233 N.C. App.—No. 1 Pages 1-108

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 11, 2016

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

THE COURT OF APPEALS
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.
[6] Deceased 11 September 2015. [7] Retired 31 December 2014. [8] Resigned 31 December 2014. [9] Resigned 31 December 2014.

Clerk

JOHN H. CONNELL[10]

DANIEL M. HORNE, JR.[11]

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[13] Appointed Interim Director 1 May 2015. Appointed Director 3 November 2015.

COURT OF APPEALS

CASES REPORTED

FILED 18 MARCH 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Issues not litigated before trial court—remand—Plaintiffs' argument that the "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" must be promulgated through rule-making under the Administrative Procedure Act was remanded for proper determination by the trial court. Plaintiffs' arguments before the Court of Appeals were not considered by the trial court when the court entered the order from which plaintiffs' appealed because these issues stemmed entirely from subsequent changes to N.C.G.S. § 15-188 and the execution protocol made during pendency of this appeal. **Robinson v. Shanahan, 34.**

Preservation of issues—issue not raised at trial—right to appeal waived—review under Rule 2—Defendant waived his right to appellate review of whether the trial court erred by failing to arrest judgment on two convictions on double jeopardy grounds where he failed to raise the double jeopardy issue at trial. However, the Court of Appeals elected to review the issue under Rule 2 of the Rules of Appellate Procedure. **State v. Mulder, 82.**

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Prosecutor's argument—offer of opinion on credibility of witness—opened the door—The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning personal property case by failing to intervene *ex mero motu* during closing arguments to address the prosecutor's alleged offer of an opinion on the credibility of a witness. Our Supreme Court has found no error in a credibility argument based on personal opinion from the State where the defendant "opened the door" to the argument. **State v. Sargent, 96.**

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Subject matter—Cherokee Indian Reservation—non-Indian—criminal offense—The trial court did not err in exercising subject matter jurisdiction over defendant, a non-Indian, for a DWI offense incurred while defendant was on the Cherokee Indian Reservation. Tribal courts lack jurisdiction over non-Indians in criminal cases and DWI is a type of criminal offense. **State v. Kostick, 62.**

Subject matter—trial transcript—The State's motion to dismiss defendant's appeal for an insufficient record as it related to subject matter jurisdiction was denied where defendant provided a pretrial but not a trial transcript. A determination of subject matter jurisdiction does not require the presence of a complete trial transcript. **State v. Kostick, 62.**

MANDAMUS

Writ of mandamus—motion to dismiss—failure to join necessary party—attempt to circumvent untimely appeal—The trial court did not err in a case involving a zoning dispute by denying respondents' motion to dismiss petitioner's

petition for writ of mandamus. Petitioner did not fail to join a necessary party and N.C.G.S. § 160A-393 was not applicable to this action for mandamus. Furthermore, petitioner was not seeking mandamus in an attempt to take an untimely appeal of the substance of the 21 April Determination but was instead appealing from the 16 November Determination. **Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty., 23.**

Writ of mandamus—zoning dispute—zoning administrator—transmission of appeal to Board of Adjustment—The trial court did not err by issuing a writ of mandamus in favor of petitioner in connection with a zoning dispute. The zoning administrator had a statutory duty to transmit petitioner's appeal to the Board of Adjustment (BOA) and the petitioner's standing was a legal determination to be made by the BOA, not the zoning administrator; the act of placing petitioner's appeal on the BOA agenda was ministerial in nature and did not involve any discretion on the part of the zoning administrator; petitioner had a legal right to have its appeal transmitted to the BOA and placed on the agenda; and mandamus was petitioner's only available remedy. **Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty., 23.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—remaining personal property—conversion claim—The trial court erred by concluding that plaintiff failed to prove her conversion claim in an action that arose from the disposal of personal property remaining after a foreclosure sale. The ten-day waiting period in N.C.G.S. § 42-25.9(g) cannot be avoided by contract because N.C.G.S. § 42-25.8 provides that a modified timeline violates public policy and is void. Nothing suggests that a tenant or former owner has only one opportunity to obtain possession of their personal property during the ten-day period. **Heaton-Sides v. Snipes, 1.**

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DWI—Knoll motion denied—no error—The trial court did not err by denying defendant's motion to dismiss a DWI citation under *State v. Knoll*, 322 N.C. 535. A *Knoll* motion alleges that a magistrate has failed to properly inform a defendant of the charges against him, his rights and of the general circumstances under which he may secure his release. Although the evidence conflicted, the trial court resolved the conflict by weighing all relevant evidence before concluding that the magistrate did not commit a *Knoll* violation. **State v. Kostick, 62.**

SEARCH AND SEIZURE

Plain view doctrine—not applicable to searches—applicable to seizures—findings of fact—lawful right of access to items seized—The trial court erred by partially denying defendant's motion to suppress. The plain view doctrine did not apply to the police officer's observation of the contents of defendant's trailer. Furthermore, while the plain view doctrine applied to whether the officer performed a lawful seizure of the contents of the trailer and the findings of fact supported the trial court's conclusion that the criminal nature of the items was immediately apparent, the case was remanded for further findings of fact and conclusions of law regarding whether the officers had a lawful right of access to the items seized. **State v. Alexander, 50.**

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

JANE HEATON-SIDES, PLAINTIFF

v.

TORETTA SNIPES, INDIVIDUALLY, AND IN HER CAPACITY AS VICE PRESIDENT OF STATE EMPLOYEES' CREDIT UNION & STATE EMPLOYEES' CREDIT UNION & JAYME CURRIN, INDIVIDUALLY, AND IN HER CAPACITY AS PRESIDENT OF AMERICAN DREAM PROPERTIES, INC. & AMERICAN DREAM PROPERTIES, INC., DEFENDANTS

No. COA13-1083

Filed 18 March 2014

1. Mortgages and Deeds of Trust—foreclosure—remaining personal property—conversion claim

The trial court erred by concluding that plaintiff failed to prove her conversion claim in an action that arose from the disposal of personal property remaining after a foreclosure sale. The ten-day waiting period in N.C.G.S. § 42-25.9(g) cannot be avoided by contract because N.C.G.S. § 42-25.8 provides that a modified timeline violates public policy and is void. Nothing suggests that a tenant or former owner has only one opportunity to obtain possession of their personal property during the ten-day period.

2. Conversion—damages—fair market value

A conversion action arising from the disposal of personal property after a foreclosure was remanded to the trial court for entry of a judgment awarding plaintiff nominal damages. The fair market value of household items would be the value of the items at the time of their conversion, not the cost of buying replacement goods. The fair market value of papers which plaintiff claimed were children's books in progress would be the price a willing buyer would pay rather than a reasonable compensation for the amount of time

plaintiff worked on the books. Actual damages, however, are not an essential element of a conversion claim and nominal damages can still be recovered.

Appeal by plaintiff from an order entered 22 May 2013 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 17 February 2014.

Michael A. Jones, for plaintiff-appellant.

Hopper, Hicks & Wrenn PLLC, by James C. Wrenn, Jr. and Gerald T. Koinis, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff Jane Heaton-Sides filed a complaint against defendants alleging claims for conversion, negligent and intentional infliction of emotional distress, punitive damages, and unfair and deceptive trade practices. The claims against defendants State Employees Credit Union ("SECU") and Toretta Snipes were dismissed by order dated 1 February 2013 as a result of plaintiff's failure to respond to discovery. Plaintiff subsequently voluntarily dismissed with prejudice all of her claims against defendants Jayme Currin and American Dream Properties except her claim for conversion.

After a bench trial, the trial court made the following relevant findings of fact, all of which are supported by the evidence presented at the trial. SECU foreclosed on plaintiff's personal residence located at 1500 Cash Road in Creedmoor, North Carolina and was later placed in lawful possession of the residence on 1 April 2011 at 9:00 a.m. On that date, plaintiff and her husband were in the process of moving out of the residence. Plaintiff, her husband, and SECU agreed that plaintiff and her husband could continue moving out until 3:00 p.m. that day. Around 3:00 p.m., Ms. Snipes, an employee of SECU, informed plaintiff and her husband that if they wanted to take any additional personal property from the residence they should inform her or Ms. Currin of American Dream, a property manager for SECU, by the close of business on 4 April 2011.[1] Furthermore, Ms. Currin testified that when she walked through the residence on 1 April 2011 it did not appear that anything of value was

1. We note that the trial court refers to both "Monday, April 3, 2011" and "Monday, April 4, 2011" in its order. The date is not disputed in this action, but we take judicial notice, by reference to a calendar, that the first Monday of April, 2011 was the 4th.

left behind. Plaintiff did not inform anyone that she wanted to retrieve additional personal property from the residence until 7 April 2011. By that time, any remaining property in the residence had been disposed of and plaintiff was not able to retrieve any additional personal property. Plaintiff testified that, as a result, she was missing some household items that would cost her $10,272 to replace as well as notes and outlines for several children's books ("the papers") that she thought had a value of $75,400 as reasonable compensation to her for the amount of time she spent working on them (20 hours per week x 52 weeks x 10 years x $7.25 per hour = $75,400). Plaintiff, however, did not offer any testimony about the fair market value of the household items or the papers.

Based on this evidence, the trial court concluded that plaintiff did not show a wrongful conversion by defendants because she had abandoned the personal property in the residence when she failed to contact anyone about removing additional personal property by 4 April 2011. Furthermore, the trial court concluded that even if plaintiff had proven her conversion claim, she had failed to prove actual damages. Plaintiff timely filed notice of appeal from the trial court's order dismissing her conversion claim with prejudice.

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[1] A conversion claim essentially requires two elements: "ownership in the plaintiff and wrongful possession or conversion by the defendant." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). On appeal, plaintiff argues that the trial court erred in dismissing her conversion claim for failure to show a wrongful conversion by defendants because defendants violated N.C.G.S. § 42-25.9(g) when they disposed of plaintiff's personal property before the expiration of the statutory ten-day waiting period. We agree.

When we review an order issued after a bench trial we determine "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 conclusion of law." *Holloway v. Holloway*, __ N.C. App. __, __, 726 S.E.2d 198, 204 (2012). However, we review the trial judge's conclusions of law *de novo*. *Id.*

In this case, plaintiff's residence was sold at a foreclosure sale and SECU was later placed in possession of the residence pursuant to N.C.G.S. § 45-21.29(l). This statute provides that the purchaser of the foreclosed property "shall have the same rights and remedies in connection with the execution of an order for possession and the disposition of

personal property following the execution as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes." *Id.* Thus, section 45-21.29(l) directs us to Chapter 42.

N.C.G.S. § 42-25.9(g) states:

> Ten days after being placed in lawful possession by execution of a writ of possession, a landlord may throw away, dispose of, or sell all items of personal property remaining on the premises . . . . During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. Upon the tenant's request prior to the expiration of the 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon.

N.C. Gen. Stat. § 42-25.9(g) (2011) *amended by* 2012 N.C. Sess. Laws 73, 74, ch. 17, §§ 2(a), 2(b), *amended by* 2013 N.C. Sess. Laws 309, 311 ch. 334, § 4.

Based on the language of this statute, the landlord or buyer in a foreclosure sale who is placed in lawful possession of a residence may move personal property in the residence to storage but cannot dispose of the property for ten days after being placed in lawful possession. Furthermore, the landlord or buyer must make the personal property available to the tenant or former owner upon their request during the ten-day period.

Defendants assert that they met the statutory requirements of N.C.G.S. § 42-25.9 by: (1) allowing plaintiff to continue removing her personal property on 1 April 2011 when they were placed in lawful possession, and (2) agreeing with plaintiff and her husband that if they wanted additional personal property from the residence they should notify defendants by the end of business on Monday 4 April 2011. In essence, defendants appear to argue that plaintiff waived the ten-day waiting period when she agreed to contact defendants by the end of business on 4 April 2011, and that plaintiff was guaranteed only one opportunity to retrieve her personal property. These arguments fail.

In contract law there are generally two types of rules: default rules and immutable rules. Default rules are rules that "parties can contract around by prior agreement." Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99

Yale L.J. 87, 87 (1989). Immutable rules, by comparison, are those rules that "parties cannot change by contractual agreement." *Id.* While these terms usually refer to the Uniform Commercial Code, they demonstrate the principle that some rules may be avoided by contract while others may not. The ten-day waiting period in N.C.G.S. § 42-25.9(g) cannot be avoided by contract because N.C.G.S. § 42-25.8 provides: "Any lease or contract provision contrary to this Article shall be void as against public policy." Thus, plaintiff and defendants could not satisfy the statutory ten-day waiting period by agreeing to a modified timeline because such an agreement violates public policy and is void.

Furthermore, nothing suggests that a tenant or former owner has only one opportunity to obtain possession of their personal property during the ten-day period. While the statutory language "[u]pon the tenant's request" is singular, it seems counterintuitive to reason that a former owner of property has only one chance in the ten-day period to obtain physical possession of their personal property before it is disposed of. As a result, we believe that plaintiff could have obtained possession of her personal property on 7 April 2011 even though she had been allowed to remove personal property on 1 April 2011. Thus, we reverse the trial court's conclusion of law that plaintiff failed to prove her conversion claim.

[2] Once a party has stated a claim for conversion, the party must present evidence that will provide a basis for determining damages. *Marina Food Assocs., Inc. v. Marina Rest., Inc.*, 100 N.C. App. 82, 94, 394 S.E.2d 824, 831, *disc. rev. denied*, 327 N.C. 636, 399 S.E.2d 328 (1990). For a conversion claim, damages are determined by the "fair market value of the converted property at the time of the conversion, plus interest." *Bartlett Milling Co., v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 81, 665 S.E.2d 478, 485, *disc. rev. denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). Fair market value is the price that a willing buyer would pay a willing seller when neither party is compelled to take part in the transaction. *Esteel Co. v. Goodman*, 82 N.C. App. 692, 698, 348 S.E.2d 153, 157 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987).

As discussed earlier, a trial court's findings of fact are conclusive on appeal if they are supported by competent evidence. *Holloway*, __ N.C. App. at __, 726 S.E.2d at 204. In this case, the trial judge found that plaintiff did not attempt to determine the fair market value of the household goods and offered no testimony as to the fair market value of the papers. These findings are supported by the evidence. At trial, plaintiff testified that the *replacement cost* of the household items was $10,272. Replacement cost is not the fair market value. The fair market value of the household goods would be the value of the goods at the time of their

conversion, not the cost of buying replacement goods. Plaintiff did not testify as to the value of the goods at the time of their conversion, and as a result, failed to offer evidence of their fair market value.

Furthermore, plaintiff offered no evidence as to the fair market value of the papers. As stated earlier, fair market value is the price a willing buyer would pay a willing seller for goods. *See Esteel*, 82 N.C. App. at 698, 348 S.E.2d at 157. Plaintiff testified that she thought that the papers had a value of $75,400 because that would be reasonable compensation for the amount of time she worked on them. However, to prove the fair market value of the papers plaintiff would have to demonstrate how much a willing buyer would pay her for the papers.

During the bench trial, plaintiff's counsel relied on Pattern Jury Instruction 810.66 to argue that $75,400 represented the "intrinsic" value of the papers. This argument was not made on appeal; however, if plaintiff had made this argument on appeal it would have failed. The note to Pattern Jury Instruction 810.66 states: "Use this instruction where damages measured by market value would not adequately compensate the plaintiff." N.C.P.I.—Civ. 810.66 (gen. civ. vol. 2013). Thus, intrinsic value was not the appropriate value to determine plaintiff's damages because there was no evidence of the fair market value of the papers or that the fair market value of the papers would not adequately compensate plaintiff. The trial court correctly found that plaintiff had presented no evidence of the fair market value of the household goods or the papers, and correctly concluded that plaintiff had failed to prove actual damages.

Actual damages, however, are not an essential element of a conversion claim. *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991), *aff'd*, 331 N.C. 743, 417 S.E.2d 447 (1992). Consequently, even if a plaintiff fails to prove actual damages, she can still recover nominal damages. *See Fagan v. Hazzard*, 34 N.C. App. 312, 313–14, 237 S.E.2d 916, 917 (1977) (affirming a trial court's award of one dollar as nominal damages when the plaintiff proved conversion but not actual damages). Accordingly, plaintiff is entitled to nominal damages because she proved her conversion claim but not actual damages.

Therefore, we reverse the trial court's holding that plaintiff failed to prove conversion, affirm the determination that plaintiff failed to prove actual damages, and remand this case to the trial court for entry of a judgment awarding plaintiff nominal damages.

Affirmed in part, reversed in part and remanded.

Judges ELMORE and HUNTER, JR. concur.

IN THE MATTER OF APPEAL OF PACE/DOWD PROPERTIES LTD. FROM THE DECISIONS OF THE UNION COUNTY BOARD OF EQUALIZATION AND REVIEW REGARDING THE VALUATIONS OF CERTAIN PROPERTY FOR TAX YEAR 2010.

No. COA13-759

Filed 18 March 2014

1. Taxation—ad valorem tax—arbitrary method of valuation—findings of fact—conclusions of law—rational basis

The North Carolina Tax Commission did not err by holding that Union County used an arbitrary method of valuation in assessing two parcels of land owned by Pace/Dowd Properties, Ltd. The challenged findings and conclusions of the Commission had a rational basis in the evidence and it was not the duty of the Court of Appeals to substitute its judgment for that of the Commission.

2. Taxation—ad valorem tax—true value—general reappraisal

The North Carolina Tax Commission (Commission) did not err in a tax valuation case by finding the true value of Parcel 3 to be $3,987,600 and Parcel 3A to be $4,583,140 as of the 1 January 2008 general reappraisal. The record sufficiently supported the Commission's finding that Union County's arbitrary method of assessment resulted in an assessment of the parcels that substantially exceeded the market values of the parcels. Based on expert testimony, the Commission reduced Union County's values of the parcels by fifty percent.

3. Taxation—ad valorem tax—conclusions of law—improper discovery of parcel of land—increase or decrease in appraisal value not retroactive

The North Carolina Tax Commission did not err by holding in conclusion of law number three that Union County improperly discovered Parcel 3A for tax years 2008 and 2009. The General Assembly has stated that an increase or decrease in appraised value made under N.C.G.S. § 105-287(c) is effective as of January 1 of the year in which it is made and is not retroactive.

Appeal by Union County from final decision entered 24 January 2013 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 20 November 2013.

K&L Gates LLP, by Samuel T. Reaves, for Pace/Dowd Properties, Ltd.

Hamilton Stephens Steele & Martin, PLLC, by Rebecca K. Cheney, for Union County.

McCULLOUGH, Judge.

Union County appeals from a decision by the North Carolina Tax Commission, holding that Union County used an arbitrary method of valuation in assessing two parcels of land owned by Pace/Dowd Properties, Ltd. Based on the following reasons, we affirm the decision of the North Carolina Tax Commission.

I. Background

Union County appeals from a 24 January 2013 "Final Decision" of the North Carolina Property Tax Commission ("Commission") concerning the tax value of two parcels of land located within Union County. The two parcels of land at issue, purchased by appellee Pace/Dowd Properties Ltd. ("Pace/Dowd"), consist of Union County Tax Parcel Number 06-135-003 ("Parcel 3") and Parcel Number 06-135-003A ("Parcel 3A"). Parcel 3 is comprised of 216 acres of land. Pace/Dowd purchased it in 2005 for $11,212,500, with the intent to develop Parcel 3 as the second and third phases of a residential development called "Lawson" with 245 lots. Parcel 3A is comprised of 173.85 acres of land. It was purchased in 2003 for $7,375,298, with the intent to develop Parcel 3A as the fourth phase of the Lawson development with 404 lots.

During Union County's 2008 countywide general reappraisal, Parcel 3 was valued by Union County at a property tax value of $10,201,240 and Parcel 3A was valued at $1,135,420. In 2009, Pace/Dowd did not appeal the tax valuations. However, in 2010, Pace/Dowd contested the value of both parcels by filing an appeal with the Union County Board of Equalization and Review ("County Board").

Union County became aware it had wrongly classified Parcel 3A as a subdivision common area and notified Pace/Dowd that it was increasing the tax value of Parcel 3A to $9,166,280 effective 1 January 2008 for tax years 2008, 2009, and 2010. The County Board heard Pace/Dowd's challenges to Union County's assessments on 22 June 2010 and declined to consider Pace/Dowd's appeal on Parcel 3 for tax years 2008 and 2009. Furthermore, the County Board reduced the value of Parcel 3 from $10,201,240 to $7,975,200 effective 1 January 2010 and affirmed the valuation of Parcel 3A at $9,166,280.

Subsequently, Pace/Dowd appealed to the Commission, presenting several issues. First, Pace/Dowd argued that the subject parcels

were appraised in excess of the true value of the subject property as of 1 January 2008. Pace/Dowd asserted that the assigned values exceeded fair market value ("FMV") as defined in N.C. Gen. Stat. § 105-283 and that the FMV of Parcel 3 should be $2,400,000 and the FMV of Parcel 3A should be $1,837,500. Next, Pace/Dowd argued that Union County applied an arbitrary method of appraisal in reaching the following values: Parcel 3 valued at $10,201,240 and later reduced to $7,975,220; Parcel 3A valued at $1,135,420 and later increased to $9,166,280. Lastly, Pace argued that Union County improperly "discovered" Parcel 3A for tax years 2008, 2009, and 2010.

Following hearings held on 15 February 2012 and 18 April 2012, the Commission entered the "Final Decision" on 24 January 2013. The Commission made the following findings of fact, in pertinent part:

> 4. Under orders of the State of North Carolina (the "State"), Union County imposed a moratorium on new sewer taps in February 2007. Thereafter, the State denied Union County's request to expand its largest sewer treatment plant, and the moratorium continued.
>
> 5. On September 17, 2007, Union County adopted the "Policy for Allocating Wastewater Treatment Capacity ("SAP"), after which the State allowed Union County to lift the moratorium.
>
> 6. Pursuant to the SAP, 50 lots within Parcel [3] and 100 lots within Parcel [3A] were included within the first priority of properties to receive sewer and permits and 449 lots from Parcel [3] and [3A] were placed in the last priority of properties to receive sewer permits. Notwithstanding that [Pace/Dowd] purchased the subject parcels at purchase prices which included water and sewer capacity for residential development, the parcels were never developed.
>
> 7. As of the January 1, 2008 countywide general reappraisal of all real property in Union County, Parcel [3] was assessed at a value of $10,210,240, and, based upon [Pace/Dowd's] 2010 appeal, the County Board reduced the assessment to a value of $7,975,220; and, based upon [Pace/Dowd's] 2010 appeal, Union County increased the assessed value of parcel [3A] from $1,135,420 to $9,166,280 and assigned the increased value of $9,116,280 for tax years 2008, 2009 and 2010.

Further, Union County has collected taxes from [Pace/Dowd] based on the increased value of Parcel [3A] ($9,166,280) for tax years 2008, 2009 and 2010.

8. Union County is required to value all property for *ad valorem* tax purposes at its true value in money, which is "market value." N.C. Gen. Stat. § 105-283. . . .

9. An important factor in determining the property's market value is its highest and best use. The highest and best use of the subject property, as improved, would be residential development. . . .

10. However, under orders of [the State], Union County imposed a moratorium on new sewer taps in February 2007, which caused declines in the market values of the subject parcels. Accordingly, Union County shall, whenever any real property is appraised, consider the factors set forth in N.C. Gen. Stat. § 105-317. In particular, Union County shall consider how the county's sewer allocation policy affects the market value of the subject parcels, and the availability of water and sewer to Parcels [3 and 3A].

11. Consequently, [Pace/Dowd] did rebut the initial presumption of correctness as to Union County's assessments of the subject parcels by offering evidence tending to show that Union County used an arbitrary method of assessment and that Union County's assessments of the subject parcels substantially exceeded the market values of the parcels when the county assessed Parcel [3] at a value of $7,975,220; and by increasing the valuation of Parcel [3A] from $1,135,420 to $9,166,280, and when Union County did not consider the factors set forth in N.C. Gen. Stat. § 105-317 (i.e. the availability of water and sewer to Parcels [3 and 3A]).

12. Accordingly, the burden then shifts to Union County to go forward with the evidence and to demonstrate that its methods would in fact produce true value[.]

13. [T]he Commission . . . determines that Union County did not meet its burden regarding the valuations of the subject parcels when Union County did not consider

certain relevant factors, as required by N.C. Gen. Stat. § 105-317[.]

14. Accordingly, the Commission, when considering the expert testimony of Mr. Willcox [sic], finds that the true value in money, which is "market value," as that term is defined in N.C. Gen. Stat. § 105-283, for Parcel [3] was $3,987,600, and the true value in money of Parcel [3A] was $4,583,140.

The Commission concluded that Pace/Dowd rebutted the presumption that Union County's *ad valorem* tax assessment was correct by showing that the county tax supervisor used an arbitrary method of valuation and that the assessments substantially exceeded the true value in money of the parcels. Furthermore, the Commission determined that the true value in money of Parcel 3 was $3,987,600 and the true value in money of Parcel 3A was $4,583,140 as of the 1 January 2008 appraisal.

