233 N.C. App.—No. 2 Pages 109-240

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 17, 2016

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OF
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COURT OF APPEALS

CASES REPORTED

FILED 1 APRIL 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

AGENCY

Apparent authority—evidence not sufficient—There was insufficient evidence to establish the apparent authority of defendant Jack Freeman (Jack) to act as a personal agent of defendant Corinna Freeman (Corinna). Plaintiffs introduced no evidence that Corinna ever made any representations to them, let alone any representations that Jack had authority to act on her behalf; plaintiffs failed to show that Corinna otherwise acted in such a way as to convey to them the idea that Jack had authority to act on her behalf; and Jack's out-of-court representations about his authority to act for Corinna are irrelevant. **Green v. Freeman, 109.**

Directed verdict—relationship between corporation and other parties—A trial court order directing a verdict on the issue of agency was affirmed where, even assuming that a letter created an agency relationship, it was an agency relationship between certain companies and defendant Jack Freeman (Jack), not between

Effective assistance of counsel—objection to joinder of charges at trial—no error—no deficient performance—Defendant did not receive ineffective assistance of counsel in a robbery with a dangerous weapon case where his trial counsel did not to object to the joinder for trial of defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon. Possession of a firearm by a felon is a criminal offense that was properly joined for trial with another criminal offense, robbery with a dangerous weapon. As there was no error in the joinder decision, defense counsel's failure to object to the joinder did not constitute deficient performance. **State v. Alston, 152.**

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Deposition—confusion—misapprehension of law—The trial court abused its discretion in excluding the offered portions of a deposition as confusing. The only possible confusion raised by defendants was that the evidence given might have been used against defendant Corinna Freeman by co-defendants, but such use is explicitly permitted under N.C.G.S. § 1A-1, Rule 32 when the co-defendant was represented at the deposition which an adverse party seeks to admit. It was clear that the trial court made its decision under a misapprehension of the applicable law and not based upon the actual content of the portions of the deposition which plaintiffs sought to admit. **Green v. Freeman, 109.**

Deposition—exclusion not prejudicial—Although the trial court erred by excluding a deposition under Rule 32 of the North Carolina Rules of Civil Procedure and under Rule 403 of the North Carolina Rules of Evidence in an action involving agency, that error was not prejudicial because the inclusion of this deposition would have had no effect on the agency theory of liability. **Green v. Freeman, 109.**

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defendant's presumption of innocence was irreparably diminished by the evidence from the civil actions, especially when the presiding judge in the murder trial was the presiding judge in the wrongful death suit, and the danger of unfair prejudice vastly outweighed the probative value in this case. Additionally, the trial court abused its discretion by admitting the evidence under a misapprehension of the law where the trial court failed to conduct an inquiry concerning N.C.G.S. § 1-149.l. **State v. Young, 207.**

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SENTENCING—Continued

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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.

GREEN v. FREEMAN

[233 N.C. App. 109 (2014)]

MICHAEL A. GREEN AND DANIEL J. GREEN, PLAINTIFFS
v.
JACK L. FREEMAN, JR., CORINNA W. FREEMAN, PIEDMONT CAPITAL HOLDING OF NC, INC., PIEDMONT EXPRESS AIRWAYS, INC., PIEDMONT SOUTHERN AIR FREIGHT, INC., AND NAT GROUP, INC., DEFENDANTS
v.
LAWRENCE J. D'AMELIO, III, THIRD-PARTY DEFENDANT

No. COA11-548-2

Filed 1 April 2014

1. Agency—directed verdict—relationship between corporation and other parties

A trial court order directing a verdict on the issue of agency was affirmed where, even assuming that a letter created an agency relationship, it was an agency relationship between certain companies and defendant Jack Freeman (Jack), not between defendant Corinna Freeman (Corinna) and Jack. Although it may have been proper to pierce the corporate veil, plaintiffs only argued that Jack was Corinna's *personal* agent, not that he was an agent of the corporation.

2. Agency—apparent authority—evidence not sufficient

There was insufficient evidence to establish the apparent authority of defendant Jack Freeman (Jack) to act as a personal agent of defendant Corinna Freeman (Corinna). Plaintiffs introduced no evidence that Corinna ever made any representations to them, let alone any representations that Jack had authority to act on her behalf; plaintiffs failed to show that Corinna otherwise acted in such a way as to convey to them the idea that Jack had authority to act on her behalf; and Jack's out-of-court representations about his authority to act for Corinna are irrelevant.

3. Evidence—use of deposition—witness present and able to testify

The trial court erred by excluding the proffered portions of a deposition where Defendant Corinna Freeman had objected on the basis that she was present and available to testify. The plain language of N.C.G.S. § 1A-1, Rule 32 permits the use of the deposition of a party by an adverse party for any purpose, regardless of whether or not the deponent testifies. Moreover, for purposes of Rule 32, it is irrelevant that there were multiple defendants at trial.

4. Evidence—deposition—confusion—misapprehension of law

The trial court abused its discretion in excluding the offered portions of a deposition as confusing. The only possible confusion raised by defendants was that the evidence given might have been used against defendant Corinna Freeman by co-defendants, but such use is explicitly permitted under N.C.G.S. § 1A-1, Rule 32 when the co-defendant was represented at the deposition which an adverse party seeks to admit. It was clear that the trial court made its decision under a misapprehension of the applicable law and not based upon the actual content of the portions of the deposition which plaintiffs sought to admit.

