to clean feces. *See State v. Sessoms*, __ N.C. App. __, __, 741 S.E.2d 449, 452 (2013) (holding that the trial court did not commit error by refusing to instruct the jury on "the defense of others" in the prosecution for assault with a deadly weapon where the only evidence supporting the defense was the defendant's self-serving testimony).

Finally, the State argues that the trial court did not err by refusing to instruct the jury on the "accepted medical purpose" defense because the specific instruction tendered by Defendant for the trial court's consideration was an incorrect statement of law. Specifically, the State argues that the "proposed instruction can be construed to incorrectly place the burden on the State to disprove the affirmative defense beyond a reasonable doubt." We believe this argument is misplaced.

Our Supreme Court has stated that "it is the duty of the trial court to instruct the jury on all of the substantive features of a case. . . . All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988). This duty arises even where a defendant fails to request the instruction. *Id.; see also State v. Scanlon*, 176 N.C. App. 410, 424, 626 S.E.2d 770, 780 (2006). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

In this case, the "accepted medical purpose" defense is a "substantive feature" of this case; and, therefore, the trial court was required to give the instruction even if Defendant never made a request for the instruction. We believe that *State v. Hudgins*, 167 N.C. App. 705, 606 S.E.2d 443 (2005), is instructive on this point. In *Hudgins*, the defendant requested an instruction on the defense of "necessity" in a DWI prosecution. The Court stated the general rule that the defense of "necessity" is available to excuse a person from criminal liability where he acts "to protect life or limb or health[.]" *Id.* at 710, 606 S.E.2d at 447. The defendant provided the trial court with an instruction that was not a correct

statement of the law in that "it [further] suggested that the defense was available for attempts to [protect property from] damage." *Id.* We held that "[a] trial court is not, however, 'relieved of his duty to give a correct . . . instruction [as to a defense], there being evidence to support it, merely because defendant's request was not altogether correct." *Id.* (quoting *State v. White*, 288 N.C. 44, 48, 215 S.E.2d 557, 560 (1975)). Accordingly, we do not need to reach whether Defendant's tendered instruction was a correct statement of the law: Since the instruction pertained to a substantive feature of the case, the trial court was required to give it.

B: The Error Was Reversible

Having determined that the trial court erred by failing to instruct the jury on the affirmative defense of "accepted medical purpose," we must determine whether the error is reversible pursuant to N.C. Gen. Stat. § 15A-1443 (2011). Defendant argues that the error is a constitutional error and, therefore, the burden is on the State to show that the error was harmless beyond a reasonable doubt, pursuant to N.C. Gen. Stat. § 15A-1443(b). We believe that "insofar as the error committed is not one of constitutional dimension, [D]efendant has met his burden of satisfying us that had the error in the instruction . . . not been made, there is a reasonable possibility that a different result would have been obtained at trial[,]" pursuant to N.C. Gen. Stat. § 15A-1443(a). *State v. Mash*, 323 N.C. 339, 349-50, 372 S.E.2d 532, 538-39 (1988). Further, "[i]nsofar as the error is one of constitutional dimension, the [S]tate has not satisfied us beyond a reasonable doubt that the error was harmless." *Id.* at 350, 372 S.E.2d at 539. Accordingly, we believe that the error is reversible based on either standard.

Specifically, Defendant admitted to penetrating and causing the superficial tears to Cathy's genital opening. In other words, his defense includes an admission to the elements of the crime of sexual conduct with a child, that is, he admitted that he digitally penetrated Cathy's genital opening. However, Defendant presented evidence that he committed these acts for the purpose of cleaning feces and urine away from Cathy while changing her diapers.

In the State's closing arguments, the prosecutor contended that "even under the defendant's version of the facts, penetrated her with his finger, however slight, ... That's what a sexual act is, the defendant's guilty of that charge." In other words, the prosecutor implied that the jury could convict Defendant of felony sexual offense based upon his digital penetration of Cathy's genital opening – conduct to which Defendant admitted – even if the jury believed Defendant's testimony and evidence

that he engaged in the conduct for the purpose of cleaning feces and urine. Furthermore, the trial court instructed the jury that it was their duty to return a verdict of guilty of committing a sexual offense with a child if they found that Defendant had caused the "penetration, however slight, . . . by an object into [Cathy's] genital [] opening[;] that the "object may be an animate or an inanimate object[;] that Cathy was "a child of under the age of 13 years[;]" and that Defendant was "at least 18 years of age." The jury was not given any option in the instruction to, otherwise, find Defendant not guilty even if they determined that Defendant engaged in the conduct for an "accepted medical purpose." Based on the foregoing, we believe that there is a possibility that the jury, or some number of jurors, would have been satisfied that Defendant penetrated Cathy's genital opening for an "accepted medical purpose." Therefore, Defendant's conviction of felony first-degree murder must be reversed.

Finally, the State contends that "[i]f this Court allows [Defendant] relief, judgment should be entered on second-degree murder as a lesser-included offense of first-degree murder under both the theory of premeditation and deliberation and felony murder," contending that "[s]econd-degree murder is a lesser included offense of felony murder." The State's argument based on the theory of premeditation and deliberation is inapposite, as the jury did not convict Defendant based on premeditation and deliberation. As to the State's argument that second degree murder is a lesser included offense of felony murder, neither case cited by the State stands for the proposition that the proper remedy from this Court, where we find reversible error in the conviction of felony first-degree murder, is to direct the trial court to enter judgment on second degree murder. *State v. Gwynn*, 362 N.C. 334, 338, 661 S.E.2d 706, 708 (2008); *State v. Millsaps*, 356 N.C. 556, 565, 572 S.E.2d 767, 774 (2002). Rather, *Gwynn* and *Millsaps* were concerned with the trial court's failure to instruct a jury on the lesser-included offense of second degree murder in a prosecution of felony first-degree murder. We note that, in *Gwynn*, the Supreme Court stated that voluntary manslaughter is also a lesser included offense of felony murder. *Gwynn*, *supra*. Therefore, we do not believe that it is the duty of this Court to invade the province of a jury to determine whether the actions of Defendant constituted second degree murder or some other lesser-included offense of felony murder.

IV: Conclusion

Defendant inflicted numerous and severe injuries on his ten-month old stepdaughter Cathy on the evening of 8 November 2009, which led to her tragic death. There was substantial evidence presented at trial from which the jury could have convicted Defendant of first-degree murder

based on a number of theories. However, the jury based its verdict *solely* on the finding that Defendant had penetrated Cathy's genital opening with an object prior to inflicting the injuries that caused her death. The evidence was conflicting as to whether Defendant penetrated Cathy's genital opening for the sole purpose of cleaning feces and urine while changing her diapers or whether he ever deviated from this purpose. However, a jury could infer from the evidence - when taken in the light most favorable to Defendant - that Defendant penetrated Cathy's genital opening, causing superficial tears thereto, while he was cleaning the feces and urine. Therefore, Defendant was entitled to the "accepted medical purpose" instruction pursuant to N.C. Gen. Stat. § 14-27.1(4), a defense which was a substantive feature of the case, notwithstanding that a proposed instruction tendered by Defendant may have contained an incorrect statement of the law. Defendant properly objected to the trial court's refusal to give the instruction. Given that Defendant admitted to the conduct which formed the sole basis by which the jury returned a guilty verdict of first-degree murder, the trial court's error by not giving the affirmative defense instruction by which the jury could have excused Defendant of his admitted conduct, we believe the error was prejudicial. Accordingly, we are compelled to reverse the verdict of the jury convicting Defendant of felony first-degree murder and remand this case for a new trial.

NEW TRIAL.

STEPHENS, Judge, concurring.

I am constrained by statute, case law, and the evidence presented at trial to agree with the majority opinion that we must grant Defendant a new trial. However, I write separately because I believe the result we are compelled to reach in this appeal is not what our General Assembly envisioned or intended when it provided the affirmative defense of penetration for an "accepted medical purpose[]" under section 14-27.1. *See* N.C. Gen. Stat. § 14-27.1 (2011) (defining "[s]exual act" to include "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").

I believe that, in the context of *sexual abuse* prosecutions, our legislature intended this affirmative defense to distinguish between necessary penetrations required by medical, hygiene, or other health needs from those which are criminal in nature. I *cannot* believe that our legislators intended this affirmative defense be used as a shield by a

drunken, drugged, and enraged Defendant who *by his own admission* (1) rubs a baby's face into carpet until she bleeds from second-degree rug burns, (2) bruises her face and head in multiple locations, and then (3) attempts to "clean" her genital and anal regions with such violence that her rectum and vagina are left torn and bleeding (all before asphyxiating the helpless infant by shoving wet toilet paper into her mouth in an effort to silence her hysterical screams of pain). I would draw our General Assembly's attention to the discussion in the majority opinion regarding the distinction between penetration for an accepted medical *purpose* and penetration which occurs for such a purpose in a medically accepted *manner*. Surely it should be a criminal offense, even if not sexual abuse, to penetrate a baby's vagina, even in an alleged attempt to clean feces away, if that action is undertaken in a drunken rage and results in injuries such as those Cathy suffered in the last moments of her brief life.

I further note the State could have elected to charge Defendant with felony child abuse, as the predicate felony to his first-degree murder charge, pursuant to various provisions of N.C. Gen. Stat. § 14-318.4:

> (a) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony . . . .
>
> . . .
>
> (a3) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony.
>
> (a4) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

> (a5) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class H felony if the act or omission results in serious physical injury to the child.
>
> . . .
>
> (d) The following definitions apply in this section:
>
> (1) Serious bodily injury. — Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.
>
> (2) Serious physical injury. — Physical injury that causes great pain and suffering. The term includes serious mental injury.