Union County appeals.

II. Standard of Review

In reviewing a decision from the North Carolina Property Tax Commission:

> [this] court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2013).

"[A]n act is arbitrary when it is done without adequate determining principle." *In re Parkdale Mills*, __ N.C. App. __, __, 741 S.E.2d 416, 419 (2013) (citation omitted).

Our Court "shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C.G.S. § 105-345.2(c).

> The "whole record" test does not allow the reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

In re Parkdale Mills, __ N.C. App. at __, 741 S.E.2d at 419 (citation omitted).

However, "the 'whole record' test is not a tool of judicial intrusion; 'instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' " *In re Appeal of Owens*, 132 N.C. App. 281, 286, 511 S.E.2d 319, 323 (1999) (citation omitted). "[T]his Court cannot reweigh the evidence presented and substitute its evaluation for the Commission's." *In re Parkdale Mills*, __ N.C. App. at __, 741 S.E.2d at 419 (citation omitted). "If the Commission's decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned." *In re Appeal of Philip Morris*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998) (citation omitted).

III. Discussion

On appeal, Union County argues that the Commission erred by: (A) concluding that Pace/Dowd had rebutted the presumption that Union County's *ad valorem* tax assessment was correct by finding

that Union County used an arbitrary method of valuation, resulting in a valuation of the parcels substantially exceeding the true values; (B) finding that as of 1 January 2008, the true values of the parcels were $3,987,600 for Parcel 3 and $4,583,140 for Parcel 3A; and (C) concluding, in conclusion of law number 3, that Pace/Dowd does not owe additional 2008 and 2009 taxes for Parcel 3A.

A. Union County's Method of Valuation

[1] First, Union County asserts that the Commission erred by concluding that Pace/Dowd had rebutted the presumption set out in *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975). Union County argues that the Commission erroneously found that Union County used an arbitrary method of valuation, resulting in a valuation of the parcels which substantially exceed the true value in money. We disagree.

In *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975), our Supreme Court stated that it is a "sound and [] fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct." *Id.* at 562, 215 S.E.2d at 761 (citation omitted). "[T]he presumption is only one of fact and is therefore rebuttable." *Id.* at 563, 215 S.E.2d at 762 (hereinafter "the *Amp* presumption").

> [I]n order for the taxpayer to rebut the presumption he must produce competent, material and substantial evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.

Id. (citations and quotation marks omitted) (emphasis in original). "[I]t is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*." *Id.* (citation omitted) (emphasis in original).

N.C. Gen. Stat. § 105-286(a) (2013) provides:

> (a) Octennial Cycle. - Each county must reappraise all real property in accordance with the provisions of G.S. 105-283 and G.S. 105-317 as of January 1 of the year set out in the following schedule and every eighth year thereafter[.]

N.C. Gen. Stat. § 105-283 (2013), entitled "Uniform appraisal standards," states that:

> [a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

When real property is being appraised, our General Assembly has mandated that

> it shall be the duty of the persons making appraisals:
>
> (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; *water privileges*; . . . adaptability for agricultural, timber-producing, commercial, industrial, or other uses;. . . . and any other factors that may affect its value except growing crops of a seasonal or annual nature.

N.C. Gen. Stat. § 105-317(a)(1) (2013) (emphasis added).

At the hearing before the Commission, Pace/Dowd called four witnesses: Steven Pace, principal and president of Pace/Dowd who was tendered as an expert in real property acquisition and residential development; Robert Palmer Wilcox, Jr., an expert in soil science; Alfred Tucker, an appraiser; and Phillip Every, serving as an adverse witness.

Steven Pace testified that Pace/Dowd purchased the parcels with the intention to develop Parcel 3 as phases 2 and 3 of the Lawson development, with 245 lots, and to develop Parcel 3A as phase 4 of the Lawson development, with 404 lots. When Pace/Dowd purchased the parcels, Pace/Dowd did not have sewer and water permits, but Steven Pace testified that he made the purchases after he "confirmed [verbally] with Union County that there would be absolutely no restrictions at all on me having sewer and water to develop this site[.]" Steven Pace admitted that although he did not have written confirmation from Union County,

he did receive reasonable assurances from the Director of Public Works that he would "be able to get sewer and water without any restrictions for capacity or moratoriums." At no point during his testimony did Steven Pace testify as to Union County's method of valuing the parcels.

Robert Palmer Wilcox, Jr., a soil science expert with Soil and Material Engineers, testified regarding his evaluation of the septic system needs and sewer capacity of both parcels. Wilcox testified that in September 2007, he performed a preliminary soil evaluation of Parcel 3. Wilcox determined that greater than fifty (50) to sixty (60) percent of Parcel 3 was "in that category of not being able to be utilized for septic suitability." In January 2012, Wilcox separately evaluated Parcel 3 and testified that there was no chance that the soil conditions could have changed from 1 January 2008. Wilcox's findings in regards to Parcel 3A were "very identical" to the findings of Parcel 3 "as there is very limited capacity to use on-site septic systems[.]"

Phillip Every, appraisal manager of Union County and mass appraiser certified by the State of North Carolina, testified that he reviewed the final numbers for the 1 January 2008 revaluation. Every testified, that as a mass appraiser valuing 93,000 parcels, he uses "models to capture valuation – to reflect valuation in the marketplace and apply that to large masses of the properties to come up with a, hopefully, rational, reasonable reflection of the value of the property." As part of mass appraisal, a schedule of values ("SOV") is developed. Every testified that a SOV is "our means, our methods, our numbers we're going to use to determine valuation, and it has to be approved by our commissioners." "The objective of the schedules is to develop standards by which all property is valued at market value." Every agreed that "for a property to be developed residentially, you would have to have some sewer and water available" and also agreed that all other things being equal, "the value of property with access to sewer and water . . . is greater than the value of the same property without the access."

In regards to the 1 January 2008 valuation, Every testified that Union County was required by statute to appraise the parcels at its true and actual value in money, which meant that Union County "is required to consider each parcel separately listed as to its particular advantages and disadvantages and its adaptability to particular uses." Nonetheless, Every testified to the following:

> [Pace/Dowd:] Do you make a determination in carrying out that analysis of what the highest and best use of the property is?

[Every:] Yes.

[Pace/Dowd:] And did you make a determination – did the County make a determination with respect to the Pace parcels as to what the highest and best use of those parcels were as of the date of revaluation?

[Every:] We valued it as raw land. Large acreage, raw land.

[Pace/Dowd:] Did you value it as raw land for residential construction or not for residential construction?

[Every:] Just say large acreage of raw land. We didn't go any further than that.

. . . .

[Every:] We did not parse it down that fine, no. We valued the land all of the parts. We made no premium – put no premium on it to be a subdivision.

. . . .

[Pace/Dowd:] Okay. Now, did you – did the County, in conducting the reappraisal of these lots in connection with the countywide revaluation in January of 2008, take the SAP into account?

[Every:] Directly, no.

[Pace/Dowd:] When you say, "Directly, no," what do you mean?

[Every:] In that this problem had been well-known for a great period of time, I believe back to 2003, that the County was our [SIC] sewer and water. I believe that the sales we used, the majority of the sales in this list were sold and bought knowing that sewer and water was an issue. So I believe that this problem was already accounted for in these land sales. So I believe in that way, yes, we did. Did we then go out and do something in addition after the sale? No, we didn't.

Furthermore, Every testified that in selecting comparable parcels to assist in valuing the parcels at issue, Union County did not take sewer and water availability into account.

[Every:] [W]e weren't going and looking at these large-acreage tracts and go, which ones have sewer and water,

> which ones don't. We just were looking at, we have sales, and there are large-acreage tracts, and we'll use them for the valuation of other large-acreage tracts.

The comparables Every used concerned sales of property made from 2004 through 2006. None of the comparables used were from dates on or after Union County adopted the SAP in 2007. Also, in selecting comparables, Every testified that Union County selected comparables that were within the same school district. When questioned regarding this method of selecting a comparable, the following exchange occurred:

> [Pace/Dowd:] And, Mr. Every, do you have any evidence that you're prepared to present that would say that the market value, the school zones of raw, undeveloped land would affect market value so significantly that you're only going to consider comparables in the same school zone?
>
> [Every:] I believe that location is a very well-established appraisal principle. You can get fairly close [geographically], and we did that. . . . And I believe, again, that in our – in our situation, schools are a prime driver. . . .
>
> [Pace/Dowd:] But – but beyond just that general statement, you don't have anything specifically that would correlate property value to the school zone?
>
> [Every:] Do I have anything prepared for you today? No.

Every explained that he did not rely on any data that supported the idea that a specific school zone had a greater increase in value over a property located in another school zone but rather limited comparables to school zones because it was "the simplest solution."

Alfred Louis Tucker, Jr., also testified at the hearing. Tucker, an expert witness for Pace/Dowd, testified that he owned his own appraisal company, A.O. Tucker and Associates. Tucker completed two appraisals of the properties; one on 29 June 2007 valued as of 12 June 2007, and one on 10 May 2011 valued as of 1 January 2008. The purpose of the June 2007 appraisal was for mortgage loan financing. As of 12 June 2007, Tucker appraised Parcel 3 at $14,565,000 and Parcel 3A at $15,321,750, with both of these values reflecting his assumption that sewer and water would be available.

Tucker also performed an appraisal of the parcels in May of 2011 valued as of 1 January 2008, the date of the last Union County tax revaluation. Parcel 3 was valued at $2,400,000 and Parcel 3A was valued at

$1,837,500. Tucker's 2008 appraisal took into consideration the SAP, providing that "[a]ccording to local developers and officials in the Union County Public Works Department, no water or sewer taps are expected to be available to the [parcels] for some 6 to 8 years from January 1, 2008, the date of the last Union County tax revaluation." Union County argues, and Pace/Dowd concedes, that the Commission extensively questioned Tucker's 2007 appraisal and ultimately did not adopt his valuation or cite his opinion in the 24 January 2013 Final Decision.

Union County argues that even if Pace/Dowd was able to rebut the *Amp* presumption, Union County was able to establish that its method of valuing the parcels produced true values. Union County relies on Every's testimony to support its contention that there was no evidence to support the conclusion that Union County used an arbitrary appraisal method. However, we find this argument to be without merit. The evidence discussed above sufficiently supports the Commission's finding that Pace/Dowd rebutted the Amp presumption "by offering evidence tending to show that Union County used an arbitrary method of assessment . . . when Union County did not consider the factors set forth in N.C. Gen. Stat. § 105-317 (i.e. the availability of water and sewer to Parcels [3] and [3A])." Applying the whole record test, we conclude that the Commission's finding is rationally based on testimony provided by Every, which established that Union County failed to consider water and sewer availability in its valuation of the parcels.

Because the challenged findings and conclusions of the Commission have a rational basis in the evidence and it is not our duty to substitute our judgment for that of the Commission, we overrule Union County's arguments.

B. True Value of Parcel 3 and Parcel 3A as of 1 January 2008

[2] Next, Union County argues that the Commission erred by finding the true value of Parcel 3 to be $3,987,600 and Parcel 3A to be $4,583,140 as of the 1 January 2008 general reappraisal where there was no competent evidence in the record to support this valuation. We disagree.

In the 24 January 2013 "Final Decision," the Commission found the following:

> 14. Accordingly, the Commission, when considering the expert testimony of Mr. Willcox [sic], finds that the true value in money, which is "market value," as that term is defined in N.C. Gen. Stat. § 105-283, for Parcel [3] was $3,987,600, and the true value in money of Parcel [3A] was $4,583,140.

In a footnote to finding of fact 14, the Commission stated that:

> Based upon the expert testimony of Mr. Robert P. Willcox [sic], Jr., L.S.S., an expert in soil sites, Union County should reduce the county's values of Parcels [3] and [3A] by fifty percent (50%). (See Stipulation 3(w) stating that the county contends the value of Parcel [3] to be $7,975,200. ($7,975,200 divided by 50% = $3,987,600 for Parcel [3] and $9,166,280 divided by 50% = $4,583,140 for Parcel [3A]).

After thorough review, we conclude that the record sufficiently supports the Commission's finding that Union County's arbitrary method of assessment resulted in an assessment of the parcels that substantially exceeded the market values of the parcels. The Commission relied on Wilcox's testimony, which provided that greater than fifty (50) to sixty (60) percent of the parcels was "in that category of not being able to be utilized for septic suitability." Based on Wilcox's expert testimony, the Commission reduced Union County's values of the parcels by fifty percent (50%) resulting in values of $3,987,600 ($7,975,200 divided by 50%) for Parcel 3 and $4,583,140 ($9,166,280 divided by 50%) for Parcel 3A. Accordingly, we overrule Union County's arguments.

C. Conclusion of Law Number 3

[3] In its last argument, Union County contends that the Commission erred by concluding the following:

> 3. . . . Union County improperly "discovered" Parcel [3A] for tax years 2008 and 2009 when N.C. Gen. Stat. § 105-287 is the applicable statute regarding [Pace's] appeal.

Originally, after Pace/Dowd challenged Union County's property tax values of Parcel 3A in 2010, Union County sent notice to Pace/Dowd that it had "discovered" Parcel 3A by increasing the value to $9,166,280 for tax years 2008 and 2009. This "discovery" implicates N.C. Gen. Stat. § 105-312 (2013), titled "Discovered property; appraisal; penalty." Union County now argues that N.C.G.S. § 105-287 is not applicable to the case *sub judice* and that N.C. Gen. Stat. § 105-394 is the correct statute regarding Pace/Dowd's appeal, allowing Union County to recover taxes on the corrected value of Parcel 3A for years 2008 and 2009. We disagree.

N.C. Gen. Stat. § 105-287, titled "Changing appraised value of real property in years in which general reappraisal is not made," provides the following:

> (a) In a year in which a general reappraisal of real property in the county is not made under G.S. 105-286, the

> property shall be listed at the value assigned when last appraised unless the value is changed in accordance with this section. The assessor shall increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in the property's value resulting from one or more of the following reasons . . . .

N.C.G.S. § 105-287(a) (2013). The statute proceeds to list reasons such as: to correct a clerical or mathematical error; to correct an appraisal error resulting from a misapplication of schedules, standards, and rules used in the county's most recent general appraisal; to recognize an increase or decrease in the value of the property resulting from a conservation or preservation agreement, a physical change in the land or improvements on the land, and a change in the legally permitted use of the property, etc. *Id.*

N.C. Gen. Stat. § 105-394, titled "Immaterial irregularities," provides the following:

> Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

N.C.G.S. § 105-394 (2013). Examples of immaterial irregularities are listed. Union County argues that "[t]he failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law" is the applicable subsection to the facts before us. N.C.G.S. § 105-394(3).

Union County relies on two cases for their arguments: *In re Appeal of Morgan*, 186 N.C. App. 567, 652 S.E.2d 655, (2007), *rev'd*, 362 N.C. 339, 661 S.E.2d 733 (2008), and *In re Appeal of Dickey*, 110 N.C. App. 823, 431 S.E.2d 203 (1993). However, we find both of the cases to be distinguishable from our present case and hold neither of these cases to be controlling.

In *Morgan*, although the taxpayers had listed their residence on the county tax listing form in 1993 and an appraiser with Henderson County's Tax Assessor's Office visited the taxpayers' property during countywide reappraisals in 1999 and 2003, the tax assessor *failed to assess any taxes* on the residence from the years 1995 through 2003.

Morgan, 186 N.C. App. at 568, 652 S.E.2d at 656. In 2004, Henderson County's Tax Assessor's Office finally assessed taxes on the residence and asserted that the taxpayers owed back taxes and interest in the amount of $8,533.61 for tax years 1995 through 2003. *Id.* The Commission concluded, and our Court affirmed, that the failure of the tax assessor to assess taxes on the residence was not an "immaterial irregularity" pursuant to N.C.G.S. § 105-394 and barred Henderson County from attempting to collect back taxes. *Id.* Our Court held that N.C.G.S. § 105-394 was "intended to cover cases where there is no dispute that but for the *clerical error*, the tax would have been valid." *Id.* at 571, 652 S.E.2d at 658 (citation omitted) (emphasis in original). Henderson County's failure to assess the residence was not an "immaterial irregularity" because it was neither a clerical nor administrative error. *Id.* at 570, 652 S.E.2d at 657. In a dissenting opinion, Judge Geer stated that the plain language of N.C.G.S. § 105-394 did not require that the failure to assess any property for taxation be due to a clerical or administrative error. Rather, Judge Geer opined that Henderson County's failure to assess the taxpayers' residence within the time prescribed by law constituted an immaterial irregularity pursuant to N.C.G.S. § 105-394 and that it did not invalidate the tax levied on the property. *Id.* For the reasons stated in Judge Geer's dissent, our Supreme Court reversed the Court of Appeal's opinion in *In re Appeal of Morgan*, 362 N.C. 339, 661 S.E.2d 733 (2008).

In *Dickey*, the taxpayers purchased a lot and a newly constructed house in 1988 for $272,500.00. The taxpayers submitted their "1989 Property Tax Listing" and the 1989 tax bill from Forsyth County assessed the taxpayers' real property valued at $37,500.00. *Dickey*, 110 N.C. App. at 824, 431 S.E.2d at 204. In 1990, the tax assessor notified the taxpayers that their property "ha[d] been taxed improperly" for the year 1989. The tax assessor, "pursuant to N.C.G.S. § 105-312 (discovered property), added to the previously assigned value the sum of $185,500.00, and assessed the [taxpayers] an additional $2,094.30 in taxes." *Id.* at 825, 431 S.E.2d at 204. The taxpayers appealed to Forsyth County, which dismissed their appeal. *Id.* The taxpayers then appealed to the Commission, and the Commission found that the taxpayers properly listed their house on the property tax listing dated 17 January 1989 "on a portion of the listing form which was designed to be torn off if it was not completed." The Commission stated that "[a]fter receipt by the County, this portion of the form was removed and destroyed even though it had been completed by the [taxpayers.]" *Id.* at 825, 431 S.E.2d at 204. Because the taxpayers submitted a timely and accurate property tax listing, the improvements on the taxpayers lot were not considered "discovered" property under

N.C.G.S. § 105-312. Furthermore, the Commission found that because the tax assessor appraised the house at a value of $0.00 for the tax year 1989, pursuant to N.C.G.S. § 105-287, the assessor was authorized to reappraise the house in 1990. Such reappraisal was effective as of 1 January of the year in which it is made and was not retroactive. *Id.* at 825, 431 S.E.2d at 205. Forsyth County appealed. Our Court held that because the tax assessor never "appraised" the taxpayer's house for tax purposes in 1989 as defined in N.C.G.S. § 105-273[1], N.C.G.S. § 105-287 had no application. "There is no evidence that the Assessor prior to 1990 attempted to ascertain the true value of the [taxpayers'] house, and it is undisputed that the true value of the house in 1989 was not *zero* dollars." *Id.* at 828, 431 S.E.2d at 206. Forsyth County argued that the tax assessor's failure to levy any tax on the house was an "immaterial irregularity" and our Court agreed that N.C.G.S. § 105-394 applied since it had been previously established that "a clerical error by a tax supervisor's office is an immaterial irregularity under G.S. 105-394 so as not to invalidate the tax levied on the property." *Id.* at 829, 431 S.E.2d at 207 (citing *In re Notice of Attachment*, 59 N.C. App. 332, 333-34, 296 S.E.2d 499, 500 (1982)).

In both *Morgan* and *Dickey*, the properties at issue had never been "appraised" as defined in N.C. Gen. Stat. § 105-273 or assessed for taxation purposes. The facts in both *Morgan* and *Dickey* support the conclusion that the tax assessors' actions constituted an "immaterial irregularity" pursuant to N.C.G.S. § 105-394, in that the assessors failed "to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law." N.C.G.S. § 105-394(3) (2013). In the case *sub judice*, Union County did not fail to appraise the parcels for the years 2008 and 2009. To the contrary, Union County appraised the parcels, but did so using an arbitrary method of valuation that resulted in an assessment that substantially exceeded the true value of the parcels.

Based on the foregoing, the Commission did not err by concluding that N.C.G.S. § 105-287 applied to Pace/Dowd's appeal, as Union County attempted to change the value of the parcels in a year in which a general reappraisal was not made. Furthermore, the Commission did not err by holding that Union County "improperly 'discovered' Parcel [3A] for tax years 2008 and 2009" as the General Assembly has stated that "[a]n increase or decrease in appraised value made under this section is

1. N.C. Gen. Stat. § 105-273 (2013) defines "appraisal" as "[t]he true value of property or the process by which true value is ascertained."

effective as of January 1 of the year in which it is made and is not retroactive." N.C.G.S. § 105-287(c).

Affirmed.

Judges ELMORE and DAVIS concur.

MORNINGSTAR MARINAS/EATON FERRY, LLC, PETITIONER
v.
WARREN COUNTY, NORTH CAROLINA AND KEN KRULIK, WARREN COUNTY PLANNING AND ZONING ADMINISTRATOR, IN HIS OFFICIAL CAPACITY, RESPONDENTS

No. COA13-458

Filed 18 March 2014

1. Mandamus—writ of mandamus—zoning dispute—zoning administrator—transmission of appeal to Board of Adjustment

The trial court did not err by issuing a writ of mandamus in favor of petitioner in connection with a zoning dispute. The zoning administrator had a statutory duty to transmit petitioner's appeal to the Board of Adjustment (BOA) and the petitioner's standing was a legal determination to be made by the BOA, not the zoning administrator; the act of placing petitioner's appeal on the BOA agenda was ministerial in nature and did not involve any discretion on the part of the zoning administrator; petitioner had a legal right to have its appeal transmitted to the BOA and placed on the agenda; and mandamus was petitioner's only available remedy.

2. Mandamus—writ of mandamus—motion to dismiss—failure to join necessary party—attempt to circumvent untimely appeal

The trial court did not err in a case involving a zoning dispute by denying respondents' motion to dismiss petitioner's petition for writ of mandamus. Petitioner did not fail to join a necessary party and N.C.G.S. § 160A-393 was not applicable to this action for mandamus. Furthermore, petitioner was not seeking mandamus in an attempt to take an untimely appeal of the substance of the 21 April Determination but was instead appealing from the 16 November Determination.

Judge ELMORE dissenting.

Appeal by respondents from order entered 13 September 2012 by Judge Robert H. Hobgood in Warren County Superior Court. Heard in the Court of Appeals 6 November 2013.

Robinson, Bradshaw & Hinson, P.A., by John H. Carmichael, for petitioner-appellee.

Turrentine Law Firm, PLLC, by Karlene S. Turrentine, for respondents-appellants.

DAVIS, Judge.

Warren County and Ken Krulik ("Mr. Krulik"), in his official capacity as the Warren County Planning and Zoning Administrator (collectively "Respondents"), appeal from the trial court's order issuing a writ of mandamus in favor of Morningstar Marinas/Eaton Ferry, LLC ("Morningstar") in connection with a zoning dispute. After careful review, we affirm the trial court's order.

Factual Background

The facts relevant to this appeal are as follows: Morningstar operates a full-service marina on a 5.03 acre parcel of land ("the Morningstar Property") located at 1835 Eaton Ferry Road in Littleton, North Carolina. The Morningstar Property is zoned commercial in the Lakeside Business District under the Warren County Zoning Ordinance ("the Ordinance"). Its commercial marina offers wet slips and dry storage for boats and a fuel dock. The Morningstar Property is located off of a small cove of Lake Gaston and is approximately 145 feet across the cove from land owned by East Oaks, LLC ("East Oaks"). Approximately 8.5 acres of the East Oaks property is zoned residential ("the Residential Property") under the Ordinance. Adjacent to the Residential Property is a 1.91 acre parcel of land owned by East Oaks and zoned commercial ("the Commercial Property"). The Commercial Property is improved with a boat storage building from which East Oaks operates a dry storage facility.

East Oaks filed a petition for a conditional use permit seeking to build 36 townhouses on the Residential Property. In its petition, East Oaks included a site plan for the proposed use showing the townhouses, roads, and a drive ("the Drive") that connects the Commercial Property and the Residential Property. The record indicates that the Drive was to be used for the purpose of transporting boats from the dry storage facility located on the Commercial Property to the boat launch area located on the Residential Property.

Before the Warren County Board of Adjustment ("BOA") ruled on East Oaks' petition for a conditional use permit, Mr. Krulik reviewed the Ordinance and issued a formal determination on 21 April 2011 ("the 21 April Determination"), finding that townhouses were a permitted use in a residential district as a single-family dwelling. As such, East Oaks withdrew its application for the conditional use permit and secured a standard zoning permit to begin construction.

Morningstar appealed the 21 April Determination to the BOA, asserting that neither the townhouses nor the Drive portions of East Oaks' site plan were permitted under the Ordinance. Because the 21 April Determination did not expressly address the Drive portion of East Oaks' site plan, on 12 May 2011, Morningstar requested that Mr. Krulik issue a formal determination as to whether East Oaks' proposed use of the Drive would constitute a commercial use of the Residential Property in violation of the Ordinance. In an email dated 10 June 2011, Mr. Krulik responded, "I am not going to make a determination on this . . . . [because] it is not a relevant issue to my determination on townhouses as a permitted use or issuing the zoning permit."