5. Evidence—deposition—exclusion not prejudicial

Although the trial court erred by excluding a deposition under Rule 32 of the North Carolina Rules of Civil Procedure and under Rule 403 of the North Carolina Rules of Evidence in an action involving agency, that error was not prejudicial because the inclusion of this deposition would have had no effect on the agency theory of liability.

Appeal by defendant Corinna Freeman and cross-appeal by plaintiffs from order entered 8 July 2010 and judgment entered 2 June 2010 and by Judge Edwin G. Wilson, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 16 November 2011. By opinion entered 4 September 2012, this Court affirmed the trial court's orders. By opinion entered 8 November 2013, the North Carolina Supreme Court reversed this Court's opinion and remanded for consideration of additional issues.

Thomas B. Kobrin, for plaintiff-appellants.

Forman Rossabi Black, P.A., by T. Keith Black, Gavin J. Reardon, and Elizabeth Klein, for defendant-appellant Corinna Freeman.

STROUD, Judge.

This case comes to us on remand from the North Carolina Supreme Court, which reversed this Court's prior opinion and remanded for us to consider the issue of agency. We affirm the trial court's order allowing defendant Corinna's motion for directed verdict on the issue of agency.

I. Background

The relevant background facts have been laid out by our Supreme Court in *Green v. Freeman*, ___ N.C. ___, ___, 749 S.E.2d 262, 265-67

(2013) (*Green I*), and we will not repeat them here. The Supreme Court held that plaintiffs' evidence on breach of fiduciary duty was insufficient as a matter of law, but remanded for this Court to consider whether the trial court erred in allowing defendant Corinna Freeman's motion for directed verdict on an agency theory of liability and piercing the corporate veil. *Id.* at ___, 749 S.E.2d at 271.

II. Agency and Piercing the Corporate Veil

[1] To hold Corinna personally liable for the actions of the corporation,

> plaintiffs must present evidence of three elements:
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [a] plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at ___, 749 S.E.2d at 270 (citation and quotation marks omitted).

The Supreme Court has already held that plaintiffs presented sufficient evidence on the first element. It remanded to this Court for us to consider whether plaintiffs presented sufficient evidence on the other two elements. The only remaining issue to be considered is that of agency. Plaintiffs argue that the trial court erred in allowing defendant Corinna's motion for directed verdict on an agency theory because there was evidence that Jack Freeman, her son, was her agent.

We conclude that, even assuming the 2001 letter created an agency relationship, it was an agency relationship between the Piedmont companies and Jack, not between Corinna and Jack. Although the Supreme Court held that it was proper to pierce the corporate veil, plaintiffs only argue that Jack was Corinna's *personal* agent, not that he was an agent of the corporation, and that piercing the corporate veil therefore makes Corinna liable for his acts. Accordingly, we affirm the trial court's order directing verdict on the issue of agency.

A. Standard of Review

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor or to present a question for the jury.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citations omitted).

B. Analysis

Agency, like piercing the corporate veil, is not itself a cause of action; it is "the relationship that arises from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Outer Banks Contractors, Inc. v. Daniels & Daniels Const., Inc.*, 111 N.C. App. 725, 730, 433 S.E.2d 759, 762 (1993) (citation and quotation marks omitted).

"Agency is a fact to be proved as any other, and where there is no evidence presented tending to establish an agency relationship, the alleged principal is entitled to a directed verdict." *Albertson v. Jones*, 42 N.C. App. 716, 718, 257 S.E.2d 656, 657 (1979); *Outer Banks Contractors, Inc.*, 111 N.C. App. at 730, 433 S.E.2d at 762 ("The presence of a principal-agent relationship is a question of fact for the jury when the evidence tends to prove it; a question of law for the trial court if the facts lead to only one conclusion.").

To establish an agency relationship, "[t]he principal must intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them." *Ellison v. Hunsinger*, 237 N.C. 619, 628, 75 S.E.2d 884, 891 (1953) (citation and quotation marks omitted). "An agency can be proved generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy." *Munn v. Haymount Rehabilitation & Nursing Center, Inc.*, 208 N.C. App. 632, 637-38, 704 S.E.2d 290, 295 (2010) (citation and quotation marks omitted).

An agency relationship can impose vicarious liability on a principal for the torts committed by an agent when he "is acting within the

line of his duty and exercising the functions of his employment." *King v. Motley*, 233 N.C. 42, 45, 62 S.E.2d 540, 543 (1950). "If the act of the employee was a means or method of doing that which he was employed to do, though the act be unlawful and unauthorized or even forbidden, the employer is liable for the resulting injury . . . ." *Wegner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 66, 153 S.E.2d 804, 808 (1967). Here, the claims against Jack—the purported agent—were fraud, breach of fiduciary duty, and unfair and deceptive business practices.

Plaintiffs argue that Corinna made Jack her agent by writing and signing the following letter, dated 30 November 2001 and entitled "RE: CORPORATE RESOLUTION":

> Dear Jack:
>
> As of this date, November 30, 2001, please be advised that I am delegating responsibility and authority for making all corporate, financial, operational, and administrative decisions for the company to you.
>
> You are free to delegate further in any area of the business to persons you decide are appropriate and qualified to insure the smooth and successful operation of the company.
>
> Sincerely,
> [signature]
>
> Corinna Freeman
> Chairperson

Although we agree that this letter and the other evidence could establish an agency relationship, plaintiffs misidentify the principal. This evidence, in the light most favorable to plaintiffs, shows that Corinna appointed Jack a general agent on behalf of "the company" in her capacity as "Chairperson." He was empowered to make "all corporate, financial, operational, and administrative decisions for the company." Nothing in the 2001 letter—and no other evidence presented at trial—indicates that Corinna appointed Jack as her personal agent or that she intended to empower him to act on her own behalf in any way other than as the corporate "chairperson." If Jack was the corporation's agent, not Corinna's, then the corporation, not Corinna, would normally be liable for the torts committed within the scope of his duties. *See Green I*, ___ N.C. at ___, 749 S.E.2d at 270 ("The general rule is that in the ordinary course of business, a corporation is treated as distinct from its shareholders." (citation

and quotation marks omitted)); *Holleman v. Aiken*, 193 N.C. App. 484, 504, 668 S.E.2d 579, 592 (2008) (stating that "a principal is liable for the torts of its agent which are committed within the scope of the agent's authority" (citation and quotation marks omitted)).