N.C. Gen. Stat. § 14-318.4 (2011). As noted *supra*, Defendant admitted that his actions caused second-degree rug burns to Cathy's face and deep tears to her anus. These injuries would surely qualify, at a minimum, as "serious physical injur[ies]" under the statute. Likewise, Defendant's actions were plainly willful. I cannot understand the decision by the State to proceed against Defendant on charges for sexual offense felonies without also charging him with felony child abuse, an offense for which Defendant's shocking claim of "diaper changing" would have provided little or no defense.

BRYANT, Judge, dissenting.

The majority opinion holds that the trial court erred and grants defendant a new trial, stating that defendant is entitled to an affirmative defense instruction based upon evidence showing that defendant's actions were for an "accepted medical purpose." Because I do not believe there was sufficient evidence that defendant's actions fell within the definition of accepted medical purpose, I do not believe defendant was entitled to an instruction on this affirmative defense; therefore, I respectfully dissent.

The majority maintains that it is a matter of common knowledge and common sense that cleaning feces from a body is an act performed

for an accepted medical purpose. I would agree that cleaning feces is necessary for purposes of good hygiene (as is washing one's hands and body, and cleaning one's teeth), and that failure to clean feces could eventually result in an infection or condition which might require medical attention. But, I would not agree that, standing alone, defendant's act of cleaning feces from the infant should be considered an act that was performed for an accepted medical purpose.

"Medical" means "[o]f or relating to the study or practice of medicine." AMERICAN HERITAGE COLLEGE DICTIONARY 846 (3d ed. 1993). "Accepted" means "[w]idely encountered, used, or recognized." *Id.* at 8. General Statutes, section 14-27.1, defining "sexual act," provides an affirmative defense for penetration of the genital or anal opening of a person where the act is done for an accepted medical purpose. N.C. Gen. Stat. § 14-27.1(4).

A common sense reading of General Statutes, section 14-27.1(4), suggests that the affirmative defense of penetration for an accepted medical purpose is available only to a defendant who can show the act was clearly done for a purpose generally approved or accepted by a physician or was done for purposes accepted in the medical field or in the practice of medicine.

In the case before us, no one testified that defendant's actions were carried out for an accepted medical purpose. Neither defendant's medical expert nor any other medical professional testified that cleaning feces from an infant is an act that is recognized as having an accepted medical purpose. Had defendant's medical expert testified that the cleaning was for an accepted medical purpose, we would be in a different posture. However, what we do have is evidence, including defendant's own admission, which supports a finding that defendant's conduct caused the injuries to the infant. There was testimony that vaginal tears may be common place with harsh cleaning and that the penetration of the infant's anus and vagina in an effort to clean off feces was responsible for the injuries inflicted. Yet, none of the evidence supports a finding that such conduct was for an accepted medical purpose.

At trial before the jury, and now before this Court, defendant asks not only that we accept his theory that his actions in causing the injuries to the genital and anal area of the child were not sexual in nature, but that we make the extraordinary leap to determine defendant's actions were conducted for an accepted medical purpose and, thus, within the safe harbor of an affirmative defense. Because I am unable to make such a leap, I do not believe the trial court erred in refusing to give an

instruction on the affirmative defense of penetration for an accepted medical purpose.

The majority cites *Cornet v. Texas*, No. PD-0205-13, 2013 Tex. Crim. App. LEXIS 1654 (Tex. Crim. App. 6 Nov. 2013), and other Texas and Oregon cases[1] as persuasive authority for its reasoning that defendant should have been entitled to the affirmative defense instruction. However, while the language of the statutes[2] involved in those cases is similar in the context of allowing an affirmative defense to an act of penetration, our statute clearly requires that acts of penetration be for accepted medical purposes before allowing the defense. I am not persuaded that the cases interpreting statutes in Texas and Oregon should inform the result of the case before us.

While I would not go so far as to posit that non-medical professionals are not entitled to this defense, I do believe it is necessary to require some direct testimony that the considered conduct is for a medically accepted purpose in order to be entitled to the affirmative defense instruction. To this end, I agree with the language of the dissent in *Cornet v. Texas*, 359 S.W.3d 217 (Tex. Crim. App. 25 Jan. 2012): "[w]hen asserting a 'medical care' defense, the defendant bears the burden of offering some evidence that his conduct was, in fact, a legitimate, accepted medical methodology. Before a trial judge is required to instruct on . . . a defense . . . there must be evidence in the record that raises . . . that defense as a valid, rational alternative to the charge." *Id.* at 229-30 (Cochran, J., dissenting).

Here, the majority states its belief that our legislature provided for the affirmative defense

> in part, to shield a parent or other charged with the caretaking of an infant, from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning

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1. *Villa v. Texas*, No. PD-0792-12, 2013 Tex. Crim. App. LEXIS 1655 (Tex. Crim. App. 6 Nov. 2013), and *Oregon v. Ketchum*, 206 Or. App. 635, 138 P.3d 860 (2006).

2. Tex. Penal Code § 22.011(d) (2012) ("It is a defense to prosecution [for sexual assault of a child] that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party."), as quoted in *Villa*, 2013 Tex. Crim. App. LEXIS, at *12 (emphasis added); Or. Rev. Stat. § 163.412(1) (2003) ("[Neither first nor second degree sexual penetration statute] prohibits a penetration described in either of those sections when: The penetration is part of a medically recognized treatment or diagnostic procedure[.]"), as quoted in *Ketchum*, 206 Or. App. at 637-38, 138 P.3d at 862 (emphasis suppressed).

> feces and urine from the genital opening with a wipe during a diaper change.

This is a most expansive reading of the affirmative defense portion of the statute. I must agree with the concurring opinion that the legislature could not have intended this statute to be used as a shield by a defendant whose attempt to "clean" the child's genital and anal area was performed "with such violence that her rectum and vagina [was] left torn and bleeding."

While I do not agree that defendant is entitled to an affirmative defense instruction on penetration for an accepted medical purpose, I also point out that defendant was not denied the opportunity to put on a defense. Defendant testified that his cleaning feces was the reason for the digital insertion into the child's genital and rectal area. However, defendant did not put forth evidence that his actions were for an accepted medical purpose. There was no testimony from defendant's medical experts or any other witnesses to support an instruction to the jury that the act of cleaning feces from the infant could be considered an act performed for accepted medical purposes. And, a trial court is not required to instruct the jury on an affirmative defense for which there is not sufficient evidence. Perhaps it would be a closer question had defendant's request for this affirmative defense instruction been based on his application of medication to treat a diaper rash or to treat some other medical condition. However, this appeal concerns defendant's actions of wiping feces from a baby, a common, everyday occurrence in the life of a child necessary to maintaining good hygiene, not the treatment of a medical condition.

Therefore, because I do not believe that defendant met his burden of showing that his actions were for an accepted medical purpose, the trial court was not required to instruct on the requested affirmative defense. I would find no error in the trial court's refusal to so instruct.

STATE OF NORTH CAROLINA
v.
JASON RUSSELL WILLIAMS, DEFENDANT

No. COA12-1128

Filed 21 January 2014

1. Pornography—second-degree sexual exploitation of minor—instruction—duplication

The trial court did not err by instructing the jury on second-degree sexual exploitation of a minor. The evidence sufficiently supported an instruction on duplication for all counts because defendant duplicated the images when he downloaded them from the internet and placed them on his computer.

2. Pornography—third-degree sexual exploitation of minor—multiple counts—receiving and possessing—separate harms

The trial court did not err by entering judgment on twenty-five counts of third-degree sexual exploitation of a minor. The Legislature's criminalization of both receiving and possessing such images prevents or limits two separate harms to the victims of child pornography.

3. Constitutional Law—right to public trial—temporary closure of courtroom—presentation of pornographic images

Defendant's constitutional right to a public trial was not violated in a sexual exploitation of a minor case when the trial court closed the courtroom during the presentation of images involving sexual activity. The State advanced an overriding interest that was likely to be prejudiced, the closure of the courtroom was no broader than necessary, the trial court considered reasonable alternatives, and the trial court made findings adequate to support the closure.

4. Evidence—officer testimony—images found on CD—sexual activity—no prejudice

The trial court did not abuse its discretion in a sexual exploitation of a minor case by allowing a detective and a special agent to testify that some of the images found on a CD that defendant gave to his neighbor included minors engaged in sexual activity. Given the jury's opportunity to observe each image and make an individualized determination of the nature of the image coupled with the fact that the image files frequently had titles noting the subject's status

as a minor and the sexual act depicted, defendant could not establish that he was prejudiced.

5. Evidence—prior crimes or bad acts—intent—absence of mistake or accident—no plain error

The trial court did not commit plain error in a sexual exploitation of a minor case by admitting evidence that defendant set up a webcam in his minor neighbor's room, videotaped her dancing in her pajamas, and inappropriately touched her while they were riding four-wheelers. The evidence served to demonstrate defendant's intent to obtain sexual images of minors and showed absence of mistake or accident.

Appeal by defendant from judgments entered 9 May 2011 by Judge Claire V. Hill in Robeson County Superior Court. Heard in the Court of Appeals 9 April 2013.

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

Staples Hughes, *Appellate Defender*, *by David W. Andrews*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Jason Russell Williams ("Defendant") appeals from his convictions for 102 counts of second-degree sexual exploitation of a minor and 25 counts of third-degree sexual exploitation of a minor. On appeal, Defendant asserts that the trial court (1) erroneously instructed the jury on two alternate theories of guilt where one theory was not supported by the evidence in 79 of the 102 counts of second-degree sexual exploitation of a minor; (2) incorrectly entered judgment on 25 counts of third-degree sexual exploitation of a minor despite a lack of intent by the General Assembly to punish criminal defendants for both receiving and possessing the same images; (3) violated his right to a public trial by closing the courtroom for a portion of the trial; (4) improperly admitted lay opinion testimony from law enforcement officers that images on a compact disc depicted minors engaged in sexual activity; and (5) improperly admitted testimony under Rule 404(b) that Defendant placed a webcam in a minor's bedroom, touched her inappropriately, and videotaped her. After careful review, we find no prejudicial error.