On 15 August 2011, the BOA heard Morningstar's appeal and voted unanimously to reverse the 21 April Determination and to revoke East Oaks' zoning permit. On 12 September 2011, East Oaks filed a petition for writ of certiorari in Warren County Superior Court seeking judicial review of the BOA's decision reversing the 21 April Determination. On 14 October 2011, the Honorable Robert H. Hobgood entered a consent order whereby East Oaks and Warren County agreed to reinstate East Oaks' zoning permit and adopt Mr. Krulik's interpretation of the Ordinance so as to allow East Oaks to develop the property pursuant to its site plan. Morningstar was not a party to the consent order, and the trial court concluded as a matter of law that "Morningstar is not a 'person aggrieved' pursuant to N.C. Gen. Stat. § 153A-345(b)" and that the "Warren County Board of Adjustment had no jurisdiction or authority to hear the appeal of Morningstar."

One week earlier, on 7 October 2011, Morningstar filed its initial petition for writ of mandamus to compel Mr. Krulik to issue the requested formal determination regarding the Drive. In Respondents' answer, they denied Morningstar's right to petition for writ of mandamus but also attached a formal determination from Mr. Krulik dated 16 November 2011 ("the 16 November Determination"), which stated, in pertinent part, that

> [w]hile I did not make a specific determination as to whether the use of the concrete drive/easement

> constitutes a commercial use of the East Oaks property in violation of the Ordinance, my issuance of the East Oaks zoning permit . . . necessarily required that I determine the submitted use of the entire property covered by the permit is not restricted by the Warren County Zoning Ordinance.
>
> The drive is shown as a "20' wide private access easement" on East Oaks' development plans. Warren County's Ordinance does not specifically regulate easements — whether or not they cross varying zoning jurisdictions. . . . [T]o my knowledge, there has been no attempt by Warren County to regulate such easements through its zoning regulations.

After Mr. Krulik issued the 16 November Determination, Morningstar dismissed its petition for writ of mandamus without prejudice.

Thereafter, Morningstar noticed its appeal of the 16 November Determination ("the Drive Appeal"). By letter dated 17 January 2012, Warren County's attorney advised Morningstar that the Drive Appeal would not be placed on the BOA's agenda. On 14 May 2012, Morningstar filed another petition for writ of mandamus in Warren County Superior Court, seeking — this time — to compel Respondents to place the Drive Appeal on the BOA's agenda for a hearing on the merits. On 13 September 2012, Judge Hobgood granted Morningstar's petition and issued a writ of mandamus ordering Respondents to place the appeal on the BOA's agenda. Respondents filed a timely notice of appeal to this Court.

Analysis

As an initial matter, Respondents argue that the 16 November Determination was not a "new" determination from which Morningstar could appeal to the BOA because it merely echoed Mr. Krulik's 21 April Determination. We disagree. The 21 April Determination did not explicitly address the use of the Drive. Moreover, in its first petition for writ of mandamus, Morningstar alleged: "As of the date of this Petition, Mr. Krulik has not issued the requested formal determination [regarding the Drive]." Respondents admitted this allegation in their answer and then — referencing the 16 November Determination — provided that "such formal determination is hereto attached." Thus, we consider Mr. Krulik's 16 November letter to be a formal determination from which Morningstar may appeal.

[1] We now turn our attention to whether the criteria for the issuance of a writ of mandamus were satisfied. "A writ of mandamus is an

extraordinary court order to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Graham Cty. Bd. of Elections v. Graham Cty. Bd. of Comm'rs*, 212 N.C. App. 313, 322, 712 S.E.2d 372, 379 (2011) (citation and quotation marks omitted). A writ of mandamus is the proper remedy when (1) the party seeking relief has "a clear legal right to the act requested;" (2) the respondent has "a legal duty to perform the act requested;" (3) the act at issue is "ministerial in nature and [does] not involve the exercise of discretion;" (4) the respondent has failed to perform the act requested and the time for performance has expired; and (5) there is no legally adequate alternative remedy. *In re T.H.T.*, 362 N.C. 446, 453-54, 665 S.E.2d 54, 59 (2008). "A court cannot refuse a petition for writ of mandamus when it is sought to enforce a clearly-established legal right." *Id.* at 453, 665 S.E.2d at 59.

Here, Respondents' primary contention is that mandamus was not appropriate because Morningstar lacked standing to appeal Mr. Krulik's 16 November Determination and, as such, did not have a "clear legal right" to have its appeal placed on the BOA's agenda. However, because we believe that Mr. Krulik had a statutory duty to transmit Morningstar's appeal to the BOA and that the existence — or nonexistence — of standing is a legal determination that must be made by the BOA, we affirm the trial court's order issuing a writ of mandamus compelling Respondents to place the appeal on the BOA's agenda.

At all times relevant to this action, N.C. Gen. Stat. § 153A-345[1] provided, in relevant part, as follows:

> (b) A zoning ordinance . . . adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. Any person aggrieved or any officer, department, board, or bureau of the county may take an appeal. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken *shall*

1. N.C. Gen. Stat. § 153A-345 was in effect during the time period relevant to the present action but has since been repealed. N.C. Gen. Stat. § 160A-388 now governs appeals to county boards of adjustment.

> forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken.

N.C. Gen. Stat. § 153A-345(b) (emphasis added). The purpose of N.C. Gen. Stat. § 153A-345 is "to provide a right of review, and statutes providing for review of administrative decisions should be liberally construed to preserve and effectuate that right." *Mize v. Cty. of Mecklenburg*, 80 N.C. App. 279, 283, 341 S.E.2d 767, 769 (1986).

Neither N.C. Gen. Stat. § 153A-345 nor any other provision of North Carolina law confers upon a zoning administrator the power to make a legal decision as to whether a party seeking to appeal to the BOA from a zoning decision is a "person aggrieved" for standing purposes. North Carolina law does, however, mandate that the zoning administrator transmit the record of an appeal to the BOA if the appeal is taken within the prescribed time period. Pursuant to N.C. Gen. Stat. § 153A-345(b), a zoning administrator has no discretion regarding whether to perform his duty of transmitting the record to the BOA once the appeal has been noticed. Instead, as quoted above, the statute expressly states that the zoning administrator from whom the appeal is being taken "*shall* forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken." N.C. Gen. Stat. § 153A-345(b) (emphasis added). The Warren County Zoning Ordinance — in accordance with § 153A-345(b) — also specifically provides that "[a]ppeals from the enforcement and interpretation of this ordinance . . . shall be filed with the Zoning Administrator, who *shall* transmit all such records to the Board of Adjustment." Warren County, N.C., Zoning Ordinance § IX-4 (emphasis added).

Our appellate courts have consistently held that the use of the word "shall" in a statute indicates what actions are required or mandatory. *See Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) ("It is well established that the word 'shall' is generally imperative or mandatory." (citations and quotation marks omitted)); *Internet E., Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001) ("The word 'shall' is defined as 'must' or 'used in laws, regulations, or directives to express what is mandatory.' " (citation omitted)). As such, we conclude that the act of placing Morningstar's appeal on the BOA agenda is ministerial in nature and does not involve any discretion on the part of the zoning administrator.

We also hold that Morningstar has a legal right to have its appeal transmitted to the BOA and placed on the agenda. Morningstar appealed the 16 November Determination on 14 December 2011. In accordance

with the provisions of the Warren County Zoning Ordinance, Morningstar filed its appeal with Mr. Krulik, the officer from whom the appeal was taken, and included a $150.00 filing fee for the appeal. *See* Warren County, N.C., Zoning Ordinance § IX-4 ("Appeals from the enforcement and interpretation of this ordinance . . . shall be filed with the Zoning Administrator . . . ."); *id.* at § IX-2 (listing $150.00 as fee for appeals to the BOA). Because Morningstar complied with the requirements for taking an appeal, it had a right to have its appeal placed on the BOA's agenda. *See id.* at § IX-3 ("The Board of Adjustment shall have the following powers and duties . . . [t]o hear and decide any appeal from and review any order, requirement, decision, or determination made by the Zoning Administrator."); *id.* at § IX-4 ("The Board of Adjustment shall fix a reasonable time, not to exceed 30 days, for the hearing of the appeal . . . .").

Mr. Krulik, as the zoning officer from whom the appeal was taken, therefore had a statutory duty to transmit the appeal to the BOA. This duty was mandatory, as indicated by the use of the word "shall," and did not involve the exercise of discretion. Because Mr. Krulik failed to comply with the statutory mandate and instead made clear his unwillingness to do so, mandamus was Morningstar's only available remedy. Morningstar's ability to appeal to the BOA was foreclosed by Mr. Krulik's refusal to place the appeal on the BOA's agenda. Moreover, Morningstar could not appeal the substance of the zoning administrator's decision directly to the superior court because only BOA decisions are subject to judicial review. *See* N.C. Gen. Stat. § 153A-345(e2) ("Each decision *of the board* is subject to review by the superior court by proceedings in the nature of certiorari." (emphasis added)).

The trial court's order compelling Respondents to place Morningstar's appeal on the BOA agenda does not allow Morningstar to circumvent the requirement of standing. To the contrary, its order fully recognizes that in accordance with § 153A-345, Morningstar must establish that it is an aggrieved party in order to have the merits of its appeal heard by the BOA. We believe the order correctly provides that the determination of whether Morningstar has standing to appeal must be made by the BOA rather than by Mr. Krulik. We express no opinion as to whether Morningstar does or does not possess standing to appeal because that issue is not before us.

Smith v. Forsyth Cty. Bd. of Adjust., 186 N.C. App. 651, 652 S.E.2d 355 (2007), the case the dissent relies upon in concluding that mandamus was not appropriate, did not involve a petition for a writ of mandamus or in any way address the authority of a zoning administrator to make a determination as to standing. Rather, the issue in *Smith*

was whether the superior court correctly dismissed the petitioner's appeal from a BOA decision for lack of standing. *Id.* at 652, 652 S.E.2d at 357. This Court concluded that the petitioner's application to the BOA appealing the zoning officer's decision had not alleged special damages as required in order for the petitioner to qualify as a "person aggrieved." *Id.* at 654-55, 652 S.E.2d at 358.

We do not read *Smith* as suggesting that a zoning officer would have the authority to refuse to transmit an appeal to the BOA based simply on his own belief that the appellant lacked standing. We cannot agree with the dissent that our holding in *Smith* somehow confers a gatekeeper role onto zoning officers given that such a role is nowhere conferred by statute or, for that matter, identified in our decision in that case. Rather, we believe that *Smith* is consistent with the notion that it is the *BOA* that has the duty of determining whether a party has made the requisite showing of standing such that the merits of the appeal may be reached.

Standing is a question of law. *Cook v. Union Cty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007). A determination of standing involves a determination of "whether a particular litigant is a proper party to assert a legal position." *Id.* As such, we are unable to conclude that a zoning officer is vested with the authority to make such legal determinations regarding standing, particularly where the result, as here, would be to insulate that very same officer's decision from review.

[2] Respondents also contend that their motion to dismiss the petition for writ of mandamus was improperly denied because (1) Morningstar failed to join a necessary party (East Oaks); and (2) Morningstar's petition for mandamus was merely an attempt to bypass the fact that the time period for appealing the 21 April Determination or the consent order reinstating that determination had already passed. We are not persuaded by either of these arguments.

"A necessary party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *McCraw v. Aux*, 205 N.C. App. 717, 719, 696 S.E.2d 739, 740, *disc. review denied*, 364 N.C. 617, 705 S.E.2d 362 (2010). As we have explained above, the present action commenced when Morningstar attempted to appeal the 16 November Determination and Mr. Krulik refused to place the appeal on the BOA's agenda. Morningstar then sought a writ of mandamus directing Respondents to perform the ministerial, nondiscretionary task of placing the appeal on the BOA's agenda for a hearing. The order issuing

mandamus in no way addressed the merits of any substantive issues concerning (1) whether Morningstar was an aggrieved party with standing to appeal; or (2) whether East Oaks' use of the Drive is permitted under the Warren County Zoning Ordinance.[2] Rather, as Morningstar notes, the present action is "a purely procedural issue between Morningstar and the Respondents."

Respondents nevertheless assert that under N.C. Gen. Stat. § 160A-393, Morningstar was required to name East Oaks as a respondent. *See* N.C. Gen. Stat. § 160A-393(e) (2013) ("If the petitioner is not the applicant before the decision-making board whose decision is being appealed, the petitioner shall also name that applicant as a respondent."). However, the scope of N.C. Gen. Stat. § 160A-393 is specifically limited to appeals in the nature of certiorari from decision-making boards to superior courts and, thus, does not apply to the present action for mandamus. N.C. Gen. Stat. § 160A-393(a) ("This section applies to appeals of quasi-judicial decision-making boards when that appeal is to superior court and in the nature of certiorari . . . ."). As such, we agree with the trial court's conclusion that "the Warren County Zoning Board of Adjustment and East Oaks, LLC are not necessary parties to this mandamus action. The parties sought to be compelled to take action in this mandamus action are the Respondents."

Finally, Respondents argue that the trial court improperly denied their motion to dismiss because Morningstar only sought mandamus in an attempt to take an untimely appeal of the substance of the 21 April Determination. Respondents correctly state that "[a]n action for mandamus may not be used as a substitute for an appeal. This extraordinary remedy is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction." *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968) (citations, quotation marks, and italics omitted).

However, as previously discussed, the 16 November Determination — unlike the 21 April Determination — specifically addresses the Drive, and was, in fact, a formal determination concerning the Drive. Once the 16 November Determination was made, Morningstar attempted to bring a timely appeal to the BOA but was prevented by Mr. Krulik from doing so. We therefore cannot agree with Respondents' argument that

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2. The trial court's order issuing mandamus specifically explains that "[t]his Order only directs that a hearing be conducted by the Warren County Board of Adjustment but does not direct that Board concerning the merits of the case."

Morningstar's petition for mandamus was filed "for the sole purpose of getting around the appeal deadline [for the 21 April Determination] which had passed." Accordingly, this argument is overruled.

Conclusion

For the reasons stated above, we affirm the trial court's order issuing a writ of mandamus compelling Respondents to place Morningstar's appeal on the BOA's agenda. Because we hold that the trial court properly issued the writ of mandamus, we also affirm the trial court's denial of Respondents' motion for attorneys' fees.

AFFIRMED.

Judge McCULLOUGH concurs.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that Mr. Krulik had a statutory duty to transmit the appeal to the Board of Adjustment (BOA) pursuant to N.C. Gen. Stat. § 153A-345. As a result, I would reverse the trial court's order granting petitioner's writ of mandamus. I concur in all other aspects of the majority opinion.

The majority is correct in that N.C. Gen. Stat. § 153A-345 mandates that any person *aggrieved* by a zoning decision shall be afforded a statutory right of review before the BOA. This Court has defined a "person aggrieved" as "one adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *Cnty. of Johnston v. City of Wilson*, 136 N.C. App. 775, 779, 525 S.E.2d 826, 829 (2000) (citations and quotations omitted). "It is well settled that an appeal may only be taken by an aggrieved real party in interest." *Id.*

While the majority argues that *Smith v. Forsyth County Bd. of Adjustment* is inapposite to the outcome of the instant case, I disagree. 186 N.C. App. 651, 652 S.E.2d 355 (2007). In *Smith*, we specifically looked to whether the petitioner had standing to appeal a zoning determination from the Zoning Officer to the BOA. To establish standing to appeal, this Court required that an aggrieved party "show either some interest in the property affected," or, if plaintiffs are adjoining property owners, "they must present evidence of a reduction in their property values. Mere proximity to the site of the zoning action at issue is insufficient to establish 'special damages.' " *Id.* at 654, 652 S.E.2d at 358. We concluded that because the petitioner's application to the BOA for appeal of the Zoning

Officer's decision failed to allege that the zoning decision had decreased the value of the petitioner's property or would do so in the future, the petitioner "failed to allege, or show, special damages; therefore, she did not have standing to appeal from the Zoning Officer to the [BOA]." *Id.* at 654-55, 652 S.E.2d at 358.

I read *Smith* as suggesting that the Zoning Officer is vested with authority to refuse to transmit an appeal to the BOA if the appealing party's application is devoid of any allegations of special damages, namely a decrease in property value. Without alleging special damages in an application for appeal, the appealing party cannot demonstrate that it is aggrieved, and therefore the Zoning Officer may unilaterally dismiss the appeal for want of standing. Simply put, to fall under the purview of N.C. Gen. Stat. § 153A-345, Morningstar must have shown that it was aggrieved, which it could have done by alleging special damages in its appeal of the 16 November determination. However, Morningstar neglected to do so. Without alleging special damages, Morningstar is not "aggrieved" under N.C. Gen. Stat. § 153A-354, and it had no standing to appeal. Thus, Mr. Krulik was not compelled to place Morningstar's appeal on the BOA's agenda.

Further, without standing, Morningstar could not demonstrate a "clear legal right" to petition for writ of mandamus. Because Morningstar failed to satisfy the first element of mandamus, the trial court erred in granting its petition. Accordingly, the trial court's order should be reversed.

MARCUS ROBINSON, JAMES EDWARD THOMAS, ARCHIE LEE BILLINGS, AND JAMES A. CAMPBELL, PLAINTIFFS

v.

KIERAN A. SHANAHAN, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, KENNETH E. LASSITER, WARDEN OF CENTRAL PRISON, DEFENDANTS

No. COA13-504

Filed 18 March 2014

Appeal and Error—issues not litigated before trial court—remand

Plaintiffs' argument that the "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" must be promulgated through rule-making under the Administrative Procedure Act was remanded for proper determination by the trial court. Plaintiffs' arguments before the Court of Appeals were not considered by the trial court when the court entered the order from which plaintiffs' appealed because these issues stemmed entirely from subsequent changes to N.C.G.S. § 15-188 and the execution protocol made during pendency of this appeal.

Appeal by plaintiffs from order entered 12 March 2012 by Senior Resident Superior Court Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 January 2014.

Poyner Spruill LLP, by Robert F. Orr, and Copeley Johnson & Groninger PLLC, by David Weiss, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli and Assistant Attorney General Jodi Harrison, for defendants-appellees.

HUNTER, Robert C., Judge.

Marcus Robinson, James Edward Thomas, Archie Lee Billings, and James A. Campbell (collectively "plaintiffs") appeal from an order granting summary judgment in favor of defendants on plaintiffs' challenge to North Carolina's previously used three-drug protocol for the administration of lethal injections ("the 2007 Protocol"). During the pendency of this appeal, the 2007 Protocol was replaced by the "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" ("the new Manual") after a statutory amendment vested the Secretary of the North Carolina Department of Public Safety ("DPS") with the authority to determine

execution procedures in North Carolina. As a result, plaintiffs' only remaining contention on appeal is that the new Manual must be promulgated through rule-making under the Administrative Procedure Act ("the APA").

After careful review, we remand so that the trial court may properly determine this issue in the first instance.

Background

Plaintiffs are death-sentenced inmates who filed individual complaints in 2007, later consolidated, seeking declaratory judgments, temporary restraining orders, and injunctive relief on the grounds that, *inter alia*, (1) the 2007 Protocol violated the Eighth Amendment of the United States Constitution and Article 1, section 27 of the North Carolina Constitution proscribing cruel and/or unusual punishment; and (2) the 2007 Protocol violated the APA because it was not promulgated through the administrative rule-making process. After effectively staying the proceedings pending resolution of other litigation involving the 2007 Protocol, the trial court recommenced the case in May 2009. Following discovery, the parties filed cross motions for summary judgment, which were heard by the trial court on 12 December 2011. By order entered 12 March 2012, the trial court granted summary judgment for defendants. With regard to plaintiffs' claim that the 2007 Protocol was implemented in violation of the APA, the trial court concluded:

> 12. Plaintiffs' claim that the execution protocol is invalid until Defendants issue it in accordance with the rule-making provisions of Chapter 150B of the North Carolina General Statutes is also without foundation. N.C.G.S. § 150B-1(d)(6) provides that the Division of Adult Correction of the Department of Public Safety - the Department into which the previously-existing North Carolina Department of Correction was recently consolidated - is exempt from rule making "with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees." Because it provides the method for and procedures by which condemned prisoners such as Plaintiffs are to be executed pursuant to Chapter 15 of the General Statutes, the Protocol relates solely to prisoners and, so, is exempt from the rule making provisions of Chapter 150B.

Plaintiffs filed timely notice of appeal from this order.

During the pendency of the appeal, the General Assembly amended the law relevant to plaintiffs' APA rule-making claim. Effective 19 June 2013, N.C. Gen. Stat. § 15-188 confers authority on the Secretary of DPS to determine North Carolina's lethal injection procedure. *See* 2013 Sess. Laws 154, § 3.(a). Pursuant to this grant of authority, Secretary of DPS Frank L. Perry issued the new Manual on 24 October 2013, eliminating the three-drug method of lethal injection challenged by plaintiffs at the trial level and instituting a new, single-drug procedure.

As a result, this Court allowed a Joint Motion for Removal from the 6 November 2013 Argument Calendar and permitted the parties to file supplemental briefs outlining the effect of these changes on plaintiffs' appeal. Subsequently, this Court dismissed as moot plaintiffs' arguments that the 2007 Protocol constituted cruel and/or unusual punishment and allowed oral argument on one issue – whether the new Manual must be promulgated through APA rule-making.

Discussion

I. APA Rule-making

The sole issue remaining on appeal is whether the new Manual must be issued in accordance with APA rule-making procedures. Because this matter has not been presented to the trial court for a determination, we remand.

Rule 10 of the North Carolina Rules of Appellate Procedure provides that:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2013). Our appellate courts have consistently declined to consider issues that were not presented at the trial level. "It is a well-established rule in our appellate courts that a contention not raised and argued in the trial court may not be raised and argued for the first time on appeal." *In re Hutchinson*, __ N.C. App. __, __, 723 S.E.2d 131, 133 (2012); *see also Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147 (1991) (refusing to pass on theories of liability for the first time on appeal).

Here, plaintiffs argue two theories as to why the new Manual must be promulgated through APA rule-making: (1) section 15-188 as revised confers authority to issue the new Manual on the Secretary of DPS, and because the General Assembly declined to give DPS an APA exception, the new Manual must undergo rule-making in its entirety; and (2) even if the rule-making exception for the Department of Adult Correction ("DAC") within DPS set out in N.C. Gen. Stat. § 150B-1(d)(6) relating solely to "persons in its custody or under its supervision" is applicable, parts of the new Manual go beyond its parameters and must be promulgated through rule-making.

Although they initially requested that this Court invalidate the new Manual until it undergoes rule-making, plaintiffs acknowledged at oral argument that the new Manual has not been evaluated at the trial level, and thus conceded that remand is proper. We agree. The order from which plaintiffs appealed contains no findings of fact or conclusions of law relating to the sole issue before us. Nor could it. These arguments could not have been considered by the trial court when it entered the 12 March 2012 order because they stem entirely from subsequent changes to section 15-188 and the execution protocol made during pendency of this appeal. Thus, in effect, we have nothing to review. Absent a ruling from the trial court on these matters, we are without authority to consider them in the first instance on appeal. *See Henderson*, 101 N.C. App. at 264, 399 S.E.2d at 147. Accordingly, we believe it is appropriate to remand this matter to the trial court for further proceedings.

In their supplemental brief, defendants first requested that this Court affirm the trial court's conclusion that the 2007 Protocol need not undergo rule-making, or in the alternative, remand so that the trial court may consider arguments on the new Manual. Because the 2007 Protocol was replaced by the new Manual and is no longer the applicable process by which lethal injections are carried out, we decline to address the trial court's conclusion that it need not undergo APA rule-making.

At oral argument, counsel for defendants further asked this Court to enter an affirmative ruling that the APA exception in section 150B-1(d)(6) "with respect to matters relating solely to persons in [DAC] custody or under its supervision" will always apply to execution procedures, including the single-drug method set out in the new Manual, based on the North Carolina Supreme Court's holding in *Connor v. N.C. Council of State*, 365 N.C. 242, 716 S.E.2d 836 (2011). In *Connor*, the Supreme Court addressed whether the APA applied to the Council of State's approval of the 2007 Protocol. *Id.* at 250, 716 S.E.2d at 841. According to the Court, neither party disputed that the APA exception in section 150B-1(d)(6)

applied to the 2007 Protocol. *Id.* at 253, 716 S.E.2d at 843. Ultimately it held that "the process by which the Council approves or disapproves the DOC's lethal injection protocol is not subject to the APA[.]" *Id.* at 257, 716 S.E.2d at 846. Regardless of whether the Supreme Court's analysis of the 2007 Protocol is dicta, a conclusion as to which plaintiffs and defendants are in disagreement, we are without authority to determine the effect that the *Connor* holding may have on the new Manual before the trial court has had the opportunity to do so. *See In re Hutchinson*, __ N.C. App. at __, 723 S.E.2d at 133.