Legally, there is a distinction between Jack's actions on behalf of the corporation and his actions purportedly as Corinna's agent, and it appears that this is the distinction which the Supreme Court directed us to address:

> In other words, if the trial court properly dismissed plaintiffs' agency claims, it is irrelevant whether Corinna exercised domination and control over the Piedmont companies. On the other hand, if the trial court erred in dismissing the agency claims, the question remains whether plaintiffs may recover against Corinna on those claims through the piercing the corporate veil doctrine. Therefore, we reverse and remand to the Court of Appeals for a determination of whether the trial court erred in granting Corinna's motion for a directed verdict on plaintiffs' agency claims for fraud and breach of fiduciary duty.

Green I, ___ N.C. at ___, 749 S.E.2d at 271.

Because the parties' original briefs failed to address this distinction, we ordered that the parties submit supplemental briefing to address the issues on remand from the Supreme Court. They did so, but plaintiffs made no argument that Corinna is liable for Jack's actions *as a corporate agent* through piercing the corporate veil, or on any other theory. It is not the duty of this Court to construct arguments for appellants. *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 533, *cert. and disc. rev. denied*, 361 N.C. 567, 650 S.E.2d 602 (2007). Therefore, we address only the argument presented—that Jack was Corinna's personal agent empowered to act on her behalf. For the foregoing reasons, we conclude that there was insufficient evidence that Jack was Corinna's personal agent, acting under actual authority.

[2] Plaintiffs also argue that even if Jack did not have actual authority to act as Corinna's personal agent, he had apparent authority to do so. "Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." *Pet, Inc. v. University of North Carolina*, 72 N.C. App. 128, 135, 323 S.E.2d 745, 750 (1984) (citation, quotation marks, and ellipses omitted). Plaintiffs introduced no evidence that Corinna ever made any representations to them, let alone any representations that

Jack had authority to act on her behalf. Plaintiffs failed to show that Corinna otherwise acted in such a way as to convey to plaintiffs the idea that Jack had authority to act on her behalf. Jack's out-of-court representations about his authority to act for Corinna are irrelevant. *See Dailey v. Integon General Ins. Corp.*, 75 N.C. App. 387, 399, 331 S.E.2d 148, 156 (noting that "the general rule is that neither the fact nor the extent of an agency relationship can be proved by the out-of-court statements of an alleged agent."), *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985); *Munn*, 208 N.C. App. at 639, 704 S.E.2d at 296 ("The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him." (citation and quotation marks omitted)); *State v. Sturgill*, 121 N.C. App. 629, 638, 469 S.E.2d 557, 563 (1996) ("Apparent authority arises when a *principal* intentionally or by want of ordinary care causes or allows a third person to believe that an agent possesses authority to act for that principal." (citation, quotation marks, and brackets omitted) (emphasis added)). Therefore, there was insufficient evidence to establish Jack's apparent authority to act as a personal agent of Corinna.

We conclude that plaintiffs failed to present sufficient evidence, taken in the light most favorable to plaintiffs, that Jack was Corinna's personal agent empowered with either actual or apparent authority to sustain a jury verdict in their favor on that theory. Therefore, we hold that the trial court did not err in granting defendant Corinna's motion for directed verdict on the theory of agency.

III. Exclusion of Deposition

[3] Plaintiffs further argue that the trial court erred in excluding the deposition of Corinna that they attempted to introduce at trial under N.C. Gen. Stat. § 1A-1, Rule 32. Defendant Corinna objected on the basis that she was present and available to testify, and that therefore reading the deposition was unnecessary.

Under N.C. Gen. Stat. § 1A-1, Rule 32(a)(3) (2007), "[t]he deposition of a party . . . may be used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing." Here, the trial court excluded the portions of Corinna's deposition offered by plaintiffs because

> [i]t just stands in the face of reason that you would have three co-defendants sitting here in court and that you could get their testimony just by introducing the deposition, with no attempt at that point for them to be cross examined.

It further sustained the objection under Rule 403 on the basis that the evidence would confuse the jury, reasoning that there were multiple defendants and that the jury might be tempted to use one defendant's admissions against the others.

First, we conclude that the trial court's interpretation of Rule 32 was error. The plain language of the rule permits the use of a deposition of a party by an adverse party for any purpose, regardless of "whether or not the deponent testifies." N.C. Gen. Stat. § 1A-1, Rule 32(a)(3). Indeed, this Court has specifically held that a party's presence at trial is not a reason to prevent an adverse party from introducing her deposition. *Stilwell v. Walden*, 70 N.C. App. 543, 547-48, 320 S.E.2d 329, 332 (1984). Therefore, the presence of defendant at trial or her availability as a witness is wholly immaterial to the issue of whether her deposition may be used against her.