Factual Background

The State's evidence tended to establish the following facts: Defendant lived in Robeson County next door to Corey and Tabitha,[1] siblings who were 15 and 16 years old at the time of the underlying events. In April 2002, Corey told his school counselors that Defendant had given him a compact disc ("CD") containing pornographic images. Corey's stepfather viewed the images and determined that, in his opinion, the pictures included images depicting adults engaging in sexual activity and images depicting persons under the age of 18 who were "unclothed." During this same time period, Tabitha informed her stepfather that Defendant had installed a webcam in her bedroom when he came over to work on her computer.

Tabitha and Corey's stepfather called the Robeson County Sheriff's Office, and on 31 May 2002, Detective Howard Branch ("Detective Branch") of the Sheriff's Office came to their home to collect the CD and to inspect and photograph the webcam in Tabitha's bedroom. Detective Branch contacted Special Agent Charles Lee Newcomb ("Special Agent Newcomb") of the State Bureau of Investigation ("SBI") to assist him in opening the files on the CD. Detective Branch testified that after several attempts, Special Agent Newcomb was able to open and view the files, which contained images of both minors and adults engaging in sexual activity.

On 11 July 2002, law enforcement officers executed a warrant to search Defendant's home, and Special Agent Newcomb seized four computer towers from four desktop-style computers. Special Agent Newcomb testified that while the officers were searching Defendant's residence, he spoke to Defendant, and Defendant admitted that there was both adult and child pornography on his computers. Special Agent Newcomb further related that Defendant had admitted attempting to install a webcam in Tabitha's room but had stated that he did not have a receiver for the webcam. During their conversation, Defendant also acknowledged that he gave Corey the CD containing the pornographic images.

Defendant was indicted and charged with 2 counts of disseminating obscene material to a minor under the age of 16, 114 counts of second-degree sexual exploitation of a minor, and 60 counts of third-degree sexual exploitation of a minor. Prior to trial, the State elected not to proceed on 9 counts of second-degree sexual exploitation of a minor and 35 counts

1. "Corey" and "Tabitha" are pseudonyms used to protect the identities of children who were minors at the time of the incidents giving rise to Defendant's convictions.

of third-degree sexual exploitation of a minor. A jury trial was held during the May 2011 Criminal Session of Robeson County Superior Court.

At trial, SBI Special Agent Jonathan Lee Dilday ("Special Agent Dilday") testified regarding each image that formed the basis of a count of sexual exploitation of a minor. Each image was shown to the jury, and Special Agent Dilday testified as to when the file was created, the specific computer(s) on which the file was located, the file's name, and — for some of the images — when the file had last been accessed. Many of the images had file titles that described the specific sexual act portrayed in the image in graphic and explicit terms and labeled the subjects as "underage," "preteens," or "kiddies." By order of the trial court, the courtroom was closed during Special Agent Dilday's testimony — the portion of the trial when the images were presented to the jury. The courtroom was open for every other portion of the trial.

Defendant testified at trial in his own defense. He stated that he repaired computers and removed computer viruses for a living and would often have 20 to 40 different clients at a time. He also testified that he was involved in multi-player computer gaming and would both invite people to his home to play videogames and go to other locations to play videogames and share files. Defendant further stated that he would let friends and other persons come to his home and use his high-speed Internet connection.

At the close of all the evidence, the trial court dismissed the two counts of disseminating obscene material to a minor and three of the counts of second-degree sexual exploitation. The jury returned guilty verdicts on all remaining charges. The trial court sentenced Defendant to five consecutive presumptive-range terms of 13 to 16 months imprisonment. The trial court then suspended three of the sentences and ordered Defendant to be placed on supervised probation for 36 months upon his release from incarceration. The trial court also ordered Defendant to register as a sex offender for 30 years. Defendant gave notice of appeal in open court.

On 7 August 2013, this Court entered an order remanding this matter to the trial court to conduct a hearing and make findings of fact and conclusions of law regarding the temporary closure of the courtroom in accordance with *Waller v. Georgia*, 467 U.S. 39, 48, 81 L.Ed.2d 31, 39 (1984), as interpreted by this Court in *State v. Rollins*, ___ N.C. App. ___, ___, 729 S.E.2d 73, 77-79 (2012). Defendant's appeal was held in abeyance pending this Court's receipt of the trial court's order containing these new findings.

A hearing was held by the trial court on 9 September 2013. On 27 September 2013, the trial court entered an order containing findings of fact and conclusions of law as directed by this Court.

Analysis

I. Jury Instructions

[1] Defendant first argues that the trial court erroneously instructed the jury on second-degree sexual exploitation of a minor. Pursuant to N.C. Gen. Stat. § 14-190.17, a person commits second-degree sexual exploitation of a minor when, knowing the nature or content of the material, he

> (1) Records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or
>
> (2) Distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

N.C. Gen. Stat. § 190.17(a)(1)-(2) (2011).

Here, the trial court instructed the jury on two alternative theories of guilt: (1) exploitation of a minor by *duplicating* material that contained a visual representation of a minor engaged in sexual activity; and (2) exploitation of a minor by *receiving* material that contained a visual representation of a minor engaged in sexual activity. Defendant's specific argument on appeal is that the trial court committed reversible error in its instructions because the duplication theory of guilt was supported by the evidence in only some of the counts.

Defendant correctly notes that "[w]here the trial court instructs on alternative theories, one of which is not supported by the evidence, and it cannot be discerned from the record upon which theory the jury relied in arriving at its verdict, the error entitles the defendant to a new trial." *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994); *see State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) ("resolv[ing] the ambiguity in favor of the defendant" and ordering new trial where one alternate theory of guilt was erroneous and one was properly submitted).

Defendant asserts that he is entitled to a new trial on 79 of the 102 counts of second-degree sexual exploitation of a minor. He contends that the evidence presented at trial was sufficient to support the duplication theory for only the 23 images that were found in two or more

locations on Defendant's computers. Because the remaining 79 images or videos were discovered in only one location, Defendant argues that the duplication theory of guilt was unsupported by the evidence offered by the State for the 79 counts predicated on those images.

At trial, Special Agent Dilday testified regarding the process that occurs when an image is downloaded from a file sharing website or other Internet source. He explained that "when you download something from the [I]nternet, you are making a copy of the file . . . from the location where it is stored on the [I]nternet down to the local machine that you are working on." When further questioned as to whether it was accurate to say that two copies of the downloaded material exist once a download is successfully completed, he replied affirmatively. The State contends that this evidence sufficiently supported an instruction on duplication for *all* counts of second-degree sexual exploitation because Defendant "duplicated the images when he downloaded them from the [I]nternet and placed them on his computer because [he] obtained a copy of the image and the original image remained in its original location."

Whether the act of downloading an image from the Internet constitutes a duplication for purposes of N.C. Gen. Stat. § 14-190.17 appears to be an issue of first impression in North Carolina. The Arizona Court of Appeals, however, addressed this precise question in *State v. Windsor*, 224 Ariz. 103, 227 P.3d 864 (2010). Arizona's sexual exploitation statute is virtually identical to N.C. Gen. Stat. § 14-190.17 and prohibits "[r]ecording, filming, photographing, developing or duplicating" and "[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging" visual depictions of a minor engaging in sexual activity or exploitive exhibitions. A.R.S. § 13-3553(A)(1)-(2) (2009). While we recognize that "decisions from other jurisdictions are, of course, not binding on the courts of this State," we are free to review such decisions for guidance. *State v. Tucker*, ___ N.C. App. ___, ___, n.4, 743 S.E.2d 55, 61, n.4 (2013); *see Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law."), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

In *Windsor*, the defendant argued that evidence of his actions in downloading child pornography from an Internet site was insufficient to support his convictions for sexual exploitation by duplicating visual depictions of minors engaged in sexual conduct. As in the present case, a witness for the State testified in *Windsor* that "downloading involves

using the Internet to copy a file from a remote computer." *Windsor*, 224 Ariz. at 104, 227 P.3d at 865.

In analyzing whether such evidence was sufficient to constitute duplication, the Arizona Court of Appeals looked to other courts' interpretations of the downloading process as well as the plain meanings of the words "download" and "duplicate." *Id.* at 105, 227 P.3d at 866. Noting that the dictionary definition of duplicate is "to make an exact copy of," the court concluded that "one who downloads an image from a remote computer or computer server has duplicated it for purposes of [the sexual exploitation statute]." *Id.* The *Windsor* court also rejected the defendant's argument that downloading an image was only consistent with "receipt or distribution of an existing image," reasoning that the defendant provided no explanation of "how creating an electronic copy of an image is so significantly different from making any other type of duplicate that it should be treated differently under the law." *Id.*

We believe that the Arizona Court of Appeals' analysis of this issue is well-reasoned and equally applicable here. In this case, the evidence presented at trial indicated that the images on Defendant's computers were obtained from the Internet using both a file sharing site and various Internet searches. Special Agent Dilday testified that when an image is downloaded from either a file sharing website or another remote site, the original image remains in its original location and a separate copy is created and stored on the machine being used. As the *Windsor* court noted, the dictionary definition of duplicate is "to make a copy of." Merriam—Webster's Collegiate Dictionary 387 (11th ed. 2003).