Conclusion

Because this Court may not pass on legal issues for the first time on appeal, we remand to the trial court so that it may properly determine this matter and develop an adequate record for any subsequent appellate review.

REMANDED.

Judges McGEE and ELMORE concur.

THOMAS BRANDON SPOON, PLAINTIFF
v.
ABBY MELVIN SPOON, DEFENDANT

No. COA13-340

Filed 18 March 2014

1. Civil Procedure—Rule 52(b)—court's authority to amend conclusions of law

The trial court did not err in a child custody case by amending its order in response to plaintiff's N.C.G.S. § 1A-1, Rule 52(b) motion. The trial court possessed authority under Rule 52(b) to amend its conclusions of law.

2. Child Custody and Support—custody—substantial change in circumstances—moving—stipulation

The trial court did not err in a child custody case by concluding that a substantial change in circumstances had occurred based on its alleged reliance on the 3 August 2011 stipulation which stated that a move to Orange County, North Carolina constituted a substantial change in circumstances affecting the minor children. There

was no indication that the trial court sought to avoid its obligation to determine whether a substantial change in circumstances had occurred.

3. Child Custody and Support—custody modification—substantial change in circumstances—moving—nexus—children's welfare

The trial court did not err by modifying child custody. The order demonstrated that there had been a substantial change in circumstances related to defendant's moves to Mebane and Chapel Hill. It also established a sufficient nexus between the change in circumstances and the children's welfare.

Appeal by defendant from order entered 20 September 2012 by Judge Kathryn Whitaker Overby in Alamance County District Court. Heard in the Court of Appeals 12 September 2013.

Wishart, Norris, Henninger & Pittman, PA, by Hillary D. Whitaker and Kathleen F. Treadwell, for plaintiff-appellee.

Alexander, Miller, and Schupp, LLP, by Sydenham B. Alexander, Jr. and Jonathan J. Loch, for defendant-appellant.

DAVIS, Judge.

Abby Melvin Spoon, now Abby Melvin Brown ("Defendant"), appeals from the trial court's amended order modifying the custody arrangements for the parties' three children. Defendant's primary arguments on appeal are that the trial court erred by (1) supplementing its conclusions of law in response to a Rule 52(b) motion filed by Thomas Brandon Spoon ("Plaintiff"); and (2) concluding that there had been a substantial change in circumstances warranting the modification of custody. After careful review, we affirm the trial court's amended order.

Factual Background

Plaintiff and Defendant were married on 8 July 2000, separated on 19 October 2007, and divorced on 15 July 2009. The parties have three minor children: Allison, age 12; Rebecca, age 11; and Trevor, age 7.[1]

On 25 September 2007, Plaintiff filed an action seeking child custody, equitable distribution, and divorce from bed and board. On

1. Pseudonyms are used in this opinion to protect the identities of the minor children.

26 September 2007, the trial court granted Plaintiff temporary custody of the minor children. Defendant filed an answer and counterclaims on 19 October 2007 seeking child custody, child support, divorce from bed and board, post-separation support, alimony, and equitable distribution. Both parties voluntarily dismissed their claims, and a consent order was entered on 14 November 2007 granting the parties joint custody of the children. The consent order also required the minor children to attend school in the Alamance Burlington School System ("ABSS").

Between December 2007 and December 2009, the parties filed various motions for contempt and to modify custody. On 15 June 2011, Plaintiff filed a motion requesting primary placement. A hearing was held on 1 August 2011. Before this hearing, the parties filed a written set of stipulations, stating the following:

> 1. Defendant, Abby Melvin Spoon, is moving to Orange County, North Carolina. A move to Orange County, North Carolina constitutes a substantial change in circumstances affecting the minor children of the parties.
>
> 2. If this Court determines that it is in the best interest of the minor children to remain in Alamance County, North Carolina, then Abby Melvin will not move from Alamance County, North Carolina, and placement will remain the same.

The trial court proceeded to enter an order determining that "[i]t is in the best interests of the minor children to remain in Alamance County, North Carolina."

In August of 2011, Defendant moved from Burlington to Mebane. On 28 October 2011, the trial court entered a consent order concerning custody and the children's school placement after Defendant withdrew the children from their previous school in Burlington and enrolled them in E.M. Yoder Elementary School in Mebane. In May of 2012, Defendant moved from Mebane to Chapel Hill. On 3 May 2012, Defendant filed motions seeking to modify the children's school placement to the Chapel Hill-Carrboro School District and to hold Plaintiff in contempt. On 22 May 2012, Plaintiff filed motions seeking to modify custody and hold Defendant in contempt. Plaintiff filed a second motion to hold Defendant in contempt on 31 July 2012.

On 14 August 2012, the trial court held a hearing on Plaintiff's motion to modify custody, Defendant's motion to modify school placement, and the parties' cross motions for contempt. The trial court entered an order

on 24 August 2012 modifying the 28 October 2011 consent order. The trial court granted Plaintiff primary physical custody, giving him custody of the minor children for nine days out of every fourteen days, and Defendant secondary physical custody, giving her custody for the remaining five days. The trial court also held Defendant in contempt for moving the minor children without giving Plaintiff 90 days written notice as required by a previous court order; however, the trial court declined to sanction her.

On 4 September 2012, Plaintiff filed a motion under Rule 52(b) of the North Carolina Rules of Civil Procedure requesting that the trial court make additional findings of fact and conclusions of law. In response to Plaintiff's motion, the trial court entered an amended order on 20 September 2012. Defendant appealed to this Court.

Analysis

A trial court may order the modification of an existing child custody order if the court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests. *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003). Our review of a trial court's decision to modify an existing child custody order is limited to determining (1) whether the trial court's findings of fact are supported by substantial evidence; and (2) whether those findings of fact support its conclusions of law. *Id.* at 474-75, 586 S.E.2d at 253-54. Evidence is substantial if "a reasonable mind might accept [it] as adequate to support a conclusion." *Id.* at 474, 586 S.E.2d at 253. Because our trial courts "are vested with broad discretion in child custody matters" and have the opportunity to observe the witnesses and the parties, the trial court's findings of fact are conclusive on appeal if supported by evidence in the record, even if the evidence might also support a contrary finding. *Balawejder v. Balawejder*, ___ N.C. App. ___, ___, 721 S.E.2d 679, 689 (2011) (citation and quotation marks omitted).

Defendant asserts a number of arguments on appeal. We address each in turn.

I. Rule 52(b) Motion

[1] Defendant first argues that the trial court erred in amending its 24 August 2012 order in response to Plaintiff's Rule 52(b) motion. Rule 52(b) provides, in pertinent part, that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." N.C. R. Civ. P.52(b).

Based on Plaintiff's Rule 52(b) motion, the trial court amended its prior order by adding the following italicized language to its second conclusion of law:

> 2. There has been a substantial change in circumstances that affects the welfare of the minor children *related to the defendant's moves to Mebane, North Carolina and Chapel Hill, North Carolina.*

The trial court also added a conclusion of law number 6 stating that "[t]he plaintiff is not in contempt." Defendant asserts that the plain language of Rule 52(b) does not allow such amendments to a trial court's original conclusions of law.

However, this Court has stated that "Rule 52(b) concerns amendments to the findings *and conclusions* relating to a final judgment . . . ." *O'Neill v. S. Nat'l Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979) (emphasis added). We also look to federal cases for guidance on this issue as our Court has held that "federal court decisions are pertinent" to our analysis of Rule 52(b) because "North Carolina's Rule 52(b) mirrors Rule 52(b) of the Federal Rules of Civil Procedure." *Parrish v. Cole*, 38 N.C. App. 691, 693, 248 S.E.2d 878, 879 (1978). Federal case law supports the proposition that Rule 52(b) gives a trial court "the power to amend its findings of fact and conclusions of law." *Nat'l Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 124 (1st Cir. 1990) (emphasis added); *see Shivers v. Grubbs*, 747 F.Supp. 434, 436 (S.D. Ohio 1990) ("The primary purpose of a Rule 52(b) motion is to enable the party to obtain a correct understanding of the Court's findings, typically for appeal purposes. In doing so the movant raises questions of substance by seeking reconsideration of material findings of fact or conclusions of law." (emphasis added)). Thus, we conclude that the trial court possessed authority under Rule 52(b) to amend its conclusions of law.

II. 3 August 2011 Stipulation

[2] Defendant next contends that the trial court erred by relying on the 3 August 2011 stipulation — which stated that "[a] move to Orange County, North Carolina constitutes a substantial change in circumstances affecting the minor children of the parties" — in concluding that a substantial change in circumstances had occurred. Specifically, she argues that "[t]he fact that Judge Overby drafted her own order, the presence of certain Findings of Fact in that order which suggest she may have worked off a previous electronic file, the addition of conclusions of law pursuant to a Rule 52 motion, and the absence of required findings of fact strongly

indicate that the trial court had again accepted the Stipulation as a conclusion of law."

Defendant correctly notes that "whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact" and that the requirement that a trial court find a substantial change in circumstances before modifying custody cannot be waived by the parties. *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 444 (2011) (citation and quotation marks omitted). Our Court has also explained that "stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *In re A.K.D.*, ___ N.C. App. ___, ___, 745 S.E.2d 7, 9 (2013) (citation, quotation marks, and brackets omitted).

However, it is well established that "[a]n appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Here, the only reference the trial court made to the parties' 3 August 2011 stipulation is in finding of fact 5 in which the trial court provides the entire procedural history of the case. There is no indication that the trial court sought to avoid its obligation to determine whether a substantial change in circumstances had occurred — in stark contrast to the trial court's actions in *Hibshman*.

In *Hibshman*, the trial court initially granted custody of the minor children to the mother during the school year. *Hibshman*, 212 N.C. App. at 122, 710 S.E.2d at 444. The order conditioned this custody arrangement on the mother "maintaining a home in the Granite Quarry Elementary School district" and provided that if she moved out of the school district, "this order may be modified without a showing of a substantial change in circumstances." *Id.* When the trial court later modified the custody order, it "explicitly stated that it was not considering whether a substantial change in circumstances warranting a change in custody had occurred" and instead expressly relied upon the above-quoted provision of the original custody order. *Id.*

Unlike in *Hibshman*, the trial court here did not disregard its duty to determine whether a substantial change in circumstances had occurred. The trial court's order does not suggest that it relied upon the parties' prior stipulation in any way when it concluded that there had been a substantial change in circumstances. Therefore, we decline to assume error.

III. Substantial Change in Circumstances

[3] Defendant's next several arguments on appeal relate to the trial court's conclusion that "[t]here has been a substantial change in circumstances that affects the welfare of the minor children related to the defendant's moves to Mebane, North Carolina and Chapel Hill, North Carolina." Defendant asserts that the trial court erred in making this conclusion because (1) the change in circumstances must "substantially affect" the children's welfare; (2) the trial court relied on a change that occurred prior to the entry of the previous custody order; and (3) relocating to another county is not a substantial change in circumstances where the evidence fails to establish a sufficient nexus between the relocation and the children's welfare.

A. "Substantially affects" the children's welfare

Citing *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (1973), Defendant claims that modification was improper here because the trial court was required to find that the moves to Mebane and Chapel Hill constituted a *substantial* change in circumstances that *substantially* affected the children's welfare.

In *Spence*, our Supreme Court stated that modification of a child custody order is appropriate upon a showing of "any change of circumstances substantially affecting the welfare of the children." *Id.* at 684, 198 S.E.2d at 545. Since *Spence*, however, our appellate courts have repeatedly articulated the standard for modification of a child custody order as a substantial change of circumstances affecting the welfare of the children. *See Shipman*, 357 N.C. at 473, 586 S.E.2d at 253 ("It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody" (citation and internal quotation marks omitted)); *Stephens v. Stephens*, 213 N.C. App. 495, 498, 715 S.E.2d 168, 171 (2011) ("In granting the Motion to Modify Custody, the trial court must have first appropriately concluded that there was a substantial change in circumstances and that the change affected the welfare of the minor child or children.").

Thus, the trial court applied the appropriate standard in concluding that "[t]here has been a substantial change in circumstances that affects the welfare of the minor children related to the defendant's moves to Mebane, North Carolina and Chapel Hill, North Carolina." Defendant's argument, therefore, is overruled.

B. Significance of Fact that Defendant's Move to Mebane Occurred Prior to Entry of 28 October 2011 Custody Order

Defendant next argues that the trial court erred in considering her move to Mebane, North Carolina when making its determination that a substantial change of circumstances had occurred, claiming that she had moved to Mebane in August of 2011, which was prior to the entry of the 28 October 2011 custody order. As such, Defendant, citing *Tucker v. Tucker*, 288 N.C. 81, 216 S.E.2d 1 (1975), asserts that her relocation to Mebane was not relevant because only changes that have occurred *since* 28 October 2011 should be considered when ruling on the motion to modify custody.

Defendant is mistaken, however, because the trial court's actual conclusion was that a substantial change of circumstances "*related* to the defendant's moves to Mebane, North Carolina and Chapel Hill, North Carolina" had occurred. (Emphasis added.) While the move to Mebane did, in fact, take place two months before the previous custody order was entered, the trial court's findings and the record evidence show that the effects of the relocation on the minor children did not manifest themselves until *after* the entry of that order. Our review of the trial court's findings reveals that the trial court was concerned about Defendant's history of uprooting, or attempting to uproot, the minor children without first consulting Plaintiff and the ramifications that these actions had on the children.

Indeed, the trial court's findings pertaining to Defendant's move to Mebane primarily refer to (1) the children's emotional well-being and school performance; and (2) Defendant's actions in attempting to diminish the amount of time the children spent with Plaintiff, once they had moved.[2] As such, the effects of the move to Mebane, which became apparent following the entry of the 28 October 2011 consent order, were relevant and properly considered by the trial court in determining whether a substantial change in circumstances had occurred.

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2. Defendant claims that findings of fact 14, 16, 18, 32, 33, 37, 47, 49, 62, and 66 address events that occurred before the entry of the consent order and must be disregarded. We first note that Defendant merely lists these findings by number and provides no specific argument regarding any of the findings as required by Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. Moreover, we believe these findings, which address the numerous times Defendant has attempted to relocate and unilaterally change the children's school placements, shed light on events occurring *after* the 28 October 2011 consent order was entered.

C. Sufficiency of Defendant's Relocations to Show a Substantial Change in Circumstances

Defendant also argues that the trial court erred in concluding that there had been a substantial change in circumstances because "a change in the custodial parent's residence is not itself a substantial change in circumstances affecting the welfare of the child which justifies a modification of a custody decree." *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000); *see Harrington v. Harrington*, 16 N.C. App. 628, 630, 192 S.E.2d 638, 639 (1972) (holding that trial court erred in modifying custody of minor child when "[t]he only finding of change in circumstances as to [the minor child] was that defendant is now residing in Mecklenburg County, North Carolina" (internal quotation marks omitted)).

In *Evans*, our Court explained that the relocation and remarriage of one of the parties could not have been deemed a substantial change in circumstances warranting modification of custody because the trial court "made no findings of fact indicating the effect of the remarriage and relocation on the child himself . . . [and did] not discuss the impact of the proposed move on the child." *Evans*, 138 N.C. App. at 141, 530 S.E.2d at 580.

In *Shipman*, our Supreme Court further elaborated on the need to show the relationship between the change in circumstances and the welfare of the child, holding that

> [i]n situations where the substantial change involves a discrete set of circumstances such as a move on the part of a parent, a parent's cohabitation, or a change in a parent's sexual orientation, the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of evidence directly linking the change to the welfare of the child. . . . Evidence linking these and other circumstances to the child's welfare might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or the parent.

Shipman, 357 N.C. at 478, 586 S.E.2d at 256 (internal citations and emphasis omitted).

Here, unlike in *Evans*, the trial court made multiple findings concerning how the two relocations (and resultant change in school placement) within a ten month period affected the minor children. The trial

court found that the move to Mebane — abruptly followed by another move to Chapel Hill — "added stress to the minor children" because they were distanced from their friends and extracurricular activities when they moved to Mebane and because the situation was repeated when they moved to Chapel Hill. The trial court also determined that both the children's teachers and Plaintiff had noticed a change in the children — observing that they were more clingy, tearful, and upset since the moves. The court found that Allison, the oldest child, had especially struggled with moving and going to a new school and that her dance instructor had observed "a change in [her] demeanor" such that she would frequently cry and be "visibly upset."

Additionally, the trial court made findings that since the two moves and her remarriage, Defendant has withdrawn the children from activities that Plaintiff helps with or coaches and has prioritized the development of relationships between the children and their step-family over their ability to spend time with Plaintiff. *See Stephens*, 213 N.C. App. at 499, 715 S.E.2d at 172 (explaining that interference with and attempts to frustrate relationship between children and other parent can be considered in determining whether modification of custody is appropriate). These findings are uncontested by Defendant and thus are binding on appeal. *See Crenshaw v. Williams*, 211 N.C. App. 136, 142, 710 S.E.2d 227, 232 (2011) ("Unchallenged findings are presumed to be supported by competent evidence and are binding on appeal." (citation, quotation marks, and brackets omitted)).

The trial court also made findings regarding Allison's and Rebecca's declining academic performance since they changed schools. Defendant only challenges the finding concerning Rebecca's academic performance. As such, the trial court's finding regarding Allison's school performance is presumed to be supported by competent evidence and is binding on appeal. *See id.* With respect to Rebecca's school performance, the trial court found

> 43. The middle child [Rebecca] is a rising 4th grader. She attended Highland for kindergarten, first and second grade. She attended Yoder for third grade. From kindergarten through second grade her grades progressively increased from eleven "needs improvement"s (and 205 "satisfactory" marks) in kindergarten to one "needs improvement" (and 215 "satisfactory" marks) in first grade to all "satisfactory" (209 "satisfactory") marks in second grade, with no "needs improvement" marks. In third grade children receive their first "letter" grades, but they also continue

> to receive "needs improvement," "satisfactory" or "unsatisfactory" marks. In third grade, the middle child received twenty-one "needs improvement" marks and 170 "satisfactory" marks. The middle child took the end of grade (EOG) tests for the first time while at Yoder. She passed math on the first try. She failed the English EOG and had to retake it. The middle child passed the English EOG on the second try. The middle child's grades (or marks) have diminished while she attended Yoder.

We cannot agree with Defendant's assertion that the trial court's findings on this issue were unsupported by competent evidence. Rebecca's report cards from her new school in Mebane — introduced into evidence by Defendant — show that Rebecca received more "needs improvement" marks and less "satisfactory" marks than in her previous years of schooling. As such, the trial court's finding that Rebecca's grades diminished is supported by competent evidence in the record.

Thus, the trial court determined that the children's emotional and academic well-being were adversely impacted by the moves to Mebane and Chapel Hill. As such, we hold that the trial court's order modifying custody (1) demonstrates that there has been a substantial change in circumstances; and (2) establishes a sufficient nexus between the change in circumstances and the children's welfare.

IV. Best Interests of the Children

Defendant also contends that the trial court erred in concluding that it was in the best interests of the minor children to modify the previous custody order because the trial court "failed to specify in its findings of fact which evidence presented convinced it that modification of the 28 October 2011 Order was in the best interest of the children." We disagree.

> Once the trial court makes the threshold determination that a substantial change has occurred, the court then must consider whether a change in custody would be in the best interests of the child. As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion.

Metz v. Metz, 138 N.C. App. 538, 540-41, 530 S.E.2d 79, 81 (2000) (internal citation omitted). In determining whether modification of custody is in the best interests of the minor children, "any evidence which is

competent and relevant to a showing of the best interest . . . must be heard and considered by the trial court." *In re P.O.*, 207 N.C. App. 35, 39, 698 S.E.2d 525, 529 (2010) (citation and emphasis omitted).

"When determining whether the findings in an order modifying child custody are adequate to support its conclusions, this Court examines the entire order. The trial court is not constrained to using certain and specific buzz words or phrases in its order." *Lang v. Lang*, 197 N.C. App. 746, 748, 678 S.E.2d 395, 397 (2009) (citation, quotation marks, and brackets omitted). In this case, the trial court's findings, taken together, support its conclusion that modification of custody was in the best interests of the minor children. As discussed above, the trial court found that the two relocations have had a negative impact on the children's emotional and academic well-being and that since the moves, Defendant has withdrawn the children from extracurricular activities with which Plaintiff assists in order to limit their time with him.

The trial court also found that Plaintiff's living situation has been more stable over the past several years than Defendant's. Specifically, the trial court noted that Plaintiff has lived in the same house since his separation from Defendant and has not been engaged or married during this time. The trial court found that, conversely, Defendant has been engaged twice, has moved twice, has transferred the children to a different school district, and is now attempting to change the children's school placement once again. The trial court also determined that at Plaintiff's house, the children had their own bedrooms, were closer to their core group of friends and to their extracurricular activities, and that the flexibility of Plaintiff's work schedule allows him to pick up the children from school and transport them to their afterschool activities. Based on our examination of the entire order and its extensive findings of fact, we are satisfied that the trial court did not abuse its discretion in concluding that modification of custody was in the best interests of the minor children.

V. Motion to Modify School Placement

Finally, Defendant argues that the trial court erred by failing to explicitly rule on her motion to modify school placement. We note that the decretal portion of the 20 September 2012 order states that "[t]he plaintiff is responsible for and shall enroll the minor children in school in the ABSS," indicating that the trial court considered and denied Defendant's motion to modify the children's school placement to the Chapel Hill-Carrboro School District. Furthermore, Defendant's argument on this issue is premised on her assertion that the trial court

erred in modifying custody, an assertion we reject for the reasons explained herein.[3]

Conclusion

For the reasons stated above, we affirm the trial court's order modifying custody.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

STATE OF NORTH CAROLINA
v.
DARIUS CORDALE ALEXANDER, DEFENDANT

No. COA13-461

Filed 18 March 2014

Search and Seizure—plain view doctrine—not applicable to searches—applicable to seizures—findings of fact—lawful right of access to items seized

The trial court erred by partially denying defendant's motion to suppress. The plain view doctrine did not apply to the police officer's observation of the contents of defendant's trailer. Furthermore, while the plain view doctrine applied to whether the officer performed a lawful seizure of the contents of the trailer and the findings of fact supported the trial court's conclusion that the criminal nature of the items was immediately apparent, the case was remanded for further findings of fact and conclusions of law regarding whether the officers had a lawful right of access to the items seized.

Appeal by defendant from judgment entered 17 August 2011 by Judge H. William Constangy in Catawba County Superior Court. Heard in the Court of Appeals 23 September 2013.

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3. We decline to address Defendant's remaining arguments because they merely consist of her contentions as to what should occur in the event that the trial court's 20 September 2012 order is vacated.

Attorney General Roy Cooper, by Special Deputy Attorney General Angel E. Gray, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt and Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.

GEER, Judge.

Defendant Darius Cordale Alexander appeals from an order denying, in part, his motion to suppress evidence seized during a warrantless search of a trailer parked in front of his mobile home. On appeal, defendant contends that the challenged search and seizure were not reasonable under the plain view doctrine because the criminal nature of the items was not immediately apparent and the officers did not have legal right of access to the items seized. We hold that the findings of fact support the trial court's conclusion that the criminal nature of the items was immediately apparent. However, we remand for further findings of fact and conclusions of law regarding whether the officers had a lawful right of access to the items seized.

Facts

The State's evidence tended to show the following facts. On the morning of 29 October 2010, Officer Stephanie Roberts of the Hickory Police Department responded to a reported theft of air conditioning copper coil at the Century Furniture Company. The maintenance supervisor, Bob Ledford, informed Officer Roberts that he had checked on the air conditioning units the previous day at around 4:30 p.m., but when he arrived that morning, he discovered that approximately 200 pounds of copper coil had been stolen.

After taking Mr. Ledford's statement, Officer Roberts called Mr. Caroll McKinney at McKinney Metals to determine if any coil had been sold to him in the previous 24 hours. Mr. McKinney called Officer Roberts back at around 3:30 p.m. and informed her that coil matching the description and weight of the stolen property had been sold to him that day by defendant. Mr. McKinney provided Officer Roberts with defendant's name and driver's license number, the license plate number of the vehicle defendant used to deliver the coil, and a physical description of defendant and his Infiniti SUV. Officer Roberts used defendant's driver's license number to locate defendant's address and determined that defendant lived in a mobile home in Hollar Mobile Home Park in Burke County.

Hollar Mobile Home Park has about 40 mobile homes on eight to 10 acres of land. There are two paved driveways that run through the park with mobile homes on either side, forming three rows of homes. The homes do not face towards the driveway, but instead are situated facing towards and parallel to the main road, which runs perpendicular to the paved driveways. In each row, there is a grassy area between each mobile home that constitutes the front yard of one home and the back yard of another. The homes are about 100 feet apart from one another, but there are no fences to separate one home from another.