Moreover, for purposes of Rule 32, it is irrelevant that there were multiple defendants at trial. Rule 32(a) specifically permits the use of a deposition "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." N.C. Gen. Stat. § 1A-1, Rule 32(a); *see Floyd v. McGill*, 156 N.C. App. 29, 40, 575 S.E.2d 789, 796 (holding that admission of one defendant's deposition was proper where she was present at the deposition, even though she was represented at the time by the same counsel as her co-defendants), *disc. rev. denied*, 357 N.C. 163, 580 S.E.2d 364 (2003). There is no dispute that all of the co-defendants received adequate notice that her deposition would be taken and that all were represented at the taking of Corinna's deposition. *Cf. Craig v. Kessig*, 36 N.C. App. 389, 400, 244 S.E.2d 721, 727 (1978) (noting that a party's deposition can be used against him, even if his co-defendants were not present when the deposition was taken, and that were such a situation to arise in a jury trial the proper remedy would be appropriate limiting instructions), *aff'd*, 297 N.C. 32, 253 S.E.2d 264 (1979). We conclude that the trial court erred in excluding the proffered portions of Corinna's deposition under Rule 32. Further, we note, as there was some confusion on this point at trial, that "there is no distinction between a discovery deposition and a trial deposition[] under Rule 32." *Robertson v. Nelson*, 116 N.C. App. 324, 327, 447 S.E.2d 488, 490 (1994). If the trial court had allowed plaintiff to use Corinna's deposition testimony, defendant would have had the opportunity to raise objections to portions of the deposition testimony and the trial court could have ruled upon those objections.

[4] Second, the trial court abused its discretion in excluding the offered portions of Corinna's deposition under the North Carolina Rules of

Evidence, Rule 403. Under Rule 403, otherwise admissible evidence may nonetheless be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues." N.C. Gen. Stat. § 8C-1, Rule 403 (2007). We review a trial court's application of Rule 403 for an abuse of discretion. *Warren v. Jackson*, 125 N.C. App. 96, 99, 479 S.E.2d 278, 280, *disc. rev. denied*, 345 N.C. 760, 760, 485 S.E.2d 310, 310-11 (1997). "An abuse of discretion occurs when the trial court's decision was unsupported by reason and could not have been a result of competent inquiry." *Leggett v. AAA Cooper Transp., Inc.*, 198 N.C. App. 96, 101, 678 S.E.2d 757, 761 (2009) (citation and quotation marks omitted).

Here, the only possible confusion raised by defendants was the risk that the jury might use the information contained in one defendant's deposition against the other two defendants. The questions and answers in the portions of Corinna's deposition offered by plaintiffs all concerned her role in the Piedmont companies, her awareness of Jack's actions, and her training and experience in the cargo aviation business. We fail to see any possible reason that admission of this evidence would lead the jury to confuse the issues.

The only possible confusion raised by defendants was that the evidence given by Corinna might be used against her co-defendants. But it is common sense that this is exactly the reason that the plaintiffs would want to use the evidence, and such use is explicitly permitted under Rule 32 when the co-defendant was represented at the deposition which an adverse party seeks to admit. *See* N.C. Gen. Stat. § 1A-1, Rule 32(a); *Craig*, 36 N.C. App. at 400, 244 S.E.2d at 727. It is clear that the trial court made its decision under a misapprehension of the applicable law and not based upon the actual content of the portions of the deposition which plaintiffs sought to admit. Therefore, we conclude that the trial court abused its discretion in excluding the proffered portions of Corinna's deposition under Rule 403.

[5] Having concluded that the trial court erred in excluding Corinna's deposition, we must consider whether this error requires reversal. "The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred. The burden is on the appellant not only to show error, but to show *prejudicial* error." *Latta v. Rainey*, 202 N.C. App. 587, 603, 689 S.E.2d 898, 911 (2010) (citations, quotation marks, and ellipses omitted). We hold that plaintiffs have failed to show that the trial court's error here was prejudicial.

First, the deposition testimony does not change the fact that "[b]ecause plaintiffs never became shareholders, Corinna could not have owed them, as shareholders, fiduciary duties." *Green I*, ___ N.C. at ___, 749 S.E.2d at 269. Second, Corinna's deposition does not indicate that she had any contact with plaintiffs or that "they relied on or trusted in her when they chose to invest in the Piedmont companies." *Id.* Therefore, the inclusion of the deposition would have had no effect on plaintiffs' breach of fiduciary duty claims. *See id.* Finally, the inclusion of this deposition would have had no effect on the agency theory of liability, given our discussion above. Nothing in the deposition indicates that Corinna authorized Jack to act on her behalf in a personal capacity. The deposition does include additional evidence that Corinna continued to be involved in the Piedmont companies after her 2001 letter and that she delegated to Jack all of her corporate responsibilities. But this evidence has no bearing on her intent to make Jack a personal agent.

We conclude that plaintiffs have failed to show "that a different result would have likely ensued had the error not occurred." *Latta*, 202 N.C. App. at 603, 689 S.E.2d at 911. As a result, we hold that although the trial court erred in excluding Corinna's deposition under Rule 32 of the North Carolina Rules of Civil Procedure and under Rule 403 of the North Carolina Rules of Evidence, that error was not prejudicial.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order allowing defendant Corinna Freeman's motion for directed verdict on the issue of agency. We further conclude that plaintiffs have failed to show that the trial court's error in excluding Corinna's deposition was prejudicial.

AFFIRMED; NO PREJUDICIAL ERROR.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF K.A., E.A., AND K.A.