It is well established that this Court's principal aim when interpreting statutes "is to effectuate the purpose of the legislature in enacting the statute," *State v. Goodson*, 178 N.C. App. 557, 558, 631 S.E.2d 842, 843 (2006) (citation and quotation marks omitted), and that "[s]tatutory interpretation properly begins with an examination of the plain words of the statute," *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (citation and quotation marks omitted). Based on the evidence presented at trial and the plain meaning of the word "duplicate," we conclude the trial court's instruction on the duplication theory of guilt was proper.

II. Legislative Intent

[2] Defendant also contends that the trial court erred in entering judgment on the 25 counts of third-degree sexual exploitation of a minor because the General Assembly did not intend to punish criminal defendants for both receiving and possessing the same images. We first

note — and Defendant acknowledges — that this Court has already determined that convictions for both second-degree sexual exploitation (based on *receiving* illicit images of minors) and third-degree sexual exploitation (based on *possessing* those same images) do not violate the constitutional prohibition against double jeopardy. *See State v. Anderson*, 194 N.C. App. 292, 298-99, 669 S.E.2d 793, 797-98 (2008), *disc. review denied*, 363 N.C. 130, 675 S.E.2d 659 (2009). In *Anderson*, we determined that — as with receiving and possessing stolen goods — receiving illicit images and possessing those same images are "separate and distinct acts," and, as such, convictions for both do not amount to double jeopardy. *Id.* at 299-300, 669 S.E.2d at 798.

Defendant asserts that because *Anderson* only addressed the issue of double jeopardy, the question of whether the Legislature intended to punish criminal defendants for both receiving and possessing the same sexually explicit images "remains unanswered." By likewise analogizing to the receipt and possession of stolen goods, he contends that the General Assembly's intent in enacting the sexual exploitation statutes "was not to impose multiple punishments on defendants for receiving and possessing the same images, but instead to allow the State an option for prosecuting defendants for possessing the images despite not being able to prove where the images came from or who received them." We disagree.

In *State v. Howell*, 169 N.C. App. 58, 609 S.E.2d 417 (2005), we discussed the legislative intent behind our sexual exploitation statutes.

> Child pornography laws, such as N.C.G.S. § 14-190.17A(a) . . . are designed to prevent the victimization of individual children, and to protect minors from the physiological and psychological injuries resulting from sexual exploitation and abuse. This Court has noted that child pornography poses a particular threat to the child victim because the child's actions are reduced to a recording [and] the pornography may haunt him in future years, long after the original misdeed took place.

Id. at 63, 609 S.E.2d at 420-21 (internal citations and quotation marks omitted).

As such, we believe that the Legislature's criminalization of both receiving and possessing such images was not intended merely "to provide for the State a position to which to recede when it cannot establish the elements of" the greater offense, *State v. Perry*, 305 N.C. 225, 236, 287 S.E.2d 810, 816 (1982) (citation and quotation marks omitted), *overruled*

on other grounds by State v. Mumford, 364 N.C. 394, 699 S.E.2d 911 (2010), but rather to prevent or limit two separate harms to the victims of child pornography. *See Anderson*, 194 N.C. App. at 299, 669 S.E.2d at 798 ("[T]he unlawful receipt . . . is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment.") (citation and quotation marks omitted)); *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 568-69, 351 S.E.2d 305, 320 (1986) ("A child who was posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.") (citation omitted)), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987). We therefore overrule Defendant's argument.

III. Closure of the Courtroom

[3] Defendant next argues that his constitutional right to a public trial was violated when the trial court closed the courtroom during the presentation of the images at issue. We disagree.

The United States Supreme Court has stated the following with respect to a criminal defendant's right to a public trial under the Sixth Amendment to the United States Constitution:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller, 467 U.S. at 46, 81 L.Ed.2d at 38 (citations and quotation marks omitted).

The presumption of an open and public trial, while substantial, is not absolute and can be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 45, 81 L.Ed.2d at 38.

When deciding whether closure of the courtroom during a trial is appropriate, the trial court must: (1) determine whether the party seeking the closure has advanced "an overriding interest that is likely to be prejudiced" if the courtroom was not closed; (2) ensure that the closure

is "no broader than necessary to protect that interest;" (3) "consider reasonable alternatives to closing the proceeding;" and (4) "make findings adequate to support the closure." *Id.* at 48, 81 L.Ed.2d at 39. We review the trial court's decision *de novo*. *See State v. Comeaux*, ___ N.C. App. ___, ___, 741 S.E.2d 346, 349 (2012) (applying *de novo* review to trial court's closure of courtroom), *disc. review denied*, ___ N.C. ___, 739 S.E.2d 853 (2013).

Here, the State made a pretrial motion to close the courtroom while the images at issue were shown to the jury "because of the nature of the images . . . [and] the nature of the testimony as to what may be depicted in the images." The trial court granted the State's motion, stating

> [t]he court will not be closed at any other time[,] and it will be open to anyone except for those witnesses that are on the — these witnesses that I have previously named that are on either the State or the defense witness list. But due to the nature of these charges, due to the nature of the photographs and that it is a criminal offense to disseminate these photographs and in a sense during this trial these photographs will be disseminated; so, the Court grants the motion to close the courtroom only during the time period in which these photographs are being presented during the trial.

The trial court subsequently made the following pertinent supplemental findings in its 27 September 2013 order:

> 5. The Court finds that the State has presented an overriding interest that is likely to be prejudiced if the courtroom is not closed.
>
> 6. The Court finds that there is a problem with the proliferation of child pornography, which is the images of children, that being minors under the age of 18, engaged in sexual activity.
>
> . . .
>
> 8. The Court recognizes that both the North Carolina Legislature and Congress have enacted specific statutes with regards to the proliferation and dissemination of child pornography, to include federal acts such as the Jacob Wetterling Act and the Adam Walsh Act, specifically to stem child pornography by preventing duplication

and discovery in criminal cases, prohibiting copying and allowing the defendant to have access to these images in a secure setting.

9. This case dealt with still images and video images, with audio, of alleged child pornography, children under the age of 18 being involved in sexual activity.

. . .

11. In this trial, there were over 120 counts involving second and third degree sexual exploitation of a minor.

12. The Court finds that there is a compelling interest to stop the distribution and dissemination of child pornography. In this case, it was disseminated to the jurors because they had to make the finding as the triers of fact, and it was up to the jury to make the determination of whether or not the defendant was guilty of second and third degree sexual exploitation of a minor.

13. The Court also recognizes the North Carolina Court of Appeals opinion *Cinema I*, 83 N.C. App. 544 (1986), and *Ferber v. New York*, that pornography is a greater threat to the victim than just the images themselves because the actions are reduced to recordings and photographs that can haunt them for years and be circulated for years.

14. The Court finds that the mere fact that the child in the video is not present in court does not obviate the State's interest to prevent continued dissemination.

15. As to the second prong of the Waller test, the Court finds that the closure of the courtroom was no broader than necessary.

16. The Court closed the courtroom during the testimony of Special Agent Dilday from the State Bureau of Investigation.

17. The Court notes that there was no media present and there were no requests by media for any access to the courtroom. Specifically, the Court recalls that there were two individuals in the courtroom at the time that the courtroom was closed and that there was a sequestration order in effect for both the State and the defense at the time.

18. The Court finds that the still images were numerous and that it would not have been judicially efficient and economical to require the State to copy all still images, one set of photographs for each of the 13 jurors and to have to view those individually. It was more judicially efficient and economical to present those images through the ELMO [projector] on the television monitor; that based on the logistics of this courtroom, the electrical outlets, that the position of the television at the time, the monitor with the ELMO on the prosecutor's table, and the computer on the prosecutor's table, that this was a reasonable placement of the monitor for all the jurors to see and that the TV was in the most centrally located position for all the jurors to be able to see and/or hear.

19. The closure did not occur until the State was ready to present these images and videos to the jury, and the Court reopened the courtroom as soon as the testimony with regards to these images and videos concluded. That the courtroom was closed for a few hours, and it was not closed at any other time during the trial of this matter. Further, the courtroom was closed temporarily for the limited purpose of publishing the still photographs through the ELMO and the videos with sound, with the sexually descriptive titles to the jury through the testimony of Special Agent Dilday. The Court does find that the defense, Mr. Davis, requested his investigator to remain in the courtroom, and the court allowed that request. Further, the Court finds that defendant's attorney, Mr. Davis, was allowed to relocate so that he would be able to view the images as they were being presented to the jury.

20. As to the third prong of the *Waller* test, the Court finds that, based on the logistics of the courtroom, that there were no other reasonable alternatives to closing the courtroom.

21. The Court finds that the State did have the television monitor on a cart, utilized it along with the ELMO and a laptop computer at the prosecutor's table. All of those had to be in close proximity to each other, not just because of the cord into the electrical outlet, but also the cords linking them up together so that these images could be presented

to the jury so that they could make their necessary findings with regard to the nature of the images and videos to determine the guilt or innocence of the defendant.

22. The Court also notes that the videos had audio, which even though the statute specifically does not discuss as it relates to detailed images being disseminated, the Court finds that the audio is a part of the video in the dissemination of the child pornography, and that if the spectators had been allowed to remain, they would have also heard the audio, which is a direct part of the video.

23. The Court does find that there were over 100 images presented to the jury, and that the position of the television was the best position for all jurors to have the best ability to see and/or hear the evidence as it was being presented.

24. The Court also notes that some of the videos were smaller in size and did not take up the whole screen of the television, so if the television had been positioned further away, as proposed by the defense, it would have been harder for jurors in seats 1 and 8 to have seen that video.

25. The Court notes that the State has limited resources and sometimes doesn't always have the necessary equipment within which to comply with other alternatives.

26. The Court finds that the location of the television was the most reasonable and logical to present the images and the videos to the jury.

27. The Court finds that all of the elements, pursuant to *Waller v. Georgia* have been met to support closure of the courtroom during the presentation of the still images and videos depicting child pornography, that being children under the age of 18 engaged in sexual activity.