When facing the park from the main road, defendant's mobile home is located in the outer left row of mobile homes. His front door faces the main road and is on the far right side of the mobile home, closest to the paved driveway. The door is accessible by walking up three steps to the front porch. The grassy area in front of his mobile home is bounded on the left by the wooded area bordering the mobile home park, the paved driveway to the right, and, at the front, another empty mobile home closer to the main road.

Officer Roberts drove to the mobile home park to question defendant, arriving at around 4:14 p.m. She drove down the main road and came upon the park on her left. As she approached the park and passed the entrance to the first paved driveway on her left, she observed an Infiniti SUV matching the description given to her by Mr. McKinney with a black male behind the steering wheel. She pulled into the second entrance, parked her car, and walked back towards defendant's mobile home on foot.

Defendant's SUV and a wooden tow-behind trailer were parked on the far left side of the grassy area in front of defendant's mobile home. The SUV was parked alongside the mobile home with its headlights facing towards the mobile home park driveway. The SUV's tailgate was at the edge of the wooded area, and the license plate was not visible from the driveway. Next to the SUV, towards the empty mobile home and the main road, the trailer had also been backed up to the woods so that its license plate was not visible. The SUV was approximately 10 to 15 feet in front of the mobile home, and the trailer was approximately five feet away from the SUV. The trailer had two wheels and was no longer attached to a vehicle, so the trailer hitch was resting on the ground. This caused the bed of the trailer, which was opened and uncovered, to tilt down in a forward angle towards the driveway.

Officer Roberts approached from the paved driveway on the right. When she reached the mobile home the vehicle was no longer occupied,

so she believed that the individual she saw in the SUV had gone inside the mobile home. She walked up to the front porch and knocked on the door, but no one answered. When she turned around, she noticed the open tow-behind trailer parked in the front yard and saw that it contained pieces of air conditioning copper coil. She believed that the pieces of coil were scrap pieces of the coils that had been stolen and sold to Mr. McKinney.

After knocking on the door and getting no response, Officer Roberts walked down from the porch and over towards the wooded area to see behind the SUV and the tow-behind trailer to check the license plate numbers. The license plate on the SUV matched the license plate given to her by Mr. McKinney.

Officer Roberts radioed for assistance and also called Mr. Ledford. She asked Mr. Ledford to bring the ends of the copper coil that were left attached to the air conditioning units so that they could be compared to the pieces of coil in the trailer. While she was waiting for the other officers to arrive, she took photographs of the mobile home, SUV, and trailer.

When Deputy Nathan Smith of the Burke County Sheriff's Office arrived, Officer Roberts again knocked on the front door of the mobile home while Deputy Smith knocked on the back door. Again, they did not get a response. However, as Deputy Smith walked to the front of the mobile home, he saw a child peeping through a curtain. Claiming concern for the welfare of the child, Deputy Smith's partner went to the mobile home park office to speak with the park manager about obtaining a key to the mobile home. At the officers' request, a maintenance man who worked at the park used the landlord's key to allow the officers into defendant's mobile home. The defendant and the child were found hiding behind a door in one of the bedrooms.

After determining that the child was okay, the officers questioned defendant about the larceny of the air conditioning coils. They also found and seized marijuana and a backpack that contained gloves, screwdrivers, pliers, and other tools. Officer Roberts placed defendant under arrest for larceny and breaking and entering. After defendant was placed under arrest, Mr. Ledford arrived and was able to identify the coils. Officer Roberts collected all of the pieces of coil from the trailer as evidence.

Defendant was indicted for felony larceny and misdemeanor possession of stolen goods. On 11 August 2011, defendant filed a motion to suppress all the evidence seized on 29 October 2010, including the

copper coil in the trailer, and any statements made by defendant during the search of his mobile home. On 17 August 2011, following a hearing, the trial court entered an order concluding that the search and seizure of the coils were justified by the plain view doctrine, but that the warrantless entry into the mobile home was not justified by any exigent circumstances, the caretaker exception, or consent of the landlord. The trial court granted defendant's motion to suppress the evidence seized within the mobile home, but denied defendant's motion to suppress the coils seized outside the mobile home.

Thereafter, defendant entered a plea of no contest to felony possession of stolen goods, and the State dismissed the charges of felony larceny and misdemeanor possession of stolen goods. The trial court sentenced defendant to a presumptive-range term of 5 to 6 months imprisonment. The court suspended the sentence and placed defendant on 30 months of supervised probation.

After the entry of judgment, defendant gave oral notice of appeal of the partial denial of his motion to suppress. On 18 December 2012, this Court dismissed defendant's appeal for lack of jurisdiction for failure to give adequate notice of appeal from the trial court's judgment. *See State v. Alexander*, ___ N.C. App. ___, ___ S.E.2d ___, 2012 WL 6590077, 2012 N.C. App. LEXIS 1390 (Dec. 18, 2012) (unpublished). On 27 December 2012, defendant filed a petition for writ of certiorari to review the 17 August 2011 judgment, which this Court granted 14 January 2013.

Discussion

The sole issue on appeal is whether the trial court erred in denying in part defendant's motion to suppress. "The scope of review of the 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. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Unchallenged findings of fact are binding on appeal. *State v. Lupek*, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011). The trial court's conclusions of law are, however, reviewed de novo and "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

We first note that defendant, the State, and the trial court have all focused both on (1) whether Officer Roberts conducted a *search* justified

by the plain view doctrine, and (2) whether the *seizure* of the copper coils was permissible under that doctrine. The trial court concluded: "Officer Roberts's warrantless examination of the contents of the trailer located adjacent to defendant's mobile home at [sic] WAS a reasonable search, justified by the plain view exception to the warrant requirement. Officer Roberts was lawfully present on the front porch when she inadvertently saw what she believed to be evidence of a crime." The trial court then upheld the seizure: "The examination by Officer Roberts of the tow-behind trailer located in the front yard and the seizure of the suspected stolen property DID NOT violate the defendant's rights under the Constitution of the United States of America or the Constitution of the State of North Carolina."

However, as the Fourth Circuit Court of Appeals has explained, "[t]he 'plain-view' doctrine provides an exception to the warrant requirement for the *seizure* of property, but it does not provide an exception for a search. Viewing an article that is already in plain view does not involve an invasion of privacy and, consequently, does not constitute a search implicating the Fourth Amendment." *United States v. Jackson*, 131 F.3d 1105, 1108 (4th Cir. 1997). *See also Horton v. California*, 496 U.S. 128, 134 n.5, 110 L. Ed. 2d 112, 121 n.5, 110 S. Ct. 2301, 2306 n.5 (1990) (" 'It is important to distinguish "plain view," . . . to justify *seizure* of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, . . . the former generally does implicate the Amendment's limitations upon seizures of personal property.' " (quoting *Texas v. Brown*, 460 U.S. 730, 738 n.4, 75 L. Ed. 2d 502, 511 n.4, 103 S. Ct. 1535, 1541 n.4 (1983) (opinion of Rehnquist, J.))).

We therefore hold, as an initial matter, that the trial court erred in applying the plain view doctrine to the question whether Officer Roberts performed a lawful search when she observed the contents of the trailer from the front porch of the mobile home. The plain view doctrine applied only to the question whether Officer Roberts' warrantless seizure of the copper coils was permissible under the plain view doctrine.

Under the plain view doctrine, a warrantless seizure is lawful if (1) the officer views the evidence from a place where he has legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause, and (3) the officer has a lawful right of access to the evidence itself. *State v. Nance*, 149 N.C. App. 734, 740, 562 S.E.2d 557, 561-62 (2002).

With respect to the first element of the plain view doctrine, defendant challenges the trial court's finding that Officer Roberts could see the coils from the porch -- a location where, defendant concedes, Officer Roberts had a legal right to be. *See State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 600–01 (1979) (holding officers legally entitled to be on front porch of defendant's house for purpose of conducting general inquiry or interview). The trial court's finding of fact was supported by Officer Roberts' testimony during cross-examination:

> Q. . . . You mentioned at some point that you knocked on a door eventually, correct?
>
> A. Yes, sir. . . . When I arrived and I seen the Infinity, I walked up on the porch. And when I did I could see over into that trailer -- into that hitch trailer. But I walked up and knocked on the door.
>
> Q. Okay.
>
> A. And that's when I could see inside that hitch trailer.
>
> Q. Okay. And after you did that did you proceed to go over and go behind the automobile to see what tag --
>
> A. To check the plate, yes, sir.
>
> Q. Okay. Did you go behind the -- You also went behind the hitch trailer to see if it had a tag on it.
>
> A. Yes, sir --

While defendant argues that this testimony does not establish that Officer Roberts could in fact see the coils in the trailer, the trial court's finding was a reasonable inference drawn from this testimony when considered together with Officer Roberts' direct examination. Although defendant's interpretation of Officer Roberts' testimony may also be reasonable, it is the trial court who "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). Because the evidence and reasonable inferences drawn from that evidence support the trial court's finding that Officer Roberts could see the copper coils from the porch, it is binding on appeal.

Defendant also challenges the sufficiency of the evidence to support the trial court's finding that Officer Roberts "inadvertently" looked

into the trailer from the front porch. This Court, however, has held that "inadvertence is not a necessary condition of a lawful search pursuant to the 'plain view' doctrine." *State v. Church*, 110 N.C. App. 569, 575, 430 S.E.2d 462, 465 (1993) (following *Horton*).[1] Because this finding of fact is, therefore, immaterial to the question whether the seizure was permissible under the Fourth Amendment, we need not address it.

Regarding the second element of the plain view doctrine, defendant argues that the trial court's findings of fact are insufficient to support a conclusion that it was "immediately apparent" to Officer Roberts that the coils were stolen. "The term 'immediately apparent' in a plain view analysis is satisfied only 'if the police have probable cause to believe that what they have come upon is evidence of criminal conduct.' " *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999) (quoting *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 389-90 (1993)). When, as here, the item in plain view is considered contraband based solely upon its status as a "stolen good," whether its criminal nature is immediately apparent to an officer depends upon the interplay between extrinsic circumstances known to the officer prior to discovery of the item and the officer's observations of the item's characteristics. *See State v. Connard*, 81 N.C. App. 327, 330, 344 S.E.2d 568, 571 (1986) ("Stolen goods . . . do not qualify automatically as contraband, but generally are innocuous except for the extrinsic circumstance that they have been stolen.").

This Court has held that it was immediately apparent that an item in plain view was evidence of a crime when the officer viewed an item that matched the description of an item he knew to be stolen. *See, e.g.*, *State v. Haymond*, 203 N.C. App. 151, 161, 691 S.E.2d 108, 118 (2010) (immediately apparent microwave, refrigerator, and dishwasher stolen when officer immediately recognized the appliances as those from break-in he was investigating based on officer's recollection of what stolen items looked like); *State v. Weakley*, 176 N.C. App. 642, 649, 627 S.E.2d 315, 320 (2006) (immediately apparent shower curtain contraband when curtain matched pictures of stolen curtain officer had seen).

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1. Nevertheless, many cases subsequent to *Church* have continued to articulate the three factor test for the plain view doctrine which includes inadvertency. Inadvertence is required pursuant to N.C. Gen. Stat. § 15A-253 (2013), which applies to items found in plain view during the execution of a valid search warrant. Because Officer Roberts did not discover the coil while executing a search warrant, N.C. Gen. Stat. § 15A-253 is inapplicable to this case.

We find that the circumstances of this case are analogous to those in *State v. Bembery*, 33 N.C. App. 31, 234 S.E.2d 33 (1977). In *Bembery*, a car dealer discovered that someone had stolen tires from a truck on his lot and provided a description of the stolen tires, including the type and size, to the county sheriff, who relayed the information to the sheriff in a neighboring county. *Id.* at 32, 234 S.E.2d at 34. Four days later, the sheriff in the neighboring county received a call from a reliable informant that two of the stolen tires were in the possession of the defendant and that the defendant was at a friend's house. *Id.* The sheriff drove to the house about 40 minutes later, where he found the defendant getting ready to put tires on his car. *Id.* The tires were in plain view and matched the description given by the car dealer. *Id.* The Court held that "[i]n these circumstances, the seizure of the tires for the purpose of taking them to [the car dealer] for identification was reasonable." *Id.* at 36, 234 S.E.2d at 37.

Here, the trial court's findings of fact establish that Officer Roberts was investigating a recent theft of air conditioning copper coil and was given the description and weight of the stolen coil. Officer Roberts, like the officer in *Bembery*, received reliable information that the defendant was recently in possession of the stolen goods -- a local metal recycler informed Officer Roberts that coil matching the description and weight of the stolen coil had been sold to the recycler by defendant earlier that day. The metal recycler provided Officer Roberts with defendant's name and driver's license number, the license plate number of the vehicle used to deliver the coil, and a physical description of defendant and his vehicle.

Officer Roberts used the information from the metal recycler to locate defendant's residence, where she saw a parked vehicle matching the description given to her by the metal recycler with a black male behind the steering wheel. From the front porch of defendant's mobile home, Officer Roberts noticed air conditioning copper coil in the open-tow trailer parked next to defendant's SUV. As in *Haymond*, *Weakley*, and *Bembery*, the items viewed by Officer Roberts matched the description of goods she knew to be stolen.[2] Furthermore, the additional information Officer Roberts had gathered from her investigation after speaking to the metal recycler bolstered her belief that the items in the

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2. Although the trial court's finding that Officer Roberts believed the coils to be evidence of a crime is found in conclusion of law #1, we treat it as a finding of fact. *See Gainey v. N.C. Dep't of Justice*, 121 N.C. App. 253, 257 n.1, 465 S.E.2d 36, 40 n.1 (1996) ("Although denominated as a conclusion of law, we treat this conclusion as a finding of fact because its determination does not involve the application of legal principles.")

trailer were stolen. These findings sufficiently support the conclusion that it was immediately apparent to Officer Roberts that the coils were evidence of a crime.

Nevertheless, defendant argues that Officer Roberts merely suspected that the coils were stolen, but did not have the level of certainty required to rise to the level of probable cause. Defendant points to the trial court's finding that Officer Roberts called the factory manager, Mr. Ledford, to ask him to come and identify the pieces of scrap metal, and analogizes these facts to cases in which the criminal nature of an item seized by an officer was not apparent until the officer further manipulated the item. *See State v. Sapatch*, 108 N.C. App. 321, 325, 423 S.E.2d 510, 513 (1992) (criminal nature of closed film canisters not apparent until officer opened canisters and discovered rocks of cocaine); *Graves*, 135 N.C. App. at 220, 519 S.E.2d at 773 (officer did not have probable cause to believe brown paper wads were evidence of crime when he did not know items were contraband until after he unfolded them); *State v. Carter*, 200 N.C. App. 47, 55, 682 S.E.2d 416, 422 (2009) (criminal nature of scraps of paper seized by officer not apparent until pieced back together and read).

In contrast to this case, in *Sapatch*, *Graves*, and *Carter*, the criminal nature of the item was not immediately apparent because the contraband was, literally, out of sight. All that could be seen at first were innocuous items -- a film canister, wads of brown paper, and a torn-up piece of paper. The plain view doctrine did not apply because the contraband -- the cocaine inside the canister, the crack pipe inside the wads of brown paper, and the incriminating words on the torn up sheets of paper -- were, simply, not in plain view. Here, however, the items that Officer Roberts saw -- the coils -- constituted the contraband itself and was plainly and completely visible at first glance without any physical manipulation. Officer Roberts possessed sufficient information at the time she saw the coils in the trailer to have probable cause to believe that the coils were stolen. Mr. Ledford merely confirmed that the coils were, in fact, the stolen coils. Accordingly, we conclude that the trial court's findings of fact are sufficient to support the conclusion that the criminal nature of the coils was immediately apparent to Officer Roberts.

Turning to the final element -- whether Officer Roberts had a lawful right of access to the trailer in which the coils were found -- defendant argues that the trial court did not make the findings necessary to establish this element. We agree.

This Court has previously emphasized that a determination that contraband was in plain view is not sufficient to support a warrantless seizure of the contraband:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. Thus, when officers are in a public place or some other area, such as an open field, that is not protected by the Fourth Amendment, knowledge that they gain from their plain-view observations does not constitute a search under the Fourth Amendment. Whether such plain-view observations can justify a warrantless seizure, however, is a separate question. If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, "plain view" seizures would not implicate that constitutional provision at all. Yet, far from being automatically upheld, "plain view" seizures have been scrupulously subjected to Fourth Amendment inquiry. That is because, the absence of a privacy interest notwithstanding, [a] seizure . . . obviously invade[s] the owner's possessory interest.

Nance, 149 N.C. App. at 739, 562 S.E.2d at 561 (internal citations and quotation marks omitted).

It is well settled that officers have a lawful right of access to items located in a public place. *See Payton v. New York*, 445 U.S. 573, 587, 63 L. Ed. 2d 639, 651, 100 S. Ct. 1371, 1380 (1980) ("objects such as weapons or contraband found in a public place may be seized by the police without a warrant"). The first question to address in establishing whether an officer had a lawful right of access to an object, therefore, is whether the object was located in a public place or on private property. In *Nance*, this Court held that an open field leased by the defendant which was outside of the curtilage of his home was not a public place, noting that "[t]he fact that defendant's property included open fields does not transform private property into public land." 149 N.C. App. at 742, 562 S.E.2d at 563.

If the seized item is not located in a public place, the officers may nevertheless have a lawful right of access to the item to justify its seizure if they entered the private property by consent, pursuant to a warrant, or under exigent circumstances. *Id.* at 741, 744, 562 S.E.2d at 562, 564 (concluding officers did not have a lawful right of access to seize malnourished horses on private property where the officers "had neither

consent nor a warrant authorizing their entry onto defendant's property" and where "exigent circumstances did not exist").

Nance also rejected the argument that officers have lawful access to seize items on private property whenever they "are conducting [a] 'legitimate law enforcement function[].'" *Id.* at 742, 562 S.E.2d at 563. *Nance* acknowledged that it is not a trespass for an officer to enter private property "'for the purpose of a general inquiry or interview.'" *Id.* (quoting *Prevette*, 43 N.C. App. at 455, 259 S.E.2d at 599-600). However, *Nance* clarified that this rule does not "stand[] for the proposition that law enforcement officers may enter private property without a warrant and *seize* evidence of a crime." *Id.* (emphasis added). *Nance* explained:

> If the position advanced by the State were correct, law enforcement officers could enter onto private property and seize evidence of criminal activity without a warrant whenever they had probable cause to suspect that such activity was taking place. Such a position directly contradicts repeated admonitions by the United States Supreme Court that although
>
> > "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity[,] [a] different situation is presented . . . when the property in open view is situated on private premises to which access is not otherwise available for the seizing officer."

Id. at 742-43, 562 S.E.2d at 563 (quoting *Texas*, 460 U.S. at 738, 75 L. Ed. 2d at 511, 103 S. Ct. at 1541). This Court, relying on *Nance*, has subsequently confirmed that, absent exigent circumstances, initiating a valid "knock and talk" does not give officers a lawful right of access to walk across the curtilage of a defendant's home to seize contraband in plain view. *State v. Grice*, ___ N.C. App. ___, ___, 735 S.E.2d 354, 358 (2012), *disc. review allowed*, ___ N.C. ___, 743 S.E.2d 179 (2013).

Here, the trial court failed to make any findings regarding whether the officers had legal right of access to the coils in the trailer. The trial court did not address whether the trailer was located on private property leased by defendant, private property owned by the mobile home park, or public property. It also did not make any findings regarding whether, assuming that the trailer was located on private property, the officers had legal right of access either by consent or due to exigent

circumstances. We, therefore, remand for further findings of fact and conclusions of law regarding that issue. We leave it to the court's discretion whether to consider additional evidence.[3]

Reversed and remanded.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
STEVEN CLARK KOSTICK, DEFENDANT

No. COA13-873

Filed 18 March 2014

1. Jurisdiction—subject matter—trial transcript

The State's motion to dismiss defendant's appeal for an insufficient record as it related to subject matter jurisdiction was denied where defendant provided a pretrial but not a trial transcript. A determination of subject matter jurisdiction does not require the presence of a complete trial transcript.

2. Appeal and Error—record—trial transcript not included—interests of justice

Defendant's contention concerning his pretrial motion to suppress evidence about a traffic checkpoint and his DWI arrest was heard by the Court of Appeals in the interests of justice even though a trial transcript was not included and it could not be determined whether defendant had renewed the motion at trial.

3. Appeal and Error—record—trial transcript not necessary—findings and conclusions at pretrial hearing

A transcript of defendant's jury trial was not necessary for appellate review of his motion under *State v. Knoll*, 322 N.C. 535, in

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3. We find no merit to the State's argument that the seizure of the coils could alternatively be justified pursuant to a search incident to lawful arrest. Under the search incident to arrest warrant requirement exception, "'if the search is incident to a lawful arrest, an officer may conduct a warrantless search of the arrestee's person and the area within the arrestee's immediate control.'" *Carter*, 200 N.C. App. at 51, 682 S.E.2d at 419 (quoting *State v. Logner*, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001)). The trial court made no findings of fact that would support the State's contention, and the record contains no evidence that would support the necessary findings.

an impaired driving prosecution where the trial court made its findings and conclusions during a pretrial hearing, of which a transcript was provided.

4. Jurisdiction—Cherokee Indian Reservation—DWI arrest

The Court of Appeals overruled a contention of the defendant in a DWI prosecution that the State had no authority to stop and arrest him on a road within the Cherokee Indian Reservation (Reservation) controlled by the Eastern Band of the Cherokee Indians (Tribe). The North Carolina State Highway Patrol has a compact with the Tribe to assist with patrolling and enforcing the traffic laws on roads within the Reservation.

5. Jurisdiction—subject matter—Cherokee Indian Reservation—non-Indian—criminal offense

The trial court did not err in exercising subject matter jurisdiction over defendant, a non-Indian, for a DWI offense incurred while defendant was on the Cherokee Indian Reservation. Tribal courts lack jurisdiction over non-Indians in criminal cases and DWI is a type of criminal offense.

6. Constitutional Law—roadblock—legitimate programmatic purpose

The trial court did not err by finding that a roadblock set up by the Cherokee Police Department was constitutional where it properly determined that the roadblock set up by the Cherokee Tribal Police had a legitimate programmatic purpose and that the factors in *Brown v. Texas*, 443 U.S. 47, were satisfied.

7. Motor Vehicles—DWI—Knoll motion denied—no error

The trial court did not err by denying defendant's motion to dismiss a DWI citation under *State v. Knoll*, 322 N.C. 535. A *Knoll* motion alleges that a magistrate has failed to properly inform a defendant of the charges against him, his rights and of the general circumstances under which he may secure his release. Although the evidence conflicted, the trial court resolved the conflict by weighing all relevant evidence before concluding that the magistrate did not commit a *Knoll* violation.

8. Bail and Pretrial Release—DWI and concealed weapon—unknown South Carolina permit—no prejudice

There was no prejudice in defendant's arraignment for DWI and carrying a concealed weapon where the magistrate acknowledged that had he would not have charged the concealed weapons offense

if he had known defendant had a South Carolina permit. The trial court specifically found that the magistrate's processing of defendant was not prejudicial because defendant was so intoxicated that his length of detention and bond amount was proper.

Appeal by defendant from judgment entered 22 February 2013 by Judge James U. Downs in Swain County Superior Court. Heard in the Court of Appeals 11 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton and Assistant Attorney General Kathryne E. Hathcock, for the State.

McLean Law Firm, P.A., by Russell L. McLean, III, for defendant-appellant.

BRYANT, Judge.

Pursuant to the Tribal Code of the Eastern Band of the Cherokee Indians and mutual compact agreements between the Tribe and other law enforcement agencies, the North Carolina Highway Patrol has authority to patrol and enforce the motor vehicle laws of North Carolina within the Qualla boundary of the Tribe, including authority to arrest non-Indians who commit criminal offenses on the Cherokee reservation. Our State courts have jurisdiction over the criminal offense of driving while impaired committed by a non-Indian, even where the offense and subsequent arrest occur within the Qualla boundary of the Cherokee reservation. A defendant's *Knoll* motion is properly dismissed where the magistrate follows N.C. Gen. Stat. § 15A-511(b) and any deviation from the statutory requirements is not prejudicial to defendant.

On 24 April 2010, the Cherokee Harley Davidson Rally (the "rally") was held at the fairgrounds in Cherokee, North Carolina. As part of a cooperative agreement between the Eastern Band of the Cherokee Indians (the "Tribe") and Swain County police departments and the North Carolina State Highway Patrol ("State Highway Patrol"), Swain County and State Highway Patrol officers assisted the Cherokee police officers in patrolling the rally, setting up and administering checkpoints, and providing assistance as needed. Checkpoints were established at the roads leading into and out of the fairgrounds, Drama Road/State Highway 1361 and State Highway 441, and were run by a combination of Cherokee and Swain County police officers. The checkpoints were intended to check all vehicles leaving the rally for potential

driving while impaired ("DWI"), driver's license, insurance, and unsafe driving violations.