No. COA13-972

Filed 1 April 2014

1. Appeal and Error—preservation of issues—proper objection made at trial

Respondent mother properly preserved for appellate review her argument that the trial court erred in an abuse, neglect and dependency hearing by determining that respondent was collaterally estopped and/or barred by the doctrine of *res judicata* from re-litigating the allegations in a custody petition that were addressed in a civil custody order. Counsel for respondent made a clear, cogent argument at the hearing for why she objected to the trial court's application of the collateral estoppel rule.

2. Collateral Estoppel and Res Judicata—collateral estoppel—not applicable—different burdens of proof in proceedings

The trial court erred in an abuse, neglect and dependency hearing by determining that respondent mother was collaterally estopped and/or barred by the doctrine of *res judicata* from re-litigating the allegations in a custody petition that were addressed in a civil custody order. Even if privity is not a requirement of collateral estoppel, the trial court erroneously applied the doctrine because of the different burdens of proof used in custody and neglect hearings. Moreover, the trial court's erroneous application of the collateral estoppel rule was prejudicial to respondent because it made it impossible for her to effectively contest the allegations made in the petition under the higher, clear and convincing evidence standard.

Appeal by Respondent-Mother from orders entered 19 April 2013 and 14 June 2013 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 27 February 2014.

Senior Associate Attorney Twyla Hollingsworth-Richardson for Mecklenburg County Department of Social Services, Youth & Family Services.

Mercedes O. Chut for Respondent-Mother.

Parker Poe Adams & Bernstein LLP, by Deborah L. Edney, for Guardian ad Litem.

STEPHENS, Judge.

Factual Background and Procedural History

This case arises from an adjudication of neglect and dependency in Mecklenburg County District Court. Three minor children, referred to as "Katie," "Elliot," and "Karen" in this opinion,[1] were the subject of the hearing. Their parents, Respondent-Mother and "the father," were married on or about 30 July 1994 and separated on or about 11 December 2010. Prior to separation, Respondent-Mother "became determined to prove [that the father] had molested all three minor children."

On 20 December 2010, Respondent-Mother initiated a custody action and filed a motion for a domestic violence protective order. The parties reached a consent order in the domestic violence matter in February of 2011. On 19 September 2012, the Mecklenburg County District Court, Judge Christy T. Mann presiding, entered a permanent civil custody order. The court found that "[i]t [was] highly unlikely that [Karen] ha[d] been molested or abused by [the father]" and that Respondent-Mother had "perpetuated a false set of beliefs onto the children which they now believe." The court placed the juveniles in the father's legal custody, but ordered the children and the father to "undergo intensive counseling with therapists to prepare them for the transition from [Respondent-Mother's] home to [the father's] home," given the "significant psychological damage" suffered by the children as a result of the parties' divorce and the Respondent-Mother's attempts to alienate the children from the father. On 6 November 2012, the court entered a second custody order placing Katie and Elliot in the father's physical custody and ordering therapy to allow Karen to be placed with the father. The order also provided that Respondent-Mother could only visit with Katie and Elliot under supervision. The record indicates that neither party appealed the custody orders.

Seven days later, on 13 November 2012, Petitioner Mecklenburg County Department of Social Services, Youth & Family Services ("YFS"), filed a juvenile petition alleging that all three juveniles were abused, neglected, and dependent. The petition recited certain findings from the trial court's 19 September 2012 civil custody order and alleged that, "[d]uring one of the . . . therapy sessions, [which were ordered so that Karen could be returned to her father's care, Karen] attacked [the] father and had to be pulled off of him by a therapist." The petition also alleged

1. Pseudonyms are used to protect the juveniles' identities.

that Elliot had accused the father of sexual abuse, but noted that the accusation was "suspect."

On 20 November 2012, the trial court entered a nonsecure custody order placing Karen in foster care. The court also determined that Katie and Elliot would remain with the father, noting that "YFS ha[d] taken appropriate steps to assess the safety of the two children remaining in the father's care [and] enter[ed] into a safety plan with the father to ensure the children's continued safety." In addition, the trial court found there was a reasonable factual basis to believe the allegations in the petition and that placement in foster care was the most appropriate arrangement as to Karen. Lastly, the court noted that "[Respondent-Mother] is collaterally estopped from re-litigating the issues adjudicated by Judge Mann. YFS shall begin the [Interstate Compact on the Placement of Children] process for the maternal grandparents[,] but the [c]ourt will not consider temporary custody with them."

The petition came on for hearing on 14 January 2013. At the outset of the hearing, the trial court orally re-stated its determination that Respondent-Mother "would be collaterally estopped from re-litigating those issues that were litigated by those parties as Petitioner and [Respondent-Mother] in a child custody action before the Honorable Christy T. Mann in 10 CVD 25443." The court also received documents from the civil custody case into evidence. The father stipulated to a mediated petition agreement, but YFS offered no further evidence at adjudication. Respondent-Mother called several witnesses, including the father. During the presentation of evidence, the trial court sustained a number of objections to Respondent-Mother's questions about the father's alleged abuse of the juveniles on grounds that Respondent-Mother was collaterally estopped from re-litigating that issue.

The trial court entered an adjudication and disposition order on 11 March 2013 and an amended adjudication order on 19 April 2013.[2] In the amended order, the trial court found as fact that "[t]he [c]ourt has previously ruled that the parents are collaterally [e]stopped from re-litigating issues which have already been ruled upon in the custody case.