Based on its findings of fact, the trial court made the following conclusions of law:

1. The State advanced an overriding interest that is likely to be prejudiced if the courtroom is not closed;

2. The closure in this case was no broader than necessary to protect the State's interest;

> 3 The Court considered and found there were no other reasonable alternatives to closing the courtroom; and
>
> 4. The closure of the courtroom during the publication of the still images and videos with audio complied with the test set forth in *Waller v. Georgia*.

Defendant challenges findings 18 and 21-26 of the trial court's supplemental findings of fact. He first argues that findings 21 and 25 — which address the logistics of the audiovisual equipment and the State's limited resources — are not supported by competent evidence because they were based solely upon the prosecutor's arguments at the 9 September 2013 hearing.

As explained above, we remanded this matter to the trial court so that it could evaluate the propriety of the temporary closure by applying the four-part *Waller* test and making the requisite findings. In so doing, the trial court essentially reheard on 9 September 2013 the State's pretrial motion to close the courtroom. During the 9 September 2013 hearing, both the prosecution and defense counsel made arguments on their respective positions as to whether the temporary closure was proper.

While Defendant is correct that arguments of counsel are generally not considered substantive evidence, *see State v. Tuck*, 191 N.C. App. 768, 775, 664 S.E.2d 27, 31 (2008) (holding that prosecutor's statements were not evidence and could not support restitution order), this Court has held that in certain pretrial motions, "evidence at the hearing may consist of oral statements by the attorneys in open court in support and in opposition to the motion . . . ." *State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 656 (1996); *see State v. Pippin*, 72 N.C. App. 387, 397-98, 324 S.E.2d 900, 907 (upholding trial court's findings regarding defendant's speedy trial claim that were based on counsel's statements), *disc. review denied*, 313 N.C. 609, 330 S.E.3d 615 (1985).

In *Pippin*, we noted that the Official Commentary to N.C. Gen. Stat. § 15A-952, a statute addressing pretrial motions, specifically provides that " 'pretrial motions . . . can be disposed of on affidavit or representations of counsel.' " 72 N.C. App. at 397, 324 S.E.2d at 907. We believe the same is true here given that the State's motion to temporarily close the courtroom was a pretrial motion. Thus, even though the 9 September 2013 hearing took place well after the trial ended, it was simply a rehearing of the original motion, and — for this reason — we believe that N.C. Gen. Stat. § 15A-952 is applicable. As such, the trial court did not err in basing its findings that (1) the audiovisual equipment all needed to be in close proximity; and (2) the State had finite

resources to comply with potential alternatives to a limited closure, on the prosecutor's arguments.

Defendant next contends that findings 23, 24, and 26 were not supported by the evidence because the testimony of Defendant's trial counsel at the 9 September 2013 hearing contradicted these findings. During the hearing, Defendant's appellate counsel argued that if the television monitor was oriented in a different direction, the courtroom could remain open. Defense counsel reasoned that if the monitor was angled differently, spectators could be present yet unable to actually view the images while still allowing an unobstructed view of the images by the jury. At the 9 September 2013 hearing, Defendant's trial counsel testified that he could see the monitor in the alternate location from each of the jurors' seats. Defendant thus asserts that the trial court's findings that the original position of the television was the most "reasonable and logical" for the jurors' viewing was unsupported by the evidence. We are not persuaded.

This Court has recently explained that in an order addressing the propriety of the temporary closure of the courtroom, "[t]he trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *State v. Rollins*, ___ N.C. App. ___, ___, ___, S.E.2d. ___, ___ (filed Dec. 17, 2013). Thus, the trial judge herself was in a position to determine the relative merits of alternative locations for the television monitor. As such, we cannot conclude that these findings were erroneous simply because the testimony of Defendant's trial counsel could have supported a different conclusion. *See id.* at ___, ___ S.E.2d at ___ ("Although it is possible that other findings of fact could have been made or that other conclusions could have been drawn weighing the factors more in defendant's favor[, that] does not mean that the trial court erred.").

Defendant also contends that finding 22 does not support the temporary closure of the courtroom because the audio portions of the videos at issue are not part of the "visual representation of a minor engaged in sexual activity." Defendant thus argues that the State was not required to play the audio and, even if it did, "the audio portions would not have exposed the spectators to child pornography." However, because N.C. Gen. Stat. § 14-190.13 — which provides definitions for terms used in the statutes addressing sexual exploitation — specifically includes "video recordings" in its description of "material," N.C. Gen. Stat. § 14-190.13(2) (2011), we do not believe that the trial court erred in considering the harm of disseminating the audio portions of the videos.

Finally, Defendant asserts that finding 18 and conclusion of law 3 were erroneous because the trial court misapplied the third prong of *Waller*, which requires the trial court to "consider reasonable alternatives to closing the proceeding[.]" *Waller*, 467 U.S. at 48, 81 L.Ed.2d at 39. Although the trial court ultimately rejected Defendant's proposed alternatives to temporary closure as unreasonable because they were not judicially efficient, economical, or the most appropriate for the jury's viewing ability, the trial court's supplemental findings do indicate that it *considered* these options. *Waller* does not require more.

We therefore conclude that the trial court's detailed supplemental findings of fact sufficiently demonstrate that "the State advanced an overriding interest that was likely to be prejudiced; that the closure of the courtroom was no broader than necessary to protect the overriding interest; that the trial court considered reasonable alternatives to closing the courtroom; and that the trial court made findings adequate to support the closure." *Comeaux*, ___ N.C. App. at ___, 741 S.E.2d at 351. Therefore, Defendant's right to a public trial was not violated.

IV. Lay Opinion Testimony of Officers

[4] Defendant's fourth argument on appeal is that the trial court erred in allowing Detective Branch and Special Agent Newcomb to testify that some of the images found on the CD that Defendant gave to Corey included minors engaged in sexual activity. Defendant contends that this testimony was improper because it expressed an opinion as to Defendant's guilt and thereby invaded the province of the jury.

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Norman*, 213 N.C. App. 114, 119, 711 S.E.2d 849, 854 (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 360, 718 S.E.2d 401 (2011). An abuse of discretion occurs when the trial judge's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (citation and quotation marks omitted), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005).

Under Rule 701 of the North Carolina Rules of Evidence, a lay witness may testify in the form of opinions or inferences "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. R. Evid. 701. It is well established that lay witnesses may testify as to "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses

at one and the same time. Such statements are usually referred to as shorthand statements of fact." *State v. Alexander*, 337 N.C. 182, 191, 446 S.E.2d 83, 88 (1994) (citation and quotation marks omitted).

In *State v. Ligon*, 206 N.C. App. 458, 464, 697 S.E.2d 481, 486 (2010), this Court addressed the admissibility of statements by lay witnesses that photographs of a minor child were " 'disturbing,' 'graphic,' 'of a sexual nature involving children,' 'objectionable,' [and] 'concerning' to the witness." In *Ligon*, defendant did not object to this testimony at trial, and the Court, being "directed to no case finding prejudicial error in admitting testimony regarding the contents of a still photograph where the testimony was not objected to at trial," determined that the lay witnesses' "reactions to the photographs [did] not rise to the level of plain error." *Id.* We did note, however, that "[a]lthough their opinions as to what the pictures showed were based on their perceptions of the photographs, the helpfulness of those opinions to the jury, which was in no worse position to evaluate the pictures, is questionable." *Id.* at 462-63, 697 S.E.2d at 485 (emphasis omitted).

Here, unlike in *Ligon*, Defendant made timely objections to Special Agent Newcomb's and Detective Branch's testimony that some of the images were of minors engaged in sexual activity. However, even when objected to at trial, evidentiary errors are subject to harmless error analysis on appeal. Thus,

> [t]he burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.

State v. Gappins, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (internal citations omitted); *see also* N.C. Gen. Stat. § 15A-1443 (2011) (prejudice occurs "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . The burden of showing such prejudice . . . is upon the defendant"). Furthermore, "[w]here there exists overwhelming evidence of defendant's guilt[,] defendant cannot make . . . a showing [of prejudicial error] . . . ." *State v. Gayton*, 185 N.C. App. 122, 125, 648 S.E.2d 275, 278 (2007) (citation and quotation marks omitted).

During Defendant's trial, Special Agent Newcomb and Detective Branch testified that some of the images found on the CD depicted individuals under the age of 18 engaging in sexual activity. However, neither

specified which *particular* images, in their opinion, included minors engaging in sexual activity. After this testimony, the jurors viewed each of the images for themselves with regard to every count of second- and third-degree sexual exploitation of a minor and were instructed to determine whether the image forming the basis of the count "contained a visual representation of a minor engaged in sexual activity." Given the jury's opportunity to observe each image and make an individualized determination of the nature of the image coupled with the fact that the image files frequently had titles noting the subject's status as a minor and the sexual act depicted, Defendant cannot establish that he was prejudiced by the admission of Special Agent Newcomb's and Detective Branch's testimony. Accordingly, even assuming, without deciding, that the admission of this testimony was an abuse of discretion, it was not reversible error.

V. Evidence of Prior Bad Acts

[5] Defendant's final argument is that the trial court erred in admitting evidence that Defendant (1) set up a webcam in Tabitha's room; (2) videotaped her dancing in her pajamas; and (3) inappropriately touched Tabitha while they were riding four-wheelers. Defendant only made objections regarding the form of the State's questions during this testimony and thus seeks review of this issue under the plain error doctrine.

Rule 404(b) of the North Carolina Rules of Evidence provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. . . .

N.C. R. Evid. 404(b).

It is well established that Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense . . . ." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). The State contends that the evidence was properly admitted to show Defendant's intent "to obtain electronic images of minors of a sexual nature" and to show "the absence of mistake or accident that the pornographic images were found on Defendant's hard drive."