That evening at around 10:00 p.m., defendant Steven Clark Kostick ("defendant") left the rally's parking lot and encountered a checkpoint on Drama Road. After rolling two car lengths past Cherokee Officer Dustin Wright who signaled for defendant to stop, defendant stopped his vehicle. As Officer Wright approached the vehicle, he immediately noticed an odor of alcohol and saw two open cans of beer in the car's center console cup holders. Officer Wright also noticed that a woman sitting in the front passenger seat of the vehicle was crying. Officer Wright directed defendant to return his vehicle to the parking lot and called for an available officer to come and conduct an investigation of defendant.

The responding officer was State Highway Patrol Trooper Jim Hipp who took over the investigation of defendant at the request of Officer Wright. After noticing that defendant smelled of alcohol, had red, glassy eyes, slurred speech, and an unsteady gait, Trooper Hipp conducted four field sobriety tests and concluded that defendant was likely intoxicated. Defendant told Trooper Hipp that he had consumed four to five beers that evening, and then admitted to having a handgun in his truck. The woman in defendant's car was driven by another officer back to the vacation cabin where she was staying with defendant.

Trooper Hipp arrested defendant on suspicion of DWI. Defendant was taken to the Swain County jail where he blew a 0.15 on a Breathalyzer test. Defendant was arraigned by a magistrate after being charged with DWI and was ordered to be held on a $500.00 secured bond. Defendant was released from the Swain County jail around 4 a.m. on 25 April 2010 after posting bail.

On 24 November 2011, defendant filed handwritten motions to suppress (entitled "Motion to Suppress Stop and Arrest;" "Motion to Suppress"). On 2 December 2011, defendant filed a motion to dismiss alleging lack of jurisdiction over defendant's arrest. The trial court denied all of defendant's motions, and on 6 April 2011, defendant was convicted of DWI in District Court. Defendant appealed his conviction to the Superior Court.

On 8 December 2011, defendant filed a new motion to dismiss alleging that the State Highway Patrol had no arrest authority within the Cherokee reservation and that defendant was on Cherokee, rather than State, property at the time of his arrest. Defendant further moved to suppress the evidence regarding the checkpoint stop and made a *Knoll* motion alleging that the magistrate did not properly inform

defendant of his right to contact counsel and friends upon his arrest. At a pretrial hearing on 20-21 February 2013, defendant's motions were denied. On 22 February 2013, a jury convicted defendant of DWI. Defendant appeals.

On appeal, defendant challenges (I) the subject matter jurisdiction of the trial court, including whether the road on which defendant was stopped was a North Carolina state road, whether the North Carolina Highway Patrol had arrest authority, and whether the trial court erred in denying defendant's pre-trial motion to dismiss the DWI charges; (II) whether the roadblock set-up by the Cherokee Police Department was constitutional; and (III) the trial court's failure to grant defendant's *Knoll* motion to dismiss the DWI citation.

Motion to Dismiss

On 2 October 2013, the State filed a motion to dismiss defendant's appeal, arguing that defendant failed to properly preserve his appeal. Specifically, the State contends that the record on appeal is insufficient because defendant failed to include a complete trial transcript to show that defendant properly renewed his pretrial objections at trial as to subject matter jurisdiction, suppression of evidence from the checkpoint and a Knoll violation, and that without proof that defendant did renew his objections at trial, those objections cannot be deemed to be preserved on appeal. Defendant, on the other hand, counters that he "has preserved each and every issue on appeal."

Pursuant to our Rules of Appellate Procedure, "[t]he record on appeal in criminal actions shall contain . . . so much of the litigation, set out in the form provided in Rule 9(c)(l), as is necessary for an understanding of all issues presented on appeal . . . ." N.C. R. App. P. 9(a)(3)(e) (2013).

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but

> not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

N.C. R. App. P. 10(a)(1) (2013). Where a defendant does not preserve an issue for appeal, that issue may only then be appealed by claiming plain error pursuant to N.C. R. App. P. 10(a)(4). *State v. Waring*, 364 N.C. 443, 467-68, 701 S.E.2d 615, 631-32 (2010).

The State contends that defendant's appeal should be dismissed in its entirety because by not providing a complete trial transcript the record on appeal is insufficient. At the pretrial hearing, defendant raised three motions: a motion to dismiss for lack of subject matter jurisdiction; a motion to suppress evidence from the checkpoint; and a *Knoll* motion.

A. Defendant's motion to dismiss for lack of subject matter jurisdiction

[1] Defendant provided a trial transcript for the pretrial hearing of 20-21 February 2013 but did not provide the transcript for his jury trial on 22 February 2013. However, a determination of subject matter jurisdiction does not require the presence of a complete trial transcript, as "[j]urisdiction has been defined as 'the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment[.]' " *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) (citation omitted). As such, defendant's failure to include a trial transcript for his jury trial on 22 February 2013 does not negate his appeal regarding his motion to dismiss for lack of subject matter jurisdiction. *See* N.C. R. App. P. 10(a)(1). The State's motion to dismiss defendant's appeal as it relates to the issue of subject matter jurisdiction must, therefore, be denied.

B. Defendant's motion to suppress evidence from the checkpoint

> [A] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial. Rulings on motions in limine are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.

State v. Reaves, 196 N.C. App. 683, 686, 676 S.E.2d 74, 77 (2009) (citation omitted).

[2] Defendant made a pretrial motion to suppress evidence regarding the checkpoint and DWI arrest. However, defendant omitted the transcript of his jury trial; therefore, we have no objective means of ascertaining whether defendant renewed his motion to suppress at trial. "[A] pretrial motion to suppress, a type of motion *in limine*, is not sufficient to preserve for appeal the issue of admissibility of evidence . . . . [Therefore, a] defendant waive[s] appellate review of this issue by failing to object during trial to the admission" of the challenged evidence. *State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000) (citation omitted). Defendant, however, points to the record of the pretrial hearing; there the trial court denied his motion to suppress and noted defendant's "exception" to the trial court's ruling. Further, defendant points to an agreement between the State and defendant that the pretrial hearing transcript would be sufficient for purposes of defendant's appeal. This agreement is part of the record on appeal.[1] Therefore, even if defendant's issue is not properly preserved, to prevent manifest injustice to defendant we exercise our authority pursuant to Rule 2 and hear defendant's appeal of this issue.

C. Defendant's Knoll motion

[3] A *Knoll* motion, based on *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), alleges that a magistrate has failed to inform a defendant of the charges against him, his right to communicate with counsel, family, and friends, and the general conditions he must meet for pretrial release pursuant to N.C. Gen. Stat. § 15A-511 (2013). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001) (citation omitted).

Here, the trial court heard arguments by both sides and made its findings of fact and conclusions of law during the pretrial hearing; therefore,

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1. The Settlement of Transcript, which is signed by counsel for both the State and defendant and dated 14 March 2013, states that:

> NOW COMES the undersigned attorneys on behalf of the Plaintiff, State of North Carolina and the Defendant, Steven Kostick as evidenced by their signatures hereto, and agree that the court reporter who transcribed the proceedings is only required to transcribe all motions to suppress for lack of subject matter jurisdiction and that the trial transcript need not be transcribed since the Defendant is only appealing the court's subject matter jurisdiction over the Defendant to the North Carolina Court of Appeals.

a transcript of defendant's jury trial is not necessary for our review of his *Knoll* motion. *See id.*; *Knoll*, 322 N.C. 535, 369 S.E.2d 558. Accordingly, the State's motion to dismiss defendant's *Knoll* motion is denied.

I.

Subject Matter Jurisdiction

A. North Carolina road

[4] Defendant first argues that the trial court erred in finding that the road on which defendant was stopped was a North Carolina state road. Specifically, defendant contends that the road on which he was stopped, Drama Road, is on federal land because it is controlled by the Tribe, and thus, the State had no authority to stop and arrest defendant while he was driving on it. Defendant's argument as to whether the road is controlled by the State or the Tribe lacks merit, as our State Highway Patrol enjoys an existing compact with the Tribe to assist with patrolling and enforcing roads within this state.

"[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.' " *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). Congress has defined Indian country as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2012). Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). "[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

> Federal recognition of the [Cherokee] Eastern Band as an Indian tribe has at least two major implications for the issue of state jurisdiction: (1) the federal government continues to maintain plenary power over the Eastern Band, a fact which strictly limits extensions of state power, and (2) the Eastern Band, like all recognized Indian tribes, possesses the status of a "domestic dependent nation" with certain retained inherent sovereign powers.

Wildcatt v. Smith, 69 N.C. App. 1, 5-6, 316 S.E.2d 870, 874 (1984) (citations omitted). An Indian tribe may engage in a tribe-state compact "to facilitate the exercise of each government's respective authority." Felix S. Cohen, Handbook of Federal Indian Law § 6.05, at 591 (Nell Jessup Newton ed., 2012). The reservation lands of the Tribe in our State are known as the Qualla boundary. *See Sasser v. Beck*, 40 N.C. App. 668, 670, 253 S.E.2d 577, 579 (1979) ("The United States first recognized the rights of the Indians who had remained in North Carolina by an Act of 1848, establishing a fund for their benefit. The Qualla Boundary lands were purchased partly with money from this fund. In 1866 the North Carolina legislature passed a statute granting the Cherokee permission to remain in the State, and in 1868 Congress provided that the Secretary of the Interior should 'take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians.' In 1889 the eastern Cherokees were incorporated under the laws of North Carolina, and in 1897 their charter was amended to give the Cherokee limited power of government, with special reference to control of tribal property. The title to the Qualla Boundary lands, which had been held by the Commissioner of Indian Affairs, was conveyed to the corporation but remained subject to the supervision of the Commissioner. This title was conveyed to the United States in trust in 1925." (citation omitted)).

The Tribe's Code of Ordinances, section 20-1 states that:

> (a) *In order to ensure consistency in the application and enforcement of all civil and criminal traffic and motor vehicle laws on the Cherokee Indian Reservation and in surrounding areas, the Tribe adopts Chapter 20 of the North Carolina General Statutes and any amendments to that chapter which may be made in the future. In so doing, all persons operating motor vehicles on the Cherokee Indian Reservation must abide by these provisions . . . . Any references in Chapter 20 of the N.C.G.S. to violations occurring within the State of North Carolina*

> *shall also include violations occurring within the Cherokee Indian Reservation.*
>
> . . .
>
> (b) All civil traffic infractions contained therein shall be enforced by the North Carolina Highway Patrol, Federal Law Enforcement Officers, and the Cherokee Police Department . . . .
>
> . . .
>
> (e) *All traffic and motor vehicle violations shall be enforced in accordance with existing compacts in an effort to ensure cooperation between all law enforcement agencies.*

Cherokee Indians Eastern Band, N.C., Code ch. 20, art. 1, § 20-1 (2013) (emphasis added). Moreover, pursuant to section 15-2 of the Tribe's Code,

> (a) The North Carolina Highway Patrol is hereby authorized to patrol the roads and highways on the Cherokee Indian Reservation and to enforce the North Carolina traffic laws as adopted by the Eastern Band of Cherokee Indians.
>
> (b) The North Carolina Highway Patrol is hereby authorized to enforce the North Carolina criminal laws against all persons who are not subject to the criminal laws of the Tribe or the criminal jurisdiction of the Cherokee Court.

Id. § 15-2.

Defendant contends that the road on which he was stopped, Drama Road, was not a road upon which the State Highway Patrol had jurisdiction to operate.

At his pretrial hearing, evidence was presented showing that Drama Road is held and maintained by the State within the Tribe's reservation, the Qualla boundary. However, pursuant to the Tribe's Code, section 20-1, the language of which is identical to that of Chapter 20 of our General Statutes, the State Highway Patrol has authority to "patrol the roads and highways on the . . . reservation." *Id.* Moreover, section 20-1(e) of the Tribal Code notes that "[a]ll traffic and motor vehicle violations shall be enforced in accordance with existing compacts in an effort to ensure cooperation between all law enforcement agencies." *Id.* Furthermore, testimony by Cherokee Officer Teesateskie and State Highway Patrol

Trooper Hipp indicated that the Cherokee Police Department had a compact with the Swain County Police Department and the State Highway Patrol to provide assistance during the rally, and that this agreement had existed for several years.

Defendant was initially stopped by Cherokee Officer Wright on suspicion of Driving While Impaired before Trooper Hipp was called in to assist. As Trooper Hipp was authorized both under Tribal Code § 20-1 and the mutual assistance compact between the Tribe, the Swain County Police Department and the State Highway Patrol, the State Highway Patrol, through Trooper Hipp, had the right to assist the Tribe in stopping, investigating, and arresting defendant on Drama Road. Defendant's argument as to whether the State or the Tribe controls Drama Road is overruled, as is defendant's argument concerning Trooper Hipp's arrest authority.

B. DWI Offense

[5] Defendant also contends the trial court lacked subject matter jurisdiction to prosecute defendant, a non-Indian, for a DWI offense incurred while defendant was on Indian land. We disagree.

A claim that the trial court lacks subject matter jurisdiction presents a question of law which is reviewed de novo. *State v. Satanek*, 190 N.C. App. 653, 656, 600 S.E.2d 623, 625 (2008). "[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted).

As discussed in *Issue I*, the Tribe has incorporated Chapter 20 of our General Statutes with regard to the regulation of motor vehicles into its Code. This incorporation and compact with neighboring police departments gave Trooper Hipp arrest authority over defendant. In determining whether the State then had subject matter jurisdiction over defendant's DWI offense, we must look to general principles of Indian sovereignity.

> [T]he Indian Civil Rights Act . . . permit[s] states to assume jurisdiction over civil cases involving Indians and arising in Indian country by consent of the tribe affected. The Eastern Band has never given formal consent to the assumption of state jurisdiction pursuant to the Indian Civil Rights Act.

Wildcatt, 69 N.C. App. at 7, 316 S.E.2d at 875 (citing *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577 (1979)). Pursuant to 18 U.S.C. § 1153, an Indian tribe has jurisdiction over crimes committed by both its own

Indian members and by Indian members of other tribes. 18 U.S.C. § 1153 (2012); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that by submitting to the overriding sovereignty of the United States, Indian tribes hold inherent power to try and punish Indians except where otherwise prohibited by Congress). However, "the commonly shared presumption of Congress . . . [is] that tribal courts do not have the power to try non-Indians [for crimes committed on Indian land]." *Oliphant*, 435 U.S. at 207.

Here, defendant concedes in his brief that he is not a member of an Indian tribe. Trooper Hipp testified that at the time he placed defendant under arrest, he assumed that defendant was non-Indian. Moreover, in its findings of fact regarding defendant's pretrial motion to suppress the trial court noted that "[t]he Court can only assume and take notice that [defendant] is a non-Indian . . . ." As such, whether the trial court would have subject matter jurisdiction over defendant's DWI offense would depend on whether a DWI offense, as defined by section 20 of our General Statutes and the Tribal Code, is a criminal or civil offense.

After defendant blew a 0.15 on his breath test, defendant was charged with DWI. A DWI, as defined by N.C. Gen. Stat. § 20-138.1, is a misdemeanor offense; a misdemeanor offense is a type of criminal offense. *See* N.C.G.S. § 20-138.1(a)(1) (2013) ("A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State [] [w]hile under the influence of an impairing substance[.]").

Pursuant to Tribal Code § 20-1, "[c]riminal penalties may only be imposed against persons who are subject to the Cherokee court's criminal jurisdiction . . . ." Cherokee Indians Eastern Band, N.C., Code ch. 20, art. 1, § 20-1. Additionally, the Code requires that a Cherokee magistrate follow specific procedures, known as the "St. Cloud test," to ensure that the Tribal court would have jurisdiction over a defendant. After specific inquiries, "[i]f the Magistrate determines that the defendant is a non-Indian, then the Magistrate shall notify the CIPD (Cherokee Indian Police Department) of same, dismiss the Tribe's charges and turn the defendant over to the CIPD for transport to the appropriate State or local judicial or law enforcement officer or to the Federal authorities." *Id.* § 15, App. A, Cherokee R. Crim. P. 6(b)(1) (2013). Therefore, tribal courts lack jurisdiction over non-Indians. *See Oliphant*, 435 U.S. at 210 ("The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of

the United States except in a manner acceptable to Congress." (citation omitted)). As such, the State Highway Patrol had authority over defendant. Therefore, where the Tribal Code of Ordinances adopted N.C.G.S. Chapter 20 and where the Code further authorizes the State Highway Patrol to enforce North Carolina traffic laws as adopted by the Eastern Band of the Cherokee Indians, the trial court did not err in exercising subject matter jurisdiction over defendant. Defendant's argument is overruled.

II.

[6] Defendant next challenges whether the roadblock set-up by the Cherokee Police Department was constitutional.

Defendant first argues that the trial court erred in finding the roadblock constitutional because the State Highway Patrol lacked authority to enforce traffic laws within the Qualla boundary. As we have already determined in *Issue I* that the State Highway Patrol had authority to enforce traffic laws within the Qualla boundary, we need not address this portion of defendant's argument.

Defendant further argues that even if the State Highway Patrol had authority to enforce traffic laws within the Qualla boundary, the trial court erred in finding the roadblock constitutional because the roadblock was improperly conducted. We disagree.

> When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. . . .
>
> Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint . . . [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.

State v. Veazey, 191 N.C. App. 181, 185-86, 662 S.E.2d 683, 686-87 (2008) (internal quotations and citations omitted).

The State, in arguing that the roadblock was constitutional, presented testimony from Cherokee Officers Wright and Teesateskie and State Highway Patrol Trooper Hipp that the roadblock was one of two established near the rally. Each roadblock was set-up to check all vehicles leaving the rally for potential DWI, driver's license, insurance, and

unsafe driving violations. In its findings of fact the trial court determined the roadblock to have a "legitimate primary programmatic purpose," stating that

> the design of the procedure of a checkpoint was that each vehicle be stopped. The primary purpose was to see if the license was current, the registration of the vehicle, and any other violation of the law that was then eminently detectable by the officer. Each and every vehicle coming out was checked. There was no selectivity in the process . . . .

As defendant presented no evidence in the record to contradict the State's proffered purpose for the roadblock, the trial court could rely on the testifying police officers' assertions of a legitimate primary purpose. *Id.* at 187, 662 S.E.2d at 687-88.

The trial court must, after finding a legitimate programmatic purpose, determine whether the roadblock was reasonable and, thus, constitutional. "To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest." *State v. Rose*, 170 N.C. App. 284, 293, 612 S.E.2d 336, 342 (2005) (citation omitted). "In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 361, 99 S. Ct. 2637, 2640 (1979)." *State v. Jarrett*, 203 N.C. App. 675, 679, 692 S.E.2d 420, 424-25 (2010) (citation omitted). "Under *Brown*, the trial court must consider [1] the gravity of the public concerns served by the seizure[;] [2] the degree to which the seizure advances the public interest[;] and [3] the severity of the interference with individual liberty." *Id.* at 679, 692 S.E.2d at 425 (citation and quotations omitted).

> The first *Brown* factor — the gravity of the public concerns served by the seizure — analyzes the importance of the purpose of the checkpoint. This factor is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public.

Rose, 170 N.C. App. at 294, 612 S.E.2d at 342 (citation omitted). The trial court, in its findings of fact, noted that the rally "added thousands [sic] people to an already burdening population at that particular time of the year . . . to the Cherokee vicinity," and that "the officers concerned about checking traffic with regard to the users and participants for that rally would [sic] probably certainly [sic] justified and that the Court could

almost take notice of the fact that at a Harley Davidson Rally, they're not singing hymns."

When Officer Wright stopped defendant, he did so for the purpose of checking defendant for potential driving violations. After Officer Wright noticed that defendant appeared to be intoxicated and saw two open cans of beer in the truck's center console, he directed defendant to return to the parking lot and requested an available officer to come and assist in a potential DWI investigation. This Court has held that such measures are appropriate under the first prong of *Brown*. *See State v. Nolan*, 211 N.C. App. 109, 712 S.E.2d 279 (2011) (discussing how the first prong of *Brown* is met where an officer stopped the defendant at a roadblock, detected an odor of alcohol and noticed two missing bottles from a six-pack of beer in the vehicle, and began a DWI investigation); *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 ("Both the United States Supreme Court as well as our Courts have suggested that 'license and registration checkpoints advance an important purpose[.]' The United States Supreme Court has also noted that states have a 'vital interest' in ensuring compliance with other types of motor vehicle laws that promote public safety on the roads." (citations omitted)).

Under the second *Brown* prong — "the degree to which the seizure advance[d] the public interest" — the trial court must determine whether "[t]he police appropriately tailored their checkpoint stops to fit their primary purpose." *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (internal quotation and citation omitted).

> Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Id.

Here, the trial court made findings of fact indicating that there was a written plan and guidelines set by the Cherokee police department for conducting roadblocks at the rally; a briefing on this plan and guidelines was held for all officers and troopers assisting at the rally; two roadblocks were set up at previously designated points to address traffic leaving the rally; the roadblocks had specific start and end times to

coincide with the conclusion of the rally; and both police cruisers and fire trucks were placed at the roadblocks with their lights flashing to indicate to drivers that roadblocks were being conducted. Such findings "do indicate that the trial court considered appropriate factors to determine whether the checkpoint was sufficiently tailored to fit its primary purpose, satisfying the second *Brown* prong." *Jarrett*, 203 N.C. App. at 680—81, 692 S.E.2d at 425.

"The final *Brown* factor to be considered is the severity of the interference with individual liberty." *Id.* at 681, 692 S.E.2d at 425. "[C]ourts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Veazey*, 191 N.C. App. at 192-93, 662 S.E.2d at 690-91.

> Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic[]; whether police took steps to put drivers on notice of an approaching checkpoint[]; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field[]; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern[]; whether drivers could see visible signs of the officers' authority[]; whether police operated the checkpoint pursuant to any oral or written guidelines[]; whether the officers were subject to any form of supervision[]; and whether the officers received permission from their supervising officer to conduct the checkpoint[.]

Id. at 193, 662 S.E.2d at 691 (citations omitted). "Our Court has held that these and other factors are not 'lynchpin[s],' but instead [are] circumstance[s] to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint." *Id.* (internal quotations and citation omitted).

The trial court's findings of fact, which were supported by the testimony of Officers Wright and Teesateskie and Trooper Hipp, found "there was in place a policy for checkpoints to be established by local police as well as assistance from the North Carolina State Highway Patrol, [for] which assistance was solicited by the Cherokee Police Department"; "the local Cherokee Police Department decided to establish two checkpoints that are random, they don't do it regularly at either one of those

places"; and that "there [was] a policy, at that time, in writing, . . . [but] that their office . . . moved twice, and whatever document existed then no longer exists now." As for the policy, the trial court further noted that "the design of the procedure of a checkpoint was that each vehicle be stopped"; "[t]he primary purpose was to see if the license was current, the registration of the vehicle, and any other violation of the law that was then eminently detectable by the officer"; and that"[e]ach and every vehicle coming out was checked . . . [t]here was no selectivity in the process." In its conclusions of law, the trial court stated that "the Court finds that those facts support the propriety of the stop and the measure of it and the substance of it based thereon, [and] the motion to suppress the stop and any information obtained as a result thereof in regard to this defendant is denied." As the trial court properly determined that the roadblock had a legitimate programmatic purpose and that the *Brown* factors were met, defendant's argument is accordingly overruled.

III.

[7] Defendant's final argument on appeal is that the trial court erred in failing to grant defendant's *Knoll* motion to dismiss the DWI citation. We disagree.

A Knoll motion, based on *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), alleges that a magistrate has failed to inform a defendant of the charges against him, his right to communicate with counsel, family, and friends, and of the general circumstances under which he may secure his release pursuant to N.C. Gen. Stat. § 15A-511. *See* N.C.G.S. § 15A-511(b) (2013); *Knoll*, 322 N.C. at 536, 369 S.E.2d at 559 ("Upon a defendant's arrest for DWI, the magistrate is obligated to inform him of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release."). If a defendant is denied these rights, the charges are subject to being dismissed. *Knoll*, 322 N.C. at 544, 369 S.E.2d at 564. On appeal, the standard of review is whether there is competent evidence to support the trial court's findings and the conclusions. *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982) (citation omitted). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *Id.*

Defendant raised his *Knoll* motion during the pretrial hearing, arguing that the magistrate failed to promptly release him after his arrest. Defendant appeared before the magistrate at 1:05 a.m., and was released from jail after posting bond at 4:50 a.m. In making his *Knoll* motion,

defendant contends that the magistrate violated his rights to a timely pretrial release by setting a $500.00 bond and holding him in jail for approximately three hours and 50 minutes. Defendant's argument is without merit. Pursuant to our standard of review, the trial court properly denied defendant's *Knoll* motion.

> In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

N.C. Gen. Stat. § 15A-534(c) (2013). "If the provisions of the . . . pretrial release statutes are not complied with by the magistrate, *and* the defendant can show irreparable prejudice directly resulting from [this noncompliance], the DWI charge must be dismissed." *State v. Labinski*, 188 N.C. App. 120, 126, 654 S.E.2d 740, 744 (2008) (citation omitted).