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2. In the 11 March 2013 order, the court elected to continue disposition in order to "fully assess the most appropriate way to achieve the purpose of the [c]ourt's exercising jurisdiction over the children [by obtaining] more information about the needs of the children." Oddly, the 11 March 2013 adjudication and disposition order purports to continue the disposition hearing to 6 March 2013, an obvious impossibility that was repeated in the 19 April 2013 amended order. In any event, the 14 June 2013 disposition order makes clear that the hearing occurred on 16 May 2013.

The [c]ourt takes judicial notice of the findings made by Judge Mann and those findings are incorporated herein." Given the findings of fact in its order, the trial court adjudicated all three juveniles neglected and additionally adjudicated Karen dependent. The trial court entered a dispositional order on 14 June 2013, providing that Karen would remain in the legal custody of YFS and continue treatment "in order to change her false beliefs about her father so she can be reintegrated into his home." Respondent-Mother appeals.

Discussion

Respondent-Mother appeals from the trial court's adjudication and disposition orders on grounds that the trial court (1) erroneously found that Respondent-Mother was collaterally estopped and/or barred by the doctrine of *res judicata*[3] from litigating the allegations in the petition that were addressed in the 19 September 2012 civil custody order or, in the alternative, (2) failed to make sufficient findings of fact to support its adjudication order. We reverse the adjudication and disposition orders on grounds that the trial court erred by invoking the doctrine of collateral estoppel and remand for further proceedings consistent with this opinion.

I. Appellate Review

[1] As a preliminary matter, we address YFS's argument that Respondent-Mother failed to preserve her first argument for appellate review because she did not object when the trial court stated at the beginning of the hearing that collateral estoppel would work to bar re-litigation of those issues raised and determined in the custody case. For support, YFS points out that, during a discussion of *res judicata* and collateral estoppel, counsel for Respondent-Mother "state[d] that she [was] not re-litigating any of the issues decided by Judge Mann" and even stated in her closing argument that she "obviously accepted" the collateral estoppel ruling. These statements are taken out of context and do not accurately represent what occurred at the hearing.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure provides that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request,

3. The record indicates that, despite Respondent-Mother's argument, the trial court relied exclusively on the doctrine of collateral estoppel to bar litigation on the relevant allegations in the petition, not *res judicata*. Therefore, we tailor our analysis to her collateral estoppel argument.

> 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).

Relevant to the preservation issue, the following colloquy occurred between counsel for Respondent-Mother, the father, counsel for the father, and the court during the 14 January 2013 hearing:

> [COUNSEL FOR RESPONDENT-MOTHER:] These allegations, when did they first surface?
>
> [THE FATHER:] Which allegations are you referring to?
>
> [COUNSEL FOR RESPONDENT-MOTHER:] Sexual abuse.
>
> [THE FATHER:] Approximately December of 2010.
>
> [COUNSEL FOR RESPONDENT-MOTHER:] And what — when it surfaced, what did you offer to do?
>
> [COUNSEL FOR THE FATHER]: I'm gonna object. I don't know how far we're gonna go with this. My understanding is the only allegation that would be relevant here is the one that's in the petition . . . . Everything else would have been covered by the previous orders of Judge Christy Mann and should be collaterally estopped . . . .
>
> THE COURT: All right. So you're objecting to this evidence on the basis that [Respondent-Mother] would be collaterally estopped from re-litigating it?
>
> [COUNSEL FOR THE FATHER]: Collaterally estopped or *res judicata* or beyond the scope.
>
> THE COURT: All right. The objection is sustained.
>
> [COUNSEL FOR RESPONDENT-MOTHER]: May I be heard?
>
> THE COURT: Yes. What is your argument for the admissibility of this evidence?
>
> [COUNSEL FOR RESPONDENT-MOTHER]: Well, the issue I'm trying to ask him about actually was not provided

in any of the orders. I asked him what he did. There's nothing about what he did.

And my position is collateral estoppel does not apply or *res judicata* in these proceedings. For *res judicata* or collateral estoppel to apply, the [c]ourt has to find that the parties are identical, the issues are identical, and we don't have that here. You had a — you had a civil action between [the father] and [Respondent-Mother] in civil court.

In this court, you have — and that was with [Respondent-Mother] as the plaintiff and [the father] as the defendant. We are in juvenile court. A different statute applies, which is the 7B statute. You have different parties now. You don't have [Respondent-Mother] bringing an action against [the father].

You have [YFS] as the petitioner in this case. You have the *Guardian ad Litem*'s office . . . representing the children. You have the mother and the father . . . as respondents in this action. So I say there is no identity of parties. The issues are not the same.

I'm not re-litigating anything, and there are additional allegations in the petition that are not referenced here. . . .

I met with [counsel for YFS] on Friday when I was getting my discovery, and I said, I don't have any police reports, I don't have any of this. [He s]aid, well, I'm not going to be offering any of those. And now we have a stipulation dealing with police reports. And if the [c]ourt adopts that stance, [Respondent-Mother] cannot litigate anything.

I say there's no identity of parties and there's no *res judicata* as far as what I'm questioning. There's some things that I'm not going to be re-litigating, but I asked him specifically when the allegations surfaced what did you do. He took certain steps that I know weren't reflected in any of the orders, and I think I should be allowed to ask that.

And I clearly wasn't a party to that proceeding. My client was unrepresented in the civil proceeding.

THE COURT: All right. Well, the Honorable Christy T. Mann presided over a hearing July 10th through 11th, 2012. . . .

. . .

> And so I'm going to conclude that [Respondent-Mother] should not be allowed to re-litigate those factual allegations in this proceeding . . . . So the objection is sustained.