"In determining whether the prior acts are offered for a proper purpose, the ultimate test of admissibility is whether the [prior acts] are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403." *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008) (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 676 S.E.2d 49 (2009). Defendant relies on *State v. Doisey*, 138 N.C. App. 620, 532 S.E.2d 240, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 1177, 148 L.Ed.2d 1015 (2001); *State v. Hinson*, 102 N.C. App. 29, 401 S.E.2d 371, *appeal dismissed and disc. review denied*, 329 N.C. 273, 407 S.E.2d 846 (1991); and *State v. Maxwell*, 96 N.C. App. 19, 384 S.E.2d 553 (1989), *disc. review denied*, 326 N.C. 53, 389 S.E.2d 83 (1990), to support his contention that the testimony regarding these prior acts was inadmissible. We believe that Defendant's reliance on these cases is misplaced.

In *Doisey*, this Court held that the trial court erred in admitting evidence that the defendant placed a camcorder in the bathroom in his prosecution for first-degree statutory sex offense. 138 N.C. App. at 626, 532 S.E.2d at 244-45. We determined that this evidence described "conduct dissimilar to the conduct with which Defendant was charged," and thus "did not tend to show Defendant's plan or scheme to sexually assault [the victim]." *Id.* We also held, however, that the improperly admitted evidence did not rise to the level of plain error because the defendant could not show that in light of all the other evidence admitted, the testimony at issue had a probable impact on the jury's determination of guilt. *Id.* at 627, 532 S.E.2d at 245.

In *Hinson*, we determined that evidence of the defendant's possession of sexual paraphernalia and books about sexual intercourse was improperly admitted in his prosecution for first-degree sex offense and indecent liberties with a minor. 102 N.C. App. at 36, 401 S.E.2d at 375-76. Ultimately, we concluded that although the evidence did not indicate proof of intent, preparation, or a plan or scheme, its admission did not constitute plain error in light of the overwhelming evidence of the defendant's guilt. *Id.* at 37, 401 S.E.2d at 376.

Finally, in *Maxwell*, this Court held that evidence that the defendant often appeared nude in front of his children and fondled himself in the presence of his daughter did not show his plan or scheme to sexually abuse his daughter and did "little more than impermissibly inject character evidence . . . of whether [the] defendant acted in conformity with these character traits at the times in question." 96 N.C. App. at 24-25, 384 S.E.2d at 557. We determined that the erroneous admission of such

evidence, combined with the improper exclusion of the victim's prior sexual abuse allegations directed at her uncle, prejudiced the defendant's right to a fair trial.

Unlike *Doisey*, *Hinson*, and *Maxwell*, however, Defendant in the present case was charged with second-degree and third-degree sexual exploitation of a minor — offenses which implicate "visual representation[s] of a minor engaged in sexual activity." N.C. Gen. Stat. § 14-190.17; 14-190.17A. We believe that installing a webcam in Tabitha's bedroom and videotaping her dancing in pajama shorts and a tank top are acts similar in nature to Defendant's present charges of possessing and receiving or duplicating visual representations of minors engaged in sexual activity and serve to demonstrate Defendant's intent to obtain sexual images of minors. *See State v. Brown*, 211 N.C. App. 427, 433-34, 710 S.E.2d 265, 270 (2011) (determining that evidence of defendant's possession of incestuous pornography was admissible under Rule 404(b) to show intent to commit sex offense against his daughter because "evidence of a defendant's incestuous pornography collection sheds light on that defendant's desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant's motive to commit the underlying act — engaging in sexual intercourse with [his] child — constituting the offense charged"), *aff'd per curiam*, 365 N.C. 465, 722 S.E.2d 508 (2012).

We also note that both the offenses for which Defendant was charged and the prior acts of videotaping and attempting to capture images of Tabitha by means of a webcam involved the use of electronics to obtain sexual images of minors. This further demonstrates the admissibility of the testimony regarding these prior acts pursuant to Rule 404(b).

Furthermore, these prior acts are also evidence of the absence of mistake or accident. Defendant denied any improper conduct during his testimony at trial, claiming that he attended large-scale file sharing events where users could share and access other users' files and that during these file sharing events "information [could] be passed to [his] hard drive" without his knowledge. Defendant also stated that when he copied customers' hard drives for his computer repair business, he did not know what sort of information was on their drives. This testimony suggested that Defendant was not aware of the images that were found on his computers. Indeed, Defendant specifically stated that he had never viewed child pornography on his computer and did not know it was there. The evidence that Defendant had previously attempted to obtain sexual images of Tabitha, a minor, was therefore relevant to suggest that the images of minors engaged in sexual activity found on

Defendant's computers were not transferred or placed there by accident or mistake.

Thus, we conclude the trial court properly determined that the testimony regarding (1) Defendant's installation of a webcam in Tabitha's room; and (2) his act of videotaping her dancing in pajamas was admissible because it was introduced for purposes other than merely to demonstrate Defendant's propensity to commit a crime.[2]

Conversely, Tabitha's testimony that Defendant touched her breasts and under her pants while they were driving a four-wheeler does not possess the same indicia of similarity to the charged offenses. Because Defendant did not object to this evidence at trial, however, he bears the burden of showing that its admission constituted plain error – meaning that the error was such that it "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

We conclude that in light of the overwhelming evidence of Defendant's guilt — specifically, the voluminous testimony concerning the images found on his computers and the explicit file names of those images, which typically described the age of the subjects and the sexual nature of the content — Defendant cannot establish plain error. *See State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (holding that inadmissible testimony did not rise to level of plain error because "[t]he overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached").

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges McGEE and STEPHENS concur.

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2. Defendant further contends that, even if it was admissible under Rule 404(b), the evidence regarding his videotaping of Tabitha nevertheless should have been excluded under Rule 403 as its probative value was substantially outweighed by the danger of unfair prejudice. However, as we explained in *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (quoting *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L.Ed.2d 997 (2001)), "[t]he balancing test of Rule 403 is reviewed by this [C]ourt for abuse of discretion, and we do not apply plain error 'to issues which fall within the realm of the trial court's discretion.'" *Accord State v. Jones*, 176 N.C. App. 678, 687, 627 S.E.2d 265, 271 (2006) (refusing, based on *Steen*, to review "defendant's Rule 403 argument" for plain error).

YEAGER v. YEAGER

[232 N.C. App. 173 (2014)]

CAROL YEAGER, PLAINTIFF
v.
GEORGE YEAGER, DEFENDANT

NO. COA13-542

Filed 21 January 2014

1. Appeal and Error—mootness—appeal from contempt orders

Plaintiff's arguments were moot in an appeal from contempt orders in an equitable distribution action involving a receivership and the division of property. The trial court did not impose any consequence or penalty for plaintiff's contempt and the subsequent order dissolving the receivership and the equitable distribution order distributing the properties left no underlying controversy.

2. Appeal and Error—sanctions—frivolous appeal

Sanctions were imposed for a frivolous appeal in light of the extensive history of litigation between the parties and the conclusion that plaintiff's arguments were moot.

Appeal by plaintiff from orders entered 26 November 2012 by Judge Christy T. Mann in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 October 2013.

Aylward Family Law, by Ilonka Aylward, for plaintiff-appellant.

Leonard G. Kornberg for defendant-appellee.

McCULLOUGH, Judge.

Plaintiff appeals from two contempt orders. Based on the reasons set forth below, we dismiss plaintiff's appeal as moot and impose sanctions based on this frivolous appeal.

I. Background

Plaintiff Carol Yeager and defendant George Yeager were married in 1972 and separated in 2007. On 6 May 2008, plaintiff filed a complaint against defendant for post-separation support, alimony, interim distribution, equitable distribution, and attorneys' fees. On 12 June 2008, defendant filed an answer and counterclaim for equitable distribution.

Following a hearing held in August 2008, the trial court entered an "Order and Judgment" on 12 September 2008. The trial court found, in

pertinent part, that plaintiff was the sole manager of NG Holdings, LLC, a marital asset. NG Holdings, LLC, owned a warehouse located at 440 Springbrook Road (hereinafter the "warehouse"), which produced rental income. The parties' former marital residence, titled in plaintiff's name, was located at 422 Livingston Drive in Charlotte, North Carolina (hereinafter the "marital residence"). The 12 September 2008 order awarded plaintiff post-separation support, ordered defendant to pay plaintiff's attorneys fees, and ordered for plaintiff to receive rental income from the warehouse.

On 29 January 2010, defendant filed a "Motion to Appoint a Receiver Order, Interim Distribution and Judicial Assistance."

On 25 June 2010 *nunc pro tunc* 30 November 2010, the trial court entered a "Motion to Appoint a Receiver Order [sic], Interim Distribution and Judicial Assistance." (hereinafter "the Receiver Order"). The trial court made the following pertinent findings of fact in the Receiver Order:

> 3. . . . The major assets of the parties are two tracts of real property each worth approximately $300,000. Prior to the parties separation neither property was encumbered with any lien whatsoever. . . .
>
> 4. Initially the Plaintiff took out two lines of credit in [an] amount under $100,000 on the marital residence. The Plaintiff paid off one line of credit but the other line of credit remains in an unknown amount.
>
> 5. The marital residence was owned by a trust setup by the parties for "asset protection reasons." The trustee for the Trust . . . deeded this property solely to the Plaintiff without the knowledge or consent of the Defendant. . . .
>
> 6. The other piece of real property [is the warehouse]. [The warehouse] was devised to the Defendant solely after the previous owner, his father [passed] away. This property was deeded to a corporation and the Plaintiff was the sole stockholder of the corporation[.]
>
> 7. By happenstance, the Defendant learned that the Plaintiff has executed two deeds of trust in September 2009, one for each tract of personal property. Each deed of trust was in the amount of $300,000. . . . These deeds of trusts were executed by the Plaintiff and were given to a corporation in Nevada. The corporation in Nevada was

established on or about the same time the Deeds of trust were executed. During a prior hearing the Plaintiff testified that she signed a promissory note for each deed of trust and an unsigned promissory not[e] was offered by her during the last hearing in this matter.