During the pretrial hearing, defendant presented evidence in support of his Knoll motion that the magistrate failed to promptly release him. The State disputed this evidence in its response. In denying defendant's motion, the trial court made the following findings of fact and conclusions of law:

> The defendant was arrested at or about 10:30 p.m., was referred to a trooper, was taken to the jail in Swain County, and test administered on or about -- wait, let's see -- it was 12:34. Then he was released at approximately 4:50 a.m., after making bond. The magistrate upon receiving notification from the trooper that the breathalyser [sic] has registered in both tests .15, knowing that the defendant was a non-resident, the magistrate also opined that upon observing the defendant, he was, and I quote, "pretty drunk," end of quote.
>
> Furthermore, that the magistrate was under an obligation not to turn him out in the public in that kind of condition notwithstanding the defendant's assertion that

> a breathalyser [sic] test is not accurate, and he wanted a blood test to show that. The Court further finds the magistrate did not deny him any rights by setting a bond, and the bond he made, albeit some four hours later. In any event, due to those circumstances the Court finds that his rights have not been violated.
>
> There's no prejudice shown to it, especially due to the fact that when he was released, he was in the company of a bondsman or bonds-lady, eventually back to the cabin where his then girlfriend, now wife, was. Either one of those ladies, either one could have helped him or assisted him in getting to a hospital to get a blood test. And if in the event I do take notice of alcohol dissipating from the body at .16 per hour, then extrapolating forward or at least backwards at the time he was arrested he had a .18. Now, going forward, had he gone ahead and gotten the blood test when he had a chance to, he still would have been at or near .08, if the breathalyser [sic] was accurate. He had the chance to do so. He hasn't been denied any rights that he could have exercised on his own. Therefore, that motion under the Knoll test is denied.

At the pretrial hearing, defendant testified that the magistrate told him of his right to contact family, friends and counsel; defendant could not recall if the magistrate told him that he could seek to have an independent chemical analysis done. Defendant also acknowledged that when the magistrate asked if he wanted to contact someone, defendant declared that he did not, and signed the release forms indicating this. Defendant further testified that he wanted to undergo an independent chemical analysis at the hospital, but that the four hour delay in his release prevented him from doing so. The magistrate testified that he had a "cordial conversation" with defendant, and that defendant was properly informed of his rights pursuant to N.C.G.S. § 15A-511(b). The magistrate further testified that defendant was given access to a telephone at the jail where he could have contacted counsel or another person to assist him in obtaining an independent analysis; defendant admitted that he used this telephone to call a bail bondsman. As such, although there was conflicting evidence between defendant and the State as to whether the magistrate erred in his arraignment of defendant, the trial court resolved this conflict by weighing all relevant evidence before concluding that the magistrate did not commit a *Knoll* violation. *See State v. Lewis*, 147 N.C. App. 274, 279, 555 S.E.2d 348, 351 (2001) ("At the

hearing on the *Knoll* motion, the defendant stipulated that Magistrate Alexander informed him of his right to communicate with counsel, family, and friends. The defendant testified that he was given a telephone and he attempted to make calls. Although there was conflicting evidence, the trial court found the defendant was informed of his rights by Trooper Jackson and Magistrate Alexander. Further, it found that the defendant was given the opportunity to exercise those rights but he failed to do so. The findings of the trial court support its conclusions. Thus, the trial court did not err in denying the motion to dismiss.").

[8] Defendant further argues that the magistrate erred in his arraignment by also charging defendant with carrying a concealed weapon. During Trooper Hipp's investigation defendant admitted that he had a handgun in his truck. Although defendant had a permit for the handgun issued in South Carolina, defendant did not produce this permit until his trial at which time the charge was dismissed. As such, the magistrate was unaware of defendant's handgun permit at the time defendant was brought before him.

In determining whether to hold defendant under bond, the magistrate testified that he considered all relevant circumstances surrounding defendant pursuant to N.C.G.S. § 15A-534(c). The magistrate stated that he set defendant's bond at $500.00 because defendant was, based on the chemical analysis, "pretty drunk," defendant was from out-of-state and therefore "[i]t's very common to ask for some kind of a secured bond when people are not from this area[,]" and because defendant had a firearm on him at the time of his arrest. The magistrate then acknowledged that had he known defendant had a South Carolina permit for the handgun, he "would not have charged him with that because we honor South Carolina permits." Therefore, as the magistrate made his decision as to defendant's bond by considering all of the evidence before him, the magistrate did not err in charging defendant for carrying a concealed weapon. Furthermore, even if the magistrate erred in considering defendant's handgun in determining defendant's bond, such error was not prejudicial. In its conclusions of law denying defendant's *Knoll* motion, the trial court noted that

> [t]here's no prejudice shown . . . . And if in the event I do take notice of alcohol dissipating from the body at .16 per hour, then extrapolating forward or at least backwards at the time he was arrested he had a .18. Now, going forward, had he gone ahead and gotten the blood test when he had a chance to, he still would have been at or near .08, if the breathalyser was accurate.

As such, the trial court specifically found that the magistrate's processing of defendant was not prejudicial because defendant was so intoxicated that his length of detention and bond amount was thus proper. *See Labinski*, 188 N.C. App. 120, 654 S.E.2d 740 (finding no prejudicial error where the defendant was arrested for DWI, blew at 0.08, was assigned a $500.00 bond, and was held in the jail for over two hours until she posted bond, despite the magistrate failing to determine whether the defendant would pose a threat if released "under conditions other than a secured bond"). Accordingly, defendant's final argument on appeal is overruled.

The State's motion to dismiss is denied. The trial court's denial of defendant's pretrial motions is affirmed.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA
v.
EDWARD EARL MULDER

No. COA13-672

Filed 18 March 2014

1. Appeal and Error—preservation of issues—issue not raised at trial—right to appeal waived—review under Rule 2

Defendant waived his right to appellate review of whether the trial court erred by failing to arrest judgment on two convictions on double jeopardy grounds where he failed to raise the double jeopardy issue at trial. However, the Court of Appeals elected to review the issue under Rule 2 of the Rules of Appellate Procedure.

2. Sentencing—judgment arrested—speeding—reckless driving—elements of speeding to elude arrest

The trial court erred by failing to arrest judgment on defendant's speeding and reckless driving convictions where defendant was also convicted of speeding to elude arrest. The speeding and reckless driving factors increased the maximum penalty for speeding to elude arrest and thus, those factors constituted elements of speeding to elude arrest for double jeopardy purposes. Furthermore, the legislature did not intend for them to be punished separately. Judgment was arrested on the speeding and reckless driving convictions and the case was remanded for re-sentencing.

Appeal by Defendant from judgments entered 15 October 2012 by Judge Carl R. Fox in Lee County Superior Court. Heard in the Court of Appeals 7 November 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen A. Blum, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Mary Cook, for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

Defendant began a dating relationship with Brenda Swann approximately seven years before the trial of this case. When the relationship ended, Swann obtained a Domestic Violence Protective Order ("DVPO") against Defendant. This appeal arises from the domestic disturbance and car chase that followed.

On 6 January 2011, around 7:00 p.m., Swann heard a loud noise outside her home. Swann's son went to the front door to investigate. From that vantage point, the son observed Defendant striking Swann's car with a hammer. Defendant was wearing a black ski mask, which was "kind of rolled up [and] pulled . . . over his head." The son confronted Defendant and asked him what he was doing. Without responding or releasing the hammer, Defendant began approaching the son. Concerned for his mother's safety, the son returned to the house and attempted to close the door. Defendant pushed back on the door, and the two began struggling. During the struggle, the son told Swann to call the police. The son eventually succeeded in closing the door, and Defendant left the premises. The police arrived two to three minutes later.

While police officers were speaking with Swann and her son, Sergeant Scott Norton was on nearby patrol. After learning about the disturbance, he observed Defendant's vehicle driving down the road. Norton activated his lights and began following the car. Defendant then turned his vehicle around, swerved into a yard, jumped over a curb, and accelerated away. According to Norton, "[i]t was obvious that [Defendant] was running [and] wasn't going to surrender." Norton requested backup and continued pursuit. Defendant eventually stopped at the top of a bridge, leading Norton to believe that he was finished fleeing. When Norton opened his door, however, Defendant "accelerated, squealing tires," and left. Norton commented at trial that Defendant

appeared to be "swerve[ing] . . . as if he was trying to hit [civilian cars] . . . . Just innocent people on the highway."

Other police cars joined in the chase and tried to "box in" Defendant. During the attempt, Defendant swerved toward Norton, missing him, and escaped. As the pursuit wore on, the vehicles reached speeds in excess of 100 miles per hour, and officers observed Defendant toss papers and other objects out the car window.[1] After a time, another officer drove down the road in the opposite direction of Defendant. Defendant then exited the road, veered off the right-hand shoulder, and overcorrected. Next, he went over to the left-hand side of the road, "slammed on the brakes," and came back across the road, heading toward Norton's vehicle.

Instead of hitting Norton, Defendant's car "went into a ditch." Officers then tried to "box [Defendant] in" a second time. They were unsuccessful, and Defendant drove out of the ditch, "ramm[ing]" another officer's vehicle in the process. Worried that Defendant would cause injury or further damage to the other officer's car, Norton then used his own vehicle to "ram[D]efendant's car in the driver's side door."

After striking Defendant's car, Norton exited his vehicle and approached Defendant. Norton had his gun out and told Defendant to raise his hands and turn off the car. In response, Defendant reached out the window, slapped Norton's pistol, and said "shoot me, mother[] fucker." Norton then reached into Defendant's car and attempted to pull him out. At the same time, Defendant "[shifted his car into] reverse and accelerate[d] while [Norton was] hanging in the driver's side window . . . ." The other officer was hanging in the passenger side window, and more officers began to approach from behind. Before Defendant was able to make contact with the approaching officers, the passenger-side officer reached inside Defendant's car, put it into park, and shut off the engine. Defendant remained "[u]ncooperative, belligerent, cussing at us, [and] trying to fight" as he was pulled from the vehicle and arrested.

Defendant was later indicted for (1) one count of failure to heed light or siren, (2) one count of first-degree burglary, (3) two counts of violating a DVPO, (4) one count of speeding, (5) one count of reckless driving to endanger, (6) one count of littering, (7) one count of failure to maintain lane control, (8) five counts of assault with a deadly weapon on a government officer ("AWDWOGO"), (9) one count of speeding to

1. A black ski mask was later recovered from the area.

elude arrest with a motor vehicle,[2] (10) one count of injury to personal property, and (11) one count of breaking or entering. The case came on for trial beginning 8 October 2012.

On 15 October 2012, the jury found Defendant guilty on all counts except first-degree burglary. Instead of burglary, Defendant was found guilty of the lesser-included offense of misdemeanor breaking and entering. Afterward, the trial court imposed consecutive sentences of 15–18 months in prison for the first two counts of AWDWOGO; 19–23 months in prison for the next three counts of AWDWOGO; 6–8 months in prison for the consolidated offenses of speeding, reckless driving, speeding to elude arrest, failure to heed light or siren, failure to maintain lane control, and littering; and 75 days in prison for the DVPO violations, the injury to personal property offense, and the breaking or entering offense. Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant argues that the trial court erred in failing to arrest judgment on the speeding and reckless driving convictions because each of those offenses is a lesser-included offense of felony speeding to elude arrest and, therefore, subjects Defendant to double jeopardy. Alternatively, Defendant argues that the speeding and reckless driving convictions must be vacated because the State failed to present sufficient evidence distinguishing them from the aggravating factors applied to enhance Defendant's speeding to elude arrest conviction from a misdemeanor to a felony. We arrest judgment on the speeding and reckless driving convictions and remand for re-sentencing.

I. Appellate Review

[1] As a preliminary matter, we address the State's argument that Defendant is barred from seeking to arrest judgment on double jeopardy grounds because he admittedly failed to raise the double jeopardy issue at trial. In response, Defendant contends (1) that a motion to arrest judgment based on a fatal error or defect in the record may be raised for the first time on appeal or, in the alternative, (2) that this Court should invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review this issue in order to prevent manifest injustice. We hold that

2. The indictment refers to this charge as "FLEE/ELUDE ARREST WITH A MOTOR VEHICLE." The cited statute, however, describes the crime as "Speeding to elude arrest[.]" N.C. Gen. Stat. § 20-141.5 (2013). Thus, for purposes of consistency with the legislature, we refer to this charge as "speeding to elude arrest."

Defendant waived his right to appellate review by failing to raise the double jeopardy issue at trial, but elect to review the issue nonetheless under Rule 2 of the North Carolina Rules of Appellate Procedure.

A. Arrest of Judgment

As a general rule, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (citations, internal quotation marks, and brackets omitted) (declining to review the defendant's double jeopardy argument because he failed to raise it at trial). Furthermore, our appellate rules require a party to make "a timely request, objection, or motion [at trial], stating the specific grounds for the [desired] ruling" in order to preserve an issue for appellate review. N.C.R. App. P. 10(a)(1).

Despite this general rule, Defendant contends that we should review his argument seeking arrest of judgment on double jeopardy grounds pursuant to our Supreme Court's opinion in *State v. Sellers*, 273 N.C. 641, 645, 161 S.E.2d 15, 18 (1968) and our opinion in *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citing *Sellers*). We disagree.

In *Sellers*, our Supreme Court stated that

> [a] motion in arrest of judgment predicated upon some fatal error or defect appearing on the face of the record proper may be made at any time in any court having jurisdiction of the matter. This is true even though the motion is made for the first time . . . at the hearing of the appeal from the judgment of the Superior Court.

Sellers, 273 N.C. at 645, 161 S.E.2d at 18. Applying *Sellers*, Defendant contends that the alleged double jeopardy problem in this case constitutes a fatal defect on the face of the record and, therefore, may be raised for the first time on appeal. This is incorrect.

A double jeopardy problem is *distinct* from a "fatal flaw which appears on the face of the record." *See State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990). In *Pakulski*, our Supreme Court confirmed that a fatal flaw on the face of the record is akin to a "substantive error on the indictment," which is separate and apart from a double jeopardy issue. *See id.* ("When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated . . . . [W]hen judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, [however,] the guilty verdicts on the

underlying felonies remain on the docket . . . ."). Therefore, Defendant's double jeopardy argument cannot be raised for the first time on appeal on a motion for arrest of judgment because a double jeopardy problem does not constitute a fatal defect on the face of the record. *See id.* Accordingly, Defendant's double jeopardy argument is waived pursuant to the general rule described above.

B. Rule 2

Despite the rule disallowing appellate review of issues not raised at trial, our Supreme Court has stated that the appellate courts may elect to review an unpreserved double jeopardy issue on appeal pursuant to our "supervisory power over the trial divisions [and] Rule 2 of the North Carolina Rules of Appellate Procedure . . . ." *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 364 (1987); N.C.R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions."). The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary. *See, e.g.*, *State v. McLaughlin*, 321 N.C. 267, 272, 362 S.E.2d 280, 283 (1987) (declining to review the defendant's double jeopardy argument because the defendant failed to raise that issue at trial and thus waived appellate review); *Dudley*, 319 N.C. at 659, 356 S.E.2d at 364 (reviewing the defendant's double jeopardy argument even though it was waived); *State v. Mebane*, 106 N.C. App. 516, 532–33, 418 S.E.2d 245, 255–56 (declining to review the defendant's double jeopardy argument because it was not raised at trial and noting that "[e]ven if we opted to review the double jeopardy issue . . . , we [would conclude that Defendants failed to establish] . . . . error on appeal"), *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992). After a careful review of Defendant's double jeopardy argument in this case, we elect to suspend the rules and review the issue under Rule 2.

II. Double Jeopardy

"Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the *same* offense *absent clear legislative intent to the contrary*." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citation omitted; certain emphasis added). In *State v. Ezell*, we described the double jeopardy doctrine as follows:

> For decades, the Supreme Court of the United States has applied . . . the *Blockburger* test in analyzing multiple

> offenses for double jeopardy purposes. The Court in *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932), held as follows:
>
> > The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.
>
> If what purports to be two offenses is actually one under the *Blockburger* test, double jeopardy prohibits prosecution for both.

159 N.C. App. 103, 106–07, 582 S.E.2d 679, 682 (2003) (certain citations omitted). The United States Supreme Court has clarified, however, that

> double jeopardy does not prohibit multiple punishment for two offenses — even if one is included within the other under the *Blockburger* test — if both are tried at the same time and the legislature intended for both offenses to be separately punished . . . .

Id. at 107, 582 S.E.2d at 682 (citing, *inter alia*, *Missouri v. Hunter*, 459 U.S. 359, 74 L. Ed. 2d 535 (1983)). The North Carolina Supreme Court has relied on both *Blockburger* and *Hunter* when determining whether double jeopardy applies under article I, section 19 of the North Carolina Constitution. *See*, *e.g.*, *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986). Thus, a defendant convicted of multiple criminal offenses in the same trial is only protected by double jeopardy principles if (1) those criminal offenses constitute the "same offense" under *Blockburger* and (2) the legislature did not intend for the offenses to be punished separately. *See id.* at 454–55, 340 S.E.2d at 709.

Here, Defendant argues that the judgments against him violate principles of double jeopardy because he was separately convicted of speeding and reckless driving and also convicted of felony speeding to elude arrest, which was raised from a misdemeanor to a felony because Defendant was speeding and driving recklessly. Therefore, pursuant to the test articulated above, we must first determine whether Defendant's convictions for speeding and reckless driving in addition to felony speeding to elude arrest constitute punishments for the same offense. If so, we must then determine whether the legislature intended for those offenses

to be punished alternatively or separately. After a thorough review, we conclude that Defendant's convictions constitute the same offense for purposes of double jeopardy and, further, that the legislature intended for them to be punished alternatively, not separately.

A. The Same Offense

As discussed above, the applicable test to determine whether double jeopardy attaches in a single prosecution is "whether each statute requires proof of a fact which the others do not." *Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683 (citing Blockburger).

> By definition, all essential elements of a lesser[-]included offense are also elements of the greater offense. Invariably then, a lesser[-]included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. If neither crime constitutes a lesser[ ]included offense of the other, the convictions will fail to support a plea of double jeopardy.

Id. (citations omitted).

In this case, as discussed above, Defendant was convicted of speeding, reckless driving, and felony speeding to elude arrest based on the aggravating factors of speeding and reckless driving. The essential elements of speeding under section 20-141(j1) are: (1) driving (2) a vehicle (3) on a highway (4) more than 15 miles per hour over the speed limit or over 80 miles per hour. N.C. Gen. Stat. § 20-141(j1) (2013). The essential elements of reckless driving under section 20-140(b) are: (1) driving (2) any vehicle (3) on a highway or any public vehicular area (4) without due caution and circumspection and (5) at a speed or in a manner so as to endanger or be likely to endanger any person or property. N.C. Gen. Stat. § 20-140(b) (2013). The essential elements of misdemeanor speeding to elude arrest under section 20-141.5(a) are: (1) operating a motor vehicle (2) on a street, highway, or public vehicular area (3) while fleeing or attempting to elude a law enforcement officer (4) who is in the lawful performance of his duties. N.C. Gen. Stat. § 20-141.5(a). The elements of the two aggravating factors used to raise the crime to a felony in this case are (i)(1) speeding (2) in excess of 15 miles per hour over the legal speed limit and (ii) "reckless driving as proscribed in G.S. 20-140." Both of these factors contain the same essential elements as the separate crimes listed above. Therefore, whether Defendant was subjected to multiple punishments for the "same offense" turns on whether these

aggravating factors are considered "essential elements" of the felony speeding to elude arrest conviction in this case. We hold that they are.

In its brief, the State argues that Defendant has not been punished for the same offense because the aggravating factors used to raise speeding to elude arrest from a misdemeanor to a felony are not essential elements of that offense. In so arguing, the State relies on the following language from this Court's opinion in *State v. Funchess*:

> Although many of the enumerated aggravating factors [for speeding to elude arrest] are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses . . . , but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.

141 N.C. App. 302, 309, 540 S.E.2d 435, 439 (2000). The State misapplies this language to the circumstances presented by this case.

In *Funchess*, the defendant was indicted for felonious speeding to elude arrest based on three of the eight listed aggravating factors. *Id.* at 306, 540 S.E.2d at 438. At trial, the court instructed the jury that the State was required to prove "two or more" of those three factors in order to convict the defendant of felony speeding to elude arrest. *Id.* On appeal, the defendant argued that the trial court's instruction violated the constitutional provision requiring a unanimous jury verdict because it did not tell the jury to "unanimously agree on the same two factors[.]" *Id.* at 307, 540 S.E.2d at 438. In finding that the trial court did not violate the unanimity requirement, we held that the aggravating factors enumerated in section 20-141.5 did not constitute separate criminal offenses when used to elevate the misdemeanor offense of speeding to elude arrest to a felony and, therefore, did not allow the jury to separately convict the defendant of more than one possible crime. *Id.* Thus, we determined that the aggravating factors — while they might constitute criminal offenses in other sections of the code — could not be separately punished in the context of section 20-141.5. This holding has no direct bearing on whether the listed aggravating factors may be considered "essential elements" of felony speeding to elude arrest for purposes of double jeopardy.

In addition, the United States Supreme Court has clarified that "the existence of any fact (other than a prior conviction) [which] increases the maximum punishment that may be imposed on a defendant . . . — no matter how the State labels it — constitutes an element [of the offense]"

for purposes of the Sixth Amendment right to a jury trial. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111, 154 L. Ed. 2d 588, 598 (2003) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000)); *see also Ring v. Arizona*, 536 U.S. 584, 609, 153 L. Ed. 2d 556, 577 (2002) (holding that aggravating circumstances that make a defendant eligible for the death penalty "operate as the functional equivalent of an element of a greater offense" for purposes of the Sixth Amendment's jury trial guarantee) (citation and internal quotation marks omitted). The Court also commented that there is "no principled reason to distinguish, [in the context of a capital case], between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence'[3] for purposes of the Fifth Amendment's Double Jeopardy Clause." *Sattazahn*, 537 U.S. at 111–12, 154 L. Ed. 2d at 599 (citation omitted).

Pursuant to the Supreme Court opinions discussed above and because the speeding and reckless driving factors increased the maximum penalty for speeding to elude arrest from 45 days to 10 months, *see* N.C. Gen. Stat. §§ 15A-1340.17, 1340.23 (2013), we conclude that those factors constituted elements of speeding to elude arrest in this case for double jeopardy purposes. Therefore, we hold that Defendant was twice subjected to punishment for the "same offense" under *Blockburger* when he was convicted of speeding, reckless driving, and felony speeding to elude arrest.

B. The Intent of the Legislature

Even when a defendant is punished twice in the same trial for the "same offense," however, our Supreme Court has stated that relief under double jeopardy principles is only available if the legislature did not intend for multiple punishments to be imposed. Citing the United States Supreme Court's opinion in *Hunter*, 459 U.S. at 368–69, 74 L. Ed. 2d at 544, our Supreme Court has described the intention doctrine as follows:

> The Double Jeopardy Clause plays only a limited role in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding — that role being only to prevent the sentencing

3. The Fifth Amendment uses the archaic spelling of the word offense, writing it with a "c." See U.S. Const. amend. V; *see generally* Webster's Third New International Dictionary of the English Language Unabridged 1566 (3d ed. 2002).

> court from prescribing *greater punishments than the legislature intended*. . . . [W]here our legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Gardner, 315 N.C. at 460–62, 340 S.E.2d at 712–13 (citations and certain quotation marks omitted; emphasis added) (determining that the defendant could be punished for the crimes of felony larceny and breaking or entering because those crimes deal with "separate and distinct social norms" and were placed in different articles and subchapters of the criminal code, which were entitled "Offenses Against the Habitation and Other Buildings" and "Offenses Against Property," respectively); *see also State v. Pipkins*, 337 N.C. 431, 434–35, 446 S.E.2d 360, 362–63 (1994) (holding that the defendant's convictions and punishments for trafficking in cocaine by possession and felonious possession of cocaine did not violate the principles of double jeopardy because the legislature intended the punishments to protect against two distinct "perceived evils" — the use of cocaine in the possession offense and the "growing concern regarding the gravity of illegal drug activity in North Carolina" in the trafficking offense). *But see Ezell*, 159 N.C. App. at 110–11, 582 S.E.2d at 684–85 (holding that the defendant was impermissibly subjected to double jeopardy when — in the same case — he was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury because the legislature intended the offenses to allow *alternative* punishments, not separate ones). In addition, our Supreme Court has noted that

> the presumption raised by the *Blockburger* test . . . may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test. That is, even if the elements of the two statutory crimes are identical and neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended.

Gardner, 315 N.C. at 455, 340 S.E.2d at 709 (citations omitted). Given our jurisprudence on this doctrine, we must determine whether the

legislature intended for the crimes of speeding and reckless driving to be punished *separately*, or *alternatively*, from felony speeding to elude arrest when the latter is based on the aggravating factors of speeding and reckless driving. After careful review, we conclude that the legislature intended the latter.