(Italics added). Later, in her closing argument, counsel for Respondent-Mother made the following comment:

> [COUNSEL FOR RESPONDENT MOTHER]: . . .
>
> While I feel that the Court has ruled that we can't litigate anything because of collateral estoppel and *res judicata*, which obviously we have accepted, I feel my hands are tied. I'm not really properly able to argue but . . . that the petition be dismissed. . . .

(Italics added). This is clearly sufficient to preserve review of the collateral estoppel issue under Rule 10.

When counsel for the father sought to halt questioning on the issue of the alleged abuse, counsel for Respondent-Mother made a clear, cogent argument for why she objected to the trial court's application of the collateral estoppel rule. Afterward, the court specifically ruled against her. As the hearing continued, counsel for Respondent-Mother maintained that she did not believe her line of questioning was barred by the doctrines of *res judicata* or collateral estoppel. Indeed, a reading of counsel's closing argument in context makes it clear that she "accepted" the trial court's ruling only to the extent that she had to do so in order to try the case, not because she believed the ruling was correct. For these reasons, we hold that this issue was properly preserved for appellate review under Rule 10. Therefore, YFS's preservation argument is overruled.

II. Collateral Estoppel

[2] In her first argument on appeal, Respondent-Mother contends the trial court prejudicially erred by finding in the 19 April 2013 neglect order that she was collaterally estopped from re-litigating the issues addressed in the 19 September 2012 civil custody order because the neglect hearing and the custody hearing involved different parties and different burdens of proof. In response, YFS asserts that (1) mutuality of parties is no longer a requirement for collateral estoppel, (2) North Carolina law allows the application of the collateral estoppel doctrine despite the different burdens of proof in juvenile cases under Chapters 7B and 50, and (3) any error that the trial court made in applying the

doctrine of collateral estoppel is harmless. The Guardian *ad Litem* contends that, even though mutuality is no longer a requirement for collateral estoppel, the trial court erred in applying the doctrine because of the different burdens of proof between this case and the civil custody case. Nonetheless, the Guardian *ad Litem* asserts that the trial court's error is harmless. After a thorough review of the case, we conclude that the trial court prejudicially erred in applying the doctrine of collateral estoppel. Accordingly, we reverse the order of the trial court and remand for further proceedings.

Under the traditional definition of collateral estoppel, our Supreme Court has said in *Thomas M. McInnis & Assocs., Inc. v. Hall* that "a final judgment on the merits prevents re[ ]litigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) ("Traditionally, courts limited the application of both [*res judicata* and collateral estoppel] to parties or those in privity with them by requiring so-called 'mutuality of estoppel:' both parties had to be bound by the prior judgment.") (citation omitted). After explaining the traditional definition of collateral estoppel, however, the Supreme Court went on to decide that there was "no good reason for continuing to require mutuality of estoppel" and abolished the requirement as a defensive tactic. *Id.* at 434, 349 S.E.2d at 560. Relying on that decision, this Court has since stated that "mutuality of parties is no longer required when invoking either offensive or defensive collateral estoppel," intending to abolish the element altogether. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 269, 488 S.E.2d 838, 840 (1997). These are the cases relied on by the Guardian *ad Litem* and YFS to support their assertion that mutuality is no longer an element of collateral estoppel.

Inexplicably, however, our Supreme Court has since defined the doctrine of collateral estoppel using the traditional definition, providing a lengthy analysis of the mutuality element. *See State v. Summers*, 351 N.C. 620, 626, 528 S.E.2d 17, 22 (2000) (holding that "the elements of collateral estoppel were satisfied" when, *inter alia*, "the district attorney is in privity with the Attorney General"). Though the *Summers* court cites *Hall*, it does not discuss the apparent divergence from *Hall* and *Rymer* on the issue of mutuality. *See id.* at 622, 528 S.E.2d at 20. The result is that our courts have defined collateral estoppel variously, applying the privity element in some cases and refraining to do so in others. *See, e.g.*, *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192–93, 614 S.E.2d 396, 401 (2005) (defining collateral estoppel without the privity element); *Bee Tree Missionary Baptist Church v. McNeil*, 153 N.C. App. 797, 799,

570 S.E.2d 781, 783 (2002) ("For collateral estoppel to bar [the] plaintiff's action, [the] defendants must show . . . (4) both parties are either identical to or in privity with a party or the parties from the prior suit.") (citations omitted); *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 54, 535 S.E.2d 388, 395 (2000) ("[M]utuality of parties is no longer required when invoking either offensive or defensive collateral estoppel . . . .").

We need not resolve the mutuality issue here. Even if privity is not a requirement of collateral estoppel, the trial court erroneously applied the doctrine because of the different burdens of proof used in custody and neglect hearings. As Respondent-Mother points out and the Guardian *ad Litem* concedes, "case law is well[ ]settled that collateral estoppel cannot apply where the proceedings involve a different burden of proof." *See, e.g.*, *State v. Safrit*, 154 N.C. App. 727, 729, 572 S.E.2d 863, 865 (2002) ("It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.") (citations and internal quotation marks omitted), *disc. review denied*, 357 N.C. 65, 579 S.E.2d 571 (2003). YFS's unsupported assertion that "civil actions intertwined around the best interest[s] of the juveniles" are somehow exempt from this precept is without merit.