8. The incorporator and the president is a paralegal in Nevada who owns a company who is a registered agent for many corporations in Nevada. There is no evidence that this corporation is anything other th[a]n [a] holder of the deeds of trust and was established solely for that purpose.

9. Although the Plaintiff did not appear in this matter, the Court remembers her reasons for having to execute the deeds of trust. Her testimony was that a trust in Virginia had been paying the utility bills on the residence and the Deed of trust was meant to secure these utilities payments.

10. The Plaintiff could not offer any documents for this alleged trust in Virginia but a letter was offered by the Plaintiff . . . which "explained" this transaction and the trustee of this trust to whom the deeds were executed on behalf[.]

11. When the above facts were established in Court, Plaintiff's counsel indicated he was taking immediate action to attempt to undo or reform the Deeds of Trust; These deeds of trust undoubtedly complicate this case and the parties estate and it is necessary to take any possible action to unravel the above transactions and put the properties back into the hands of the parties.

12. Since the time of the prior action, Plaintiff['s] previous counsel has withdrawn and no action has been taken to undo the Deeds of trust or to unravel the web of trusts and corporations.

The trial court further found that plaintiff's rationale for entering into these deeds was not credible and that it did not believe the deeds of trust were for "a legitimate purpose but because of the nature of these documents cannot void these deeds without the appropriate legal process." Based on the foregoing, the trial court believed "it is in the best interest of the marital estate to handle the financial matters regarding the [warehouse]."

The trial court appointed a receiver to investigate and take all necessary steps to remove both deeds of trust from the marital residence and the warehouse (hereinafter "the properties") and ordered plaintiff to "not take any other action as it relates to either proper[ty and] to in anyway further encumber either piece of real property[.]"

On 13 December 2010, the trial court entered an "Order Clarifying and Amending Appointment of Receiver/Referee." This order restated and incorporated by reference the findings of fact and conclusions of law in the Receiver Order. The trial court found that "[t]he Court needs the assistance of the Receiver/Referee in investigating the transactions related to two parcels of real property that have impacted the value of the marital estate, so that the Court can engage in its statutory responsibilities in Equitable Distribution between the parties herein." It further specified that the receiver shall have powers contemplated in Rule 53 of North Carolina Rules of Civil Procedure, without limitation, for conducting the investigation:

> Receiver/Referee . . . is conferred with all powers that the Court may vest pursuant to the North Carolina General Statutes and North Carolina Rules of Civil Procedure, to take any and all necessary legal actions to assist the Court, as it relates to these two parcels of property, to cure any defects in the titles thereto, so that the Court can properly and equitably distribute same as the law would require.

On 7 June 2011, defendant filed a "Motion for Contempt," alleging that plaintiff was violating the Receiver order. Defendant alleged that plaintiff was using the line of credit encumbering the marital residence, thereby increasing the outstanding debt, and was refusing to comply with the requests of the receiver.

On 21 June 2011, plaintiff, through her attorney Ilonka Aylward, filed a "Declaratory Judgment Action to Quiet Title" to the properties.

On 28 July 2011, defendant filed another "Motion for Contempt," alleging that plaintiff had filed the 21 June 2011 action to quiet title to the properties in direct contravention of the receiver's orders. Defendant alleged that the receiver had expressly told both "[p]laintiff and her counsel . . . that they were not to file Lawsuit to reform the Deeds of Trust which Plaintiff executed encumbering the party's marital property."

On 8 August 2011, the trial court entered a "Show Cause Order," ordering plaintiff to appear in court on 16 August 2011 and "to show cause, if any there be, why Plaintiff should not be adjudged in willful contempt of this Court."

On 16 August 2011, the trial court held a hearing upon defendant's motion for contempt. The receiver testified that he informed Ms. Aylward, plaintiff's counsel, via e-mail, "do not file the action to quiet title." However, Ms. Aylward "made it clear to everyone that she planned to proceed with the action to quiet title even though she had been directly, or I had directed her not to file for a number of reasons." At the conclusion of the hearing, the trial court orally found the following:

> [Trial Court]: Okay. Alright, I find that Ms. Yeager is in contempt of Court for filing the lawsuit in direct contradiction of what the court appointed Referee and Receiver said. I don't know how much clearer it can be, do not file the action, do not file the action.

In the written order, signed on 9 November 2012 and filed on 26 November 2012, the trial court made the following findings of fact:

1. This Court previously entered [the Receiver Order] (which remains in full force and effect) that provided, among other things, neither party would further encumber any assets (particularly the 2 pieces of real estate) that are the subject of both parties' claims for equitable distribution.

2. After the entry of that Order the Plaintiff drew money out of an equity line that was secured by the former marital residence. The Plaintiff freely admitted that she had used this money to pay for her own expenses, including attorney's fees.

3. The Plaintiff increased the amount of money owed on the equity line in direct violation of the Court's previous Order.

4. The Plaintiff's actions in borrowing money and increasing the balance due on the equity line further encumbered the former marital residence. The Plaintiff's actions were willful and without justification.

5. The Plaintiff has had and continues to have the ability to comply with the Order.

The trial court ordered that plaintiff "shall not use the equity line or further encumber any assets that are the subject of this litigation."

On 4 April 2012, the trial court held a hearing upon defendant's motion to hold plaintiff in contempt. At the conclusion of the hearing, the trial court orally made the following findings:

> despite [the Receiver] [O]rder prohibiting further encumbrances, Plaintiff admitted that she, in fact, wrote checks off of the equity line thereby increasing the amount owed and secured by the property.
>
> The Plaintiff continued to write checks on the line of credit, received monies and increased the amount owed on the equity line up to the date of the filing of the contempt motion.
>
> Plaintiff's actions of further encumbering the property was willful. I find her in contempt; order her to abide by all terms and conditions of the order; to not write anymore checks on the equity line[.]
>
> . . . .
>
> My previous order of the court Todd Owens, appointed referee, giving him authority among other things, resolve the issue of the encumbrances; to establish what encumbrances of any were on the real property pursuant to North Carolina Rules of the Civil Procedure 53.
>
> The referee has authority to file such lawsuits as he thinks necessary and appropriate. Mr. Owens instructing [plaintiff] not to file a lawsuit in Superior Court regarding an action [to] quiet title in this very property that is the subject of the case.
>
> In despite of this, [plaintiff] filed a Superior Court action regarding the property that is the subject matter of this case. Records specifically instructed [plaintiff] to not file this lawsuit but she filed it in direct contradiction of the direct instructions.
>
> [Plaintiff's] action to file the Superior Court lawsuit was willful and a direct violation of the previous order of the court. I find her in contempt[.]

The trial court's written order, signed on 9 November 2012 and filed on 26 November 2012, made the following findings of fact:

> 1. On June 25, 2010 this Court previously entered [the Receiver Order] (which remains in full force and effect) that provided, among other things, N Todd Owen was appointed as Receiver/Referee of certain real estate which was the subject of both parties'

claims for equitable distribution. The [Receiver] Order was later clarified in an order dated December 13, 2010. The [Receiver Order] was appealed; however, this appealed [sic] was dismissed by the North Carolina Court of Appeals.

2. Both of the aforementioned orders gave the Receiver/Referee broad powers to investigate the various claims of certain 3rd parties which purported to place liens against the real estate that is the subject of the equitable distribution claims. The orders also gave the Receiver/Referee the power to take the steps necessary to "quiet" the titles to both parcels.

3. The Receiver/Referee instructed both parties to NOT file any additional claims regarding these 2 parcels of real estate. The Plaintiff filed a Superior Court lawsuit to "quiet" title after being instructed numerous times to not do so.

4. The Plaintiff's actions in filing the Superior Court lawsuit was a direct violation of the Court's [Order] and was willful and without justification.

5. The Plaintiff has had and continues to have the ability to comply with the Order.

Furthermore, plaintiff was ordered to not file any other legal actions regarding the two real estate parcels.

On 13 December 2011 *nunc pro tunc* 1 December 2011, the trial court entered an "Order Dissolving Receivership and Relieving Court Appointed Receiver/Referee." This order found that on 16 August 2011, the receiver caused Satisfactions of Security Instruments to be recorded with the Mecklenburg Register of Deeds to terminate the post-complaint encumbrances on the properties. The trial court also found that the receiver had concluded the investigation and rendered a detailed report and ordered the receivership to be dissolved.

On 5 June 2012, the trial court entered an Equitable Distribution Order distributing the marital residence to plaintiff and holding, *inter alia*, that the warehouse is the separate property of defendant.

On 20 December 2012, plaintiff appealed from both of the trial court's orders holding her in contempt.

II. Standard of Review

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997) (citation omitted).

III. Discussion

[1] On appeal, plaintiff argues that there is insufficient evidence in the record to support both contempt orders entered by the trial court. Plaintiff also maintains that both contempt orders are fatally defective for the following reasons: that the trial court erred by finding that the Receiver Order "remains in full force and effect"; that the contempt orders contained permanent injunctions but failed to meet the statutory requirements of Rule 56; and that the contempt orders failed to contain adequate findings of fact.

> At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice.

O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (citations omitted). "[C]ivil contempt, . . ., is employed to coerce disobedient [parties] into complying with orders of court." *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003) (citation omitted).

Guided by these principles, we conclude that plaintiff's failure to abide by the Receiver Order constituted civil contempt.