The speeding charge in this case is prohibited under section 20-141(j1) of the North Carolina General Statutes. In determining the legislature's purpose for enacting section 20-141, we have commented that the section was created "for the protection of persons and property and in the interest of public safety[] and the preservation of human life." *State v. Bennor*, 6 N.C. App. 188, 190, 169 S.E.2d 393, 394 (1969) (citation and internal quotation marks omitted). In addition, our Supreme Court has stated more generally that speeding laws are intended to protect both "those traveling on arterial highways and those entering them from intersecting roads[] from the dangers arising because of the frequency of travel along the through highway." *Groome v. Davis*, 215 N.C. 510, 515, 2 S.E.2d 771, 774 (1939). Therefore, the speeding statute was enacted to protect against harm to persons and property.

Reckless driving is prohibited under section 20-140(b) of the North Carolina General Statutes. Subsection (b) provides that "[a]ny person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." N.C. Gen. Stat. § 20-140(b). As with speeding, our Supreme Court has stated that this conduct was prohibited by the legislature "for the protection of persons and property and in the interest of public safety[] and the preservation of human life." *State v. Norris*, 242 N.C. 47, 53, 86 S.E.2d 916, 920 (1955).

Speeding to elude arrest is prohibited under section 20-141.5 of the North Carolina General Statutes. Subsection (a) provides that "[i]t shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." Subsection (b) raises that offense from a misdemeanor to a felony in the presence of two or more of the following factors: (1) speeding, (2) gross impairment while driving, (3) reckless driving, (4) negligent driving leading to an accident causing property damage or personal injury, (5) driving while license revoked, (6) speeding on school property or in an area designated as a school zone or a highway work zone, (7) passing a stopped school bus, or (8) driving with a child under

12 years old. N.C. Gen. Stat. § 20-141.5(a)–(b). Our appellate courts have not offered a distinct legislative rationale for this statute. Nonetheless, the statute's own terms state that an individual in violation of subsection (a) whose act results in "the death of *any* person" shall be subject to a higher penalty. N.C. Gen. Stat. § 20-141.5(b1) (emphasis added). In addition, by transforming the crime from a misdemeanor into a felony for actions like speeding, reckless driving, causing property damage or personal injury, and endangering the lives of children, the plain language of the statute suggests that the legislature intended to deter actions subjecting persons, property, and public safety to greater risk. Thus, at least to the extent that speeding to elude arrest is raised from a misdemeanor to a felony pursuant to the aggravating factors of speeding and reckless driving, we see no reason to conclude that the legislature intended this crime to permit a separate punishment from speeding and reckless driving.

In *Gardner*, as noted above, our Supreme Court determined that the defendant's convictions for larceny and breaking or entering did not invoke principles of double jeopardy because the legislature intended for those offenses to prohibit "two separate and distinct social norms, the breaking into or entering the property of another and the stealing and carrying away of another's property." *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712. In so holding, the Court pointed out that this was evidenced by the fact that the two offenses were placed in different articles and subchapters of the criminal code. *Id.* at 462, 340 S.E.2d at 713.

In this case, the crimes of speeding, reckless driving, and felony speeding to elude arrest (when supported by the aggravating factors of speeding and reckless driving) all seek to deter the same conduct — driving on public roads in a way that might endanger public safety or property. In addition, unlike the statutes in *Gardner*, each offense is listed in approximately the same section of the Motor Vehicle Act — Chapter 20 (Motor Vehicles), Article 3 (The Motor Vehicle Act of 1937), Part 10 (Operation of Vehicles and Rules of the Road). Therefore, pursuant to the rationale employed in *Gardner*, it is apparent that the legislature intended for the offenses of "speeding" and "reckless driving" to permit alternative, not separate, punishments to "felony speeding to elude arrest" when supported by the aggravating factors of speeding and reckless driving.

Accordingly, we hold that Defendant was unconstitutionally subjected to double jeopardy when he was convicted of speeding and

reckless driving in addition to felony fleeing to elude arrest based on speeding and reckless driving. As a result, we need not address Defendant's second, alternative, argument on appeal. For the foregoing reasons, we arrest judgment on the speeding and reckless driving convictions in 11 CRS 50049[4] and remand for resentencing.

JUDGMENT ARRESTED; REMANDED FOR RESENTENCING.

Judges GEER and ERVIN concur.

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4. The speeding and reckless driving convictions were consolidated for sentencing purposes with other convictions, including felony speeding to elude arrest. As a result, Defendant was sentenced to 6 to 8 months in prison. This is within the presumptive range for felony speeding to elude arrest, alone, when the defendant has a prior record level II, as here. *See* N.C. Gen. Stat. §§ 15A-1340.17, 20-141.5(b). Though the State does not argue that resentencing would be unnecessary in this case, we nonetheless point out that the judgment must be remanded because we cannot assume that the trial court's consideration of the speeding and reckless driving convictions had no effect on the sentence imposed. *State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 69–70 (1999) ("[W]e . . . conclude that the judgment on this offense must be remanded for resentencing because the trial court consolidated it with the solicitation conviction, which we have now vacated, in imposing a single sentence of thirty years, and we cannot assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed."); *see also State v. Williams*, 150 N.C. App. 497, 505–06, 563 S.E.2d 616, 621 (2002) (arresting judgment on the crime of first degree trespass, when that conviction was consolidated for trial with the crime of resisting a public officer, and remanding for resentencing on the resisting crime even though both crimes had a presumptive sentence of 60 days because "whether the crime warrants the sentence imposed in connection with the two consolidated crimes is a matter for the trial court to reconsider") (citation omitted).

STATE OF NORTH CAROLINA
v.
NEIL MATTHEW SARGENT

No. COA13-482

Filed 18 March 2014

1. Criminal Law—prosecutor's argument—alleged discussion of facts not in evidence

The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning personal property case by failing to intervene *ex mero motu* during closing arguments to address the prosecutor's alleged discussion of facts not in evidence. The fact that evidence refuted the State's closing argument did not indicate that the State argued facts not in evidence. Further, the State's remarks were supported by evidence presented at trial that Dalrymple played an active role in the murder of the victim.

2. Criminal Law—prosecutor's argument—offer of opinion on credibility of witness—opened the door

The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning personal property case by failing to intervene *ex mero motu* during closing arguments to address the prosecutor's alleged offer of an opinion on the credibility of a witness. Our Supreme Court has found no error in a credibility argument based on personal opinion from the State where the defendant "opened the door" to the argument.

3. Evidence—prior crimes or bad acts—assault—character—positive military service record—circumstances of discharge

The trial court did not commit plain error in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning personal property case by allowing the State's evidence of defendant's prior assault. Defendant placed his character at issue by testifying at length about his positive military service record, and thus, the State was entitled to examine the circumstances that led to defendant's discharge.

Appeal by defendant from judgments entered 8 November 2012 by Judge James U. Downs in Watauga County Superior Court. Heard in the Court of Appeals 22 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney David J. Adinolfi II, for the State.

Michele Goldman for defendant-appellant.

BRYANT, Judge.

Where the prosecutor responded to defense counsel's endorsement of defendant's witness as truthful by stating that defendant's witness did not give truthful testimony, the trial court did not err in failing to intervene during the prosecutor's closing argument. Where defendant placed his character at issue by testifying at length about his positive military service, the prosecution was allowed to examine the circumstances of his general discharge from the United States Army.

On 28 November 2005, a Watauga County grand jury indicted defendant Neil Matthew Sargent on charges of first-degree murder with aggravating factors, first-degree kidnapping, burning of personal property, and robbery with a dangerous weapon stemming from events leading to the death of Steven William Harrington. On 5 November 2007, defendant was indicted on a second count of robbery with a dangerous weapon.

On 24 April 2008, following a jury trial in Watauga County Superior Court, the Honorable Ronald K. Payne, Judge presiding, entered judgment against defendant on the charges of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property. Defendant appealed to this Court from the entry of these judgments. In *State v. Sargeant*, 206 N.C. App. 1, 696 S.E.2d 786 (2010), this Court granted defendant a new trial due in part to the exclusion of a statement made by Matthew Brandon Dalrymple to law enforcement officers on 10 September 2007. Following an appeal by the State, our Supreme Court affirmed the decision of this Court to grant defendant a new trial. *See State v. Sargeant*, 365 N.C. 58, 707 S.E.2d 192 (2011) (hereinafter *Sargeant I*).

A new trial commenced during the 29 October 2012 session of Watauga County Criminal Superior Court, the Honorable James U. Downs, Judge presiding. The evidence presented at trial tended to show that on the evening of 7 November 2005, Harrington was assaulted, robbed, and asphyxiated in a residence located at 121 Poplar Drive in Boone, then driven to another location where his body was doused with lighter fluid and set on fire in the trunk of a car. Three people were present in the home at the time of Harrington's death and at the location of the burning car: defendant, Kyle Triplett, and Dalrymple.

During the prosecution's case-in-chief, the prosecutor called Kyle Triplett, a witness who had also testified at defendant's first trial. Triplett testified that defendant orchestrated an ambush of Harrington. On the evening in question, Triplett followed defendant's explicit instructions whereby Triplett was to grab Harrington by the throat and hold a gun to his head. Defendant provided Triplett with a gun. Triplett testified that when Harrington appeared, Triplett grabbed Harrington by the throat and choked him until his face turned red. When Harrington dropped to the floor, defendant began wrapping Harrington's head in duct tape. Triplett testified that following this, he and defendant began punching Harrington and then kicking him, at which point Dalrymple joined in. After Harrington stopped moving, Dalrymple reached into Harrington's pants pocket and removed a softball sized box that contained four to six ounces of cocaine. Harrington's body was then carried outside and placed in the trunk of Harrington's car. Triplett testified that he drove Harrington's car with defendant as a passenger and Dalrymple following in a second vehicle. Triplett stopped Harrington's car on a roadside along Sleepy Hollow Lane. Triplett testified that defendant opened the trunk, doused lighter fluid on Harrington's body and ignited a fire. Triplett and defendant then got into the car driven by Dalrymple and returned to defendant's residence.

During the presentation of defendant's case, defendant called Dalrymple to testify. Dalrymple testified that on the evening of 7 November 2005, he was using the bathroom when he heard a knock on an outside door. When Dalrymple exited the bathroom, he observed Triplett choking a man at gunpoint. Dalrymple had never before seen the man being choked. Dalrymple testified that Triplett hit the victim in the temple with the butt of a handgun. When the victim dropped to the floor, Triplett began kicking the victim in the ribs. Dalrymple testified that Triplett wrapped the victim's head in duct tape and taped his hands behind his back. Dalrymple testified that when Triplett told Dalrymple that Dalrymple was to drive one of the vehicles, Dalrymple refused, but then Triplett pointed the gun at him. When Dalrymple headed toward a bedroom to retrieve his clothes, he passed defendant in the hallway. Defendant asked, "what the f**k is going on[.]" Having gotten dressed and stepped outside, Dalrymple testified that he observed Triplett placing the victim's body in the trunk of a car. Triplett then drove the car containing the victim's body while Dalrymple followed in a second vehicle with defendant as a passenger. When Triplett pulled onto the roadside off of Sleepy Hollow Lane, Dalrymple observed Triplett open the trunk of the vehicle. Dalrymple soon saw flames. Triplett got into

Dalrymple's car, and the three men drove off. According to Dalrymple, defendant did not exit the vehicle in which he was riding.

Defendant testified on his own behalf, consistent with the version of events testified to by Dalrymple.

Following the close of the evidence, the jury returned verdicts finding defendant guilty of first-degree murder on the bases of lying in wait, felony murder, and premeditation and deliberation; first-degree kidnapping; robbery with a dangerous weapon; and burning personal property. The trial court entered judgment in accordance with the jury verdicts. On the charge of first-degree murder, the trial court sentenced defendant to a term of life imprisonment without parole. On the charges of first-degree kidnapping, robbery with a dangerous weapon, and burning personal property, the trial court entered a separate consolidated judgment and sentenced defendant to a term of 80 to 105 months to be served consecutive to the life sentence. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court (I) erred in failing to intervene during the prosecutor's closing argument; and (II) committed plain error in allowing the prosecution to introduce evidence of defendant's prior assault.

I

Defendant first argues that the trial court erred by failing to intervene *ex mero motu* during closing arguments to address the prosecutor's discussion of facts not in evidence, misstating the evidence not in evidence, and offering an opinion on the credibility of a witness. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

Pursuant to North Carolina General Statutes, section 15A-1230, "Limitations on argument to the jury,"

> [d]uring a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make

> arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2013); *see also State v. Gladden*, 315 N.C. 398, 422, 340 S.E.2d 673, 688 (1986) ("Although the closing arguments of counsel are largely within the control and discretion of the trial court, it is well established that counsel is to be afforded wide latitude in the argument of fiercely contested cases. Counsel for both sides may argue the law and the facts in evidence, along with all reasonable inferences to be drawn from them. Counsel may not, however, raise incompetent and prejudicial matters nor refer to facts not in evidence. Counsel is also prohibited from placing before the jury his own knowledge, beliefs, and personal opinions not supported by the evidence."). "Only where the prosecutor's argument affects the right of the defendant to a fair trial will the trial judge be required to intervene where no objection has been made." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911 (1987) (citation omitted). "A prosecutor's argument is not improper where it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *Id.*

a. Argument of Facts Not In Evidence

[1] Defendant contends the State lacked evidence to support its claims that "Dalrymple [was] [the State's] deal with the devil[,]" that the deal "was a mistake[,]" that the State had "figured if we put a big enough carrot in front of [Dalrymple], maybe [Dalrymple would] tell the truth[,]" that Dalrymple did not tell the truth, and the State was "stuck with [Dalrymple's] plea."

The State responds that the Dalrymple plea offer was in evidence as defense exhibit #9. However, defense exhibit #9 was actually an agreement wherein the State agreed to forego seeking the death penalty in exchange for Dalrymple's truthful testimony at his own trial. The agreement provided that the truthfulness of his testimony was to be measured against his September 2007 statement.

Defendant contends that the State's claim that it would not call Dalrymple as a witness because he "would not know the truth if it came up and slapped him in the head" was refuted by defense exhibit #9. However, even assuming that defense exhibit #9 does refute the State's claim, the fact that evidence refutes the State's closing argument does not indicate that the State argued facts not in evidence.

Defendant further challenges the State's remarks that the Dalrymple plea was a mistake "because that man was just as guilty of first-degree murder [and] kidnapping as every other defendant here." Defendant contends that the remarks were improper because, by "offering unchallenged testimony to the jury during its closing, the State was able to strike an unfair blow against [defendant's] most crucial witness." However, the State's remarks are supported by evidence presented at trial that Dalrymple played an active role in the murder of Harrington as discussed earlier in this opinion. Defendant has not shown error on this basis and his argument is overruled.

b. Offered A Personal Opinion On Witness Credibility

[2] Defendant also argues that the State's claim that "it would not call Dalrymple to testify because Dalrymple 'would not know the truth if it came up and slapped him on the head' offered a personal opinion" as to witness credibility. Defendant cites *State v. Holloway*, 82 N.C. App. 586, 347 S.E.2d 72 (1986), in which two doctors were improperly permitted to testify "that in their opinion the child had testified *truthfully*." *Id.* at 587, 347 S.E.2d at 73. The present case is distinguishable from *Holloway* because the prosecutor was not giving an opinion as to witness credibility in the form of sworn testimony.

Defendant's argument emphasizes the significance of any improprieties in this case where the jury's verdict "hinged on its determination of Triplett's, Dalrymple's, and [Defendant's] credibility[.]" Similarly, our Supreme Court noted that the first trial indicated that "the objective facts of what happened the night the victim was killed are elusive." *Sargeant I*, 365 N.C. at 67, 707 S.E.2d at 198. The Supreme Court further noted that "the reason for the State's decision to jettison Dalrymple in favor of Triplett is not in the record." *Id.*

In the present case, Defendant made the following statements in his closing argument to the jury:

> Just as Mr. Dalrymple's agreement states, he will testify truthfully if called upon by the State to do so. Why didn't the State call him at this trial? Why not? It's in black and white. Don't take my word for it. Look at this. They never called him. I had to call him, and he gave truthful testimony. He has been pretty much consistent throughout.

In its closing, the State made the following statements to the jury regarding Dalrymple:

> You darn right we're not going to put him up, because that man would not know the truth if it came up and slapped him in the head. But they want you to believe that version of truth or what they believe the truth was.

The challenged portion of the prosecutor's argument seems to answer the very question that the Supreme Court noted was not in the record of the first trial. As to the question of why the State jettisoned Dalrymple in favor of Triplett, the prosecutor stated:

> Dalrymple is our deal with the devil. It was a mistake . . . . We're stuck with that plea. The plea was a mistake and should never have happened . . . because that man was just as guilty of first-degree murder [and] kidnapping as every other defendant here.

Evidence that Dalrymple entered into a plea agreement with the State does not tell *why* the State "jettison[ed] Dalrymple in favor of Triplett" at this trial. *Id.* The prosecutor informed the jury, by way of closing argument, of her opinion and belief as to the credibility of the various defendants and that the prosecution had made a mistake by entering into the plea agreement with Dalrymple. This statement, made in response to defendant's closing argument, seems to venture close to the area of "conjecture or personal opinion." *Zuniga*, 320 N.C. at 253, 357 S.E.2d at 911. However, our Supreme Court has found no error in a credibility argument based on personal opinion from the State where the defendant "opened the door" to the argument. *State v. Gladden*, 315 N.C. 398, 423, 340 S.E.2d 673, 689 (1986). In *Gladden*, the defendant stated that a State's witness "could not possibly remember . . . every detail in this case" and "insinuated that [the witness's] testimony had not been truthful." *Id.* The State, in its closing, argued that its witness was "one of the finest Sheriffs that [the prosecutor had] ever met[.]" *Id.* at 423, 340 S.E.2d at 688. Our Supreme Court held that the "expression of personal opinion by the prosecutor, while improper, was not, however, so grossly improper as to require the trial court to intervene *ex mero motu*." *Id.* at 423, 340 S.E.2d at 688-89.

The State's remarks appear to be in response to defendant's attempt to bolster Dalrymple's credibility. As in *Gladden*, defendant's statements in closing opened the door to the State's response. Therefore, while the State's remarks may have been improper, they were "not, however, so grossly improper as to require the trial court to intervene *ex mero motu*." *Id.* at 423, 340 S.E.2d at 689. Defendant's argument is overruled.

II

[3] Next, defendant argues that the State's evidence of a prior assault constituted evidence of a propensity for violence and amounted to plain error. We disagree.

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citation and quotations omitted).

> 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 affect[s] the fairness, integrity or public reputation of judicial proceedings.

Id. at 518, 723 S.E.2d at 334 (citations and quotations omitted).

Pursuant to General Statutes, section 8C-404,

> 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 . . . [e]vidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same[.]

N.C. Gen. Stat. § 8C-1, Rule 404(a)(1) (2013); *see also State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000) ("A criminal defendant is entitled to introduce evidence of his good character, thereby placing his

character at issue. The State in rebuttal can then introduce evidence of defendant's bad character. *See State v. Gappins*, 320 N.C. 64, 69, 357 S.E.2d 654, 658 (1987). Such evidence offered by the defendant or the prosecution in rebuttal must be 'a pertinent trait of his character.' N.C.G.S. § 8C–1, Rule 404(a)(1) (1999).").

Before this Court, defendant challenges the prosecution's cross-examination of him as to his use of cocaine and prior accusation of assaultive behavior while a member of the United States Army. In response, the State argues that on direct examination, defendant placed his character at issue by testifying about his military service. On direct examination, defendant testified at length about his positive military service: serving in the United States Army from September 1999 to January 2003, defendant worked with a field artillery unit in both Kosovo and Afghanistan; also, he was awarded the United Nations Kosovo Liberation Medal, Army Service Ribbon, and a National Defense bar. Defendant's Kosovo Liberation medal was admitted into evidence. Defendant engaged in the following examination on direct examination:

> Q Now, Mr. Sargent, when did you get discharged from the US Army?
>
> A I believe the exact date was January 3rd, 2003.
>
> Q And do you remember, do you recall what the character of your discharge was?
>
> A It was on, on other than honorable conditions.
>
> Q What they call general?
>
> A General.
>
> . . .
>
> Q Who were you living with?
>
> A Well, when I initially got out of the Army I was having some substance abuse problems with alcohol and marijuana so my aunt and uncle that I lived with before I went in the Army they thought it would be a good idea if I came back and was in a better environment . . . .

On cross-examination, the prosecutor focused on the circumstances of defendant's discharge from the military. We look to the following exchange, which took place in the absence of any objection by defendant:

Q . . . [I]n fact, when you were talking about all of your military accomplishments, you didn't tell the jury [about your] less than honorable circumstances for using cocaine, did you?

A I said I was discharged for other than honorable conditions, I said that.

Q Did you tell the jury that you were discharged for other than honorable conditions you were discharged . . . on 11 December, 2002 for using cocaine and for assault, is that right?

A That is correct.

Q And in fact, it was so bad, sir, that the commander there at Fort Bragg . . . requested that you be barred from Fort Bragg pending your hearing because of your assault and use of cocaine, didn't he?

A That's correct.

Q You didn't tell the jury that, did you?

A I wasn't asked.

Q Well, sir, you told the jury all about all the fine things you had done in the military, and all the honors, I believe you held up a certificate here about service overseas and the battalions you were in, and how you supported the artillery, supported people over in the, the Vulcans and all of that, but you didn't tell them about being dishonorably discharged, did you?

A I just answered the questions my lawyer asked me.

. . .

Q You tried to mislead the jury into believing you were a wonderful fine soldier serving your country when in fact you were dishonorably discharged for the use of cocaine and for assault?

. . .

And that is exactly what you're here today for is using cocaine and murder, isn't it?

A That's correct.

Because defendant placed his character at issue by testifying at length about his positive military service record and acknowledging that he received a general discharge from the United States Army, the State was entitled to examine the circumstances that led to defendant's discharge. *See Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000) ("A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue. The State in rebuttal can then introduce evidence of defendant's bad character."). Therefore, we hold there was no error in the admission of this evidence. Defendant's argument is overruled.

No error.

Judges McGEE and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 MARCH 2014)

ALLEN INDUS., INC. v. KLUTTZ No. 13-1032	Guilford (13CVS5637)	Dismissed
BROWN v. ARTISAN 2510, INC. No. 13-868	Mecklenburg (11CVS18370)	Affirmed in part; reversed and remanded in part; vacated in part
FOSS v. McGUIRE, WOOD & BISSETTE, PA No. 13-894	Buncombe (09CVS2352)	Affirmed
FRIEDMAN v. BANK OF AM., N.A. No. 13-483	Iredell (12CVS1812)	Affirmed
IN RE FORECLOSURE OF LOPEZ No. 13-1015	Catawba (11SP841)	Affirmed
IN RE B.K. No. 13-938	Madison (11JA36)	Affirmed in part and remanded in part.
IN RE C.G., M.G., A.G. No. 13-971	Orange (11JT76-78)	Affirmed
IN RE Z.D.N.T. No. 13-1098	Craven (13JT6)	Reversed and Remanded
JERNIGAN v. TART No. 13-919	Johnston (11CVS987)	New Trial; Dismissed in part
MDT PERS., LLC v. APH CONTRACTORS, INC. No. 13-802	Guilford (12CVS3555)	Dismissed
MEHERRIN INDIAN TRIBE v. LEWIS No. 13-882	Hertford (08CVS159)	Affirmed
PEEK v. WATSON No. 13-797	Chatham (11CVS482)	No Error
PIGNATIELLO v. SYNOVUS FIN. CORP. No. 13-901	Henderson (10CVS1303)	Affirmed in part; dismissed in part

RABUN CNTY. BANK v. HIGHLANDS LAND HOLDING GRP., LLC No. 13-718	Jackson (12CVS344)	Affirmed
STATE v. BROWN No. 13-562	Columbus (07CRS53687)	Reversed and Remanded
STATE v. CALL No. 13-706	Rowan (10CRS53951)	No Error
STATE v. CARROLL No. 13-989	Cleveland (11CRS50468) (11CRS50471) (11CRS50473)	No Error
STATE v. CROWDER No. 13-824	Mecklenburg (10CRS205883)	Reversed
STATE v. DENNING No. 13-724	Wake (11CRS228201) (12CRS3448)	No Error
STATE v. HOWIE No. 13-553	Union (10CRS56325-26) (11CRS2520) (12CRS2040)	No Error in Part; Vacated in Part
STATE v. HUTCHESON No. 13-842	Nash (11CRS51133) (11CRS51314)	No Error
STATE v. MELTON No. 13-940	Wake (12CRS4725) (12CRS4726)	No Prejudicial Error
STATE v. PHELPS No. 13-957	Washington (11CRS50589)	No prejudicial error in part; remanded in part
STATE v. WARNER No. 13-699	Cabarrus (11CRS55594) (12CRS1086)	No Error
STATE v. WHITTINGTON No. 11-1197-2	Nash (09CRS51601)	Vacated in part, no error in part.

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