> To hold a [party] in civil contempt, the trial court must find the following: (1) the order remains in force, (2) the purpose of the order may still be served by compliance, (3) the non-compliance was willful, and (4) the non-complying party is able to comply with the order or is able to take reasonable measures to comply.

Shippen v. Shippen, 204 N.C. App. 188, 190, 693 S.E.2d 240, 243 (2010) (citation omitted).

In the case *sub judice*, although plaintiff challenges the sufficiency of the evidence in the record and the findings made by the trial court to

uphold the contempt orders, we initially consider defendant's contention that this appeal is moot in light of the fact that the receivership established by the Receiver Order was dissolved on 13 December 2011 and the properties were distributed through the 5 June 2012 Equitable Distribution Order.

"When events occur during the pendency of an appeal which cause the underlying controversy to cease to exist, this Court properly refuses to entertain the cause merely to adjudicate abstract propositions of law." *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (citation omitted). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. [A]n appeal presenting a question which has become moot will be dismissed." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160 (2005) (citations omitted).

In *Smithwick v. Frame*, 62 N.C. App. 387, 303 S.E.2d 217 (1983), the plaintiff filed a motion for civil contempt against the defendants for failure to comply with an order awarding temporary custody of the minor child to plaintiff and failure to comply with a consent order providing primary custody of the minor child with the defendants, subject to temporary custody and visitation rights in the plaintiff. The trial court entered an order finding the defendants in contempt but reserving punishment of the defendants until final disposition of the child custody matter. *Id.* at 391, 303 S.E.2d at 220. Subsequently, the trial court entered an order disposing of the child custody matter and electing not to punish the defendants for contempt. The defendants appealed, arguing that the trial court lacked jurisdiction to consider the issue of contempt. *Id.* Our Court held that because the defendants "suffered no injury or prejudice as a result of the contempt order, their [arguments] are moot and will not be considered by us." *Id.*

Here, plaintiff was found in contempt for willfully failing to comply with the Receiver Order by drawing money out of an equity line secured by the marital residence and by filing an action to quiet title to the properties. However, the trial court did not impose any consequence or penalty for plaintiff's contempt. Similar to *Smithwick*, plaintiff did not suffer an injury or prejudice as a result of the contempt orders. In addition, the order dissolving the receivership and the equitable distribution order distributing the properties has left "the underlying controversy to cease to exist." *Hatley*, 291 N.C. at 694, 231 S.E.2d at 634 (citation omitted). Based on the foregoing, we hold that any determination we might make in this appeal concerning the contempt orders would not have any practical effect, and therefore, plaintiff's arguments are moot. Accordingly, we dismiss plaintiff's appeal.

[2] Moreover, we note two recent interrelated cases from our Court that involved the same parties and counsel. Our Court filed an unpublished opinion on 2 July 2013, affirming an order of the trial court awarding defendant $4,605.00 in attorney's fees as a sanction against plaintiff for seeking the issuance of a mandamus petition by our Court. *Yeager v. Yeager*, __ N.C. App. __, 748 S.E.2d 774 (2013) (unpublished). Our Court observed that during the pendency of that appeal, the parties had filed eleven motions and other requests for relief and stated the following:

> [a]s should be apparent from the unusual length of the list of motions and other requests for relief that the parties have asserted before this Court during the pendency of the present appeal, the parties have expended considerable time and effort complaining about each other's conduct and seeking redress from the Court for allegedly unprofessional or legally unsupported actions on the part of their opponents. Although the various remedies available under the North Carolina Rules of Appellate Procedure exist for a reason and although members of the bar do have an obligation to provide their clients with zealous representation, we take the liberty of pointing out that "scorched earth" litigation tactics, while sometimes emotionally satisfying to attorneys or their clients, are often counterproductive, particularly in family law matters; have the potential to substantially increase the complexity and cost of the litigation process; and increase the burdens placed upon both the trial and appellate judiciary.

Id. at __, 748 S.E.2d at __. More importantly, we point out that our Court warned counsel, which included Ilonka Aylward of Aylward Family law, the following: "we urge counsel to seriously consider the merits and potential demerits of the manner in which this case has been litigated to this point as they attempt to resolve any matters which remain at issue between the parties." *Id.*

Subsequently, in an unpublished opinion filed 6 August 2013 also involving the same parties and counsel, our Court affirmed the trial court's dismissal of plaintiff's complaint for declaratory judgment and to quiet title to the properties. *Yeager v. Yeager*, __ N.C. App. __, 746 S.E.2d 427 (2013) (unpublished). Our Court noted that

> [c]ontinuously since 6 May 2008, when plaintiff filed a complaint for alimony, equitable distribution, and

> attorney's fees against defendant, the parties have been engaged in a course of incessant litigation in several interrelated lawsuits in Mecklenburg County which have thus far resulted in numerous court orders addressing various issues including interim distribution, appointment of a receiver, contempt, sanctions, equitable distribution, and no less than eleven appeals to this Court, excluding the many petitions filed with this Court.
>
> . . . .
>
> This litigation has been particularly rancorous. . . .

Id. at __, 746 S.E.2d at 428.

Based on our conclusion above that plaintiff's arguments challenging the contempt orders are moot, we conclude that plaintiff's present appeal was taken frivolously, as it was "not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" pursuant to Rule 34(a) of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 34(a)(1) (2013). In light of the extensive history of litigation between the parties, we must also conclude that this appeal was taken for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" N.C. R. App. P. 34(a)(2). Therefore, we determine that sanctions are warranted and order that plaintiff and her attorney pay the costs and reasonable expenses, including reasonable attorney fees, incurred by defendant because of this frivolous appeal. N.C. R. App. P. 34(b)(2). Pursuant to Rule 34(c), we remand this case to the trial court for a hearing to determine defendant's costs and expenses. N.C. R. App. P. 34(c).

Dismissed and remanded.

Judges McGEE and DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JANUARY 2014)

BARNES v. HENDRICK AUTO. No. 13-537	N.C. Industrial Commission (W80523)	Affirmed
BLAND v. MILLS No. 13-628	Cabarrus (08CVS3379)	Reversed and Remanded
BOMBRIA v. LOWES HOME CTRS., INC. No. 13-680	Iredell (11CVS2751)	Affirmed
BURNS v. UNION CNTY. BD. OF EDUC. No. 13-616	N.C. Industrial Commission (TA-22902)	Reversed and Remanded
ETHERIDGE v. LEVITSKY No. 13-350	Currituck (11CVS33)	Affirmed
HENSLEE v. N.C. DEP'T OF PUB. SAFETY No. 13-739	N.C. Industrial Commission (TA-22724)	Dismissed
IN RE D.D.D. No. 13-854	Cherokee (02JT59-60) (08JT38-39)	Affirmed
IN RE J.C. No. 13-848	Wake (12JA320-322)	Affirmed
LLOYD v. COFFEY No. 13-840	Henderson (11CVS1251)	Affirmed
NAYLOR CONCRETE CONSTR., CO., INC. v. MIDCONTINENT CAS. CO. No. 13-83	Mecklenburg (10CVS7027)	Affirmed
SIMMONS v. FAYETTEVILLE STATE UNIV. No. 13-749	N.C. Industrial Commission (TA-22342)	Dismissed
SPENCER v. SPENCER No. 13-727	Stokes (12CVD57)	Dismissed
STATE v. BRIDGES No. 13-493	Wake (11CRS214643)	Affirmed
STATE v. BROCK No. 13-648	Buncombe (12CRS325)	No Error

STATE v. DAVIS No. 13-677	Craven (11CRS50791) (12CRS1014)	Affirmed in part, reversed and remanded in part.
STATE v. HARRELL No. 13-591	Stokes (10CRS446) (10CRS50048-50) (10CRS51449)	Vacate possession of a firearm by a felon conviction; reverse and remand for resentencing on remaining charges.
STATE v. HINES No. 13-793	Wilson (12CRS52283)	Remanded for resentencing.
STATE v. JACKSON No. 13-825	Pitt (09CRS59887) (09CRS59891)	Reversed and Remanded
STATE v. JOHNSON No. 13-382	Wake (12CRS204029) (12CRS206399) (12CRS5924)	No Error
STATE v. JOHNSON No. 13-428	Johnston (10CRS50020)	Reversed and Remanded
STATE v. JOHNSON No. 13-872	Rowan (11CRS4870) (11CRS54373)	No Error
STATE v. JOHNSON No. 13-792	Guilford (11CRS85063)	No Error
STATE v. KAY No. 13-570	Wayne (11CRS5499)	No Error
STATE v. KISER No. 13-826	Rowan (12CRS52407)	No Error
STATE v. KNOTTS No. 13-903	Union (11CRS55510) (12CRS869)	No Error
STATE v. MCGARVA No. 13-336	Carteret (11CRS51385) (11CRS51395)	No Error
STATE v. MINTON No. 13-218	Orange (08CRS930-931) (09CRS512)	No Error

STATE v. PUGH No. 13-536	Randolph (97CRS17484)	Conviction of First Degree Murder on Basis of Felony Murder: No Error. Conviction for First Degree Murder on the Basis of Premeditation and Deliberation: No Plain Error.
STATE v. RICKS No. 12-1476	Edgecombe (10CRS2944-45)	No Error
STATE v. SANFORD No. 13-890	Mecklenburg (11CRS55571) (11CRS55572) (11CRS55573)	No Error
STATE v. TUCKER No. 13-722	Wake (12CRS204030) (12CRS5922)	No Error
STATE v. WATLINGTON No. 13-891	Alamance (11CRS50193) (11CRS51683)	Reversed and Remanded
STATE v. WILLIS No. 13-626	Rutherford (11CRS2459)	Vacated and Remanded
STATE v. WOODRUFF No. 13-812	Rowan (12CRS54233)	No Error

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