Here, the burden of proof in the custody action was preponderance of the evidence. N.C. Gen. Stat. § 50-13.5(a) (2013) ("The procedure in actions for custody and support of minor children shall be as in civil actions . . . ."); *McCorkle v. Beatty*, 225 N.C. 178, 181, 33 S.E.2d 753, 755 (1945) ("Ordinarily, in civil matters, the burden of the issue is required to be carried only by the preponderance or greater weight of the evidence . . . .") (citations omitted). The standard of proof for an adjudicatory order entered on a petition alleging abuse, neglect, or dependency in a juvenile matter, however, is "clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2013); *In re C.B.*, 180 N.C. App. 221, 222, 636 S.E.2d 336, 337 (2006) (citation omitted), *affirmed per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007). Therefore, we hold that the trial court erred by applying the doctrine of collateral estoppel in this case to bar Respondent-Mother's questions because the neglect hearing was held pursuant to a different burden of proof. *See Safrit*, 154 N.C. App. at 729, 572 S.E.2d at 865.

Nevertheless, the Guardian *ad Litem* and YFS contend that such error was harmless. In support of this point, the Guardian *ad Litem* notes that "the trial court . . . properly found Karen to be neglected and dependent and the issue as to the neglect of Elliot and Katie is now moot." In addition, YFS points out that the trial court received "other items" into evidence beyond the testimony that was barred on grounds

of collateral estoppel. Specifically, YFS points out that the court properly considered the father's mediated agreement, the father's testimony, testimony of the YFS social worker, and the Respondent-Mother's own evidence in determining that Katie and Elliot were neglected and that Karen was both neglected and dependent. We are unpersuaded.

When the appellant in a civil case is seeking a new trial pursuant to prejudicial error, as here, the appealing party must "enable the Court to see that [s]he was prejudiced and that a different result would have likely ensued had the error not occurred." *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 730 (1981). Respondent-Mother argues on appeal that she was prejudiced by the trial court's erroneous application of the collateral estoppel rule in this case because

> the trial court sustained objections to questions asked by [Respondent-Mother] . . . to the point that the court limited the evidence to those orders in the [c]ustody [a]ction. The court did not allow any questioning of the allegations in the petition to the extent that they mirrored or related to the findings of fact made in orders in the [c]ustody [a]ction.

This comports with our reading of the transcript. The trial court's erroneous application of the collateral estoppel rule made it impossible for Respondent-Mother to effectively contest the allegations made in the petition under the higher, clear and convincing evidence standard.[4] For this reason, we cannot conclude that, if Respondent-Mother had been given the opportunity to contest *all* of the allegations made in the petition, a different result might not have ensued. Therefore, we reverse the trial court's order and remand for further proceedings consistent with this opinion.[5]

REVERSED and REMANDED.

Judges CALABRIA and ELMORE concur.

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4. The Guardian *ad litem* asserts that the trial court's order was nonetheless correct because it is permissible to take judicial notice of findings of fact made in a previous order, which was decided under a different, lower standard of review, citing *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) [hereinafter *J.B.*]. This is incorrect. In *J.B.* we held that a trial court may take judicial notice of "prior disposition orders" even though such orders were based on a lower evidentiary standard. *Id.* Taking judicial notice of the existence of an order or the disposition in that order is not the same thing as taking judicial notice of each of the facts resolved in that order. Here, the court did the latter.

5. Because we resolve this case on collateral estoppel grounds, we need not address Respondent-Mother's second, alternative argument.

LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA, PLAINTIFF
v.
SUE E. MAKO; R. SCOTT GIRDWOOD; AND MAKO & ASSOCIATES, P.A., DEFENDANTS

No. COA13-691

Filed 1 April 2014

Insurance—interpretation of policy—term not ambiguous—cashier's check treated as traditional check

The trial court did not err in a declaratory relief action by granting summary judgment in favor of plaintiff insurer. The term "irrevocably credited" was not ambiguous in the insurance policy as, pursuant to N.C.G.S. § 25-3-104(f), a cashier's check is treated the same as a traditional check. Therefore, the insurance policy would not have protected defendants unless defendants had deposited the cashier's check and waited until the provisional settlement period had finally elapsed.

Appeal by defendants from order entered 18 December 2012 by Judge Lucy N. Inman in Wake County Superior Court. Heard in the Court of Appeals 5 November 2013.

Poyner Spruill LLP, by T. Richard Kane and Andrew H. Erteschik, for plaintiff-appellee.

Girdwood & Williams, PLLC, by Benjamin D. Williams, for defendant-appellants.

BRYANT, Judge.

As our General Statutes hold that a cashier's check is to be treated in the same fashion as a traditional check, a cashier's check must undergo a provisional settlement period before it can be deemed irrevocably credited by the payor bank. Where there is no issue as to any material fact regarding our statutory language concerning the processing of a cashier's check, summary judgment is appropriate.

Defendants Sue E. Mako; R. Scott Girdwood; and Mako & Associates, P.A. ("defendants") had a professional liability insurance policy ("the policy") with plaintiff Lawyers Mutual Liability Insurance Company ("Lawyers Mutual") for the period of 7 August 2011 through 7 August 2012. On 17 June 2011, defendants received an email from a potential

client, Oliver Burkeman ("Burkeman"). Burkeman contacted defendants seeking assistance in collecting $350,000.00 allegedly owed him by his former employer, Crest Iron and Steel; Burkeman claimed the money was part of a workers' compensation claim settlement.

On 23 June 2011, Burkeman sent a signed Fee Agreement to defendants, and defendants agreed to represent Burkeman in collecting his settlement money. Defendants would assess Burkeman a contingent fee of 20% of any amount obtained.

On 11 July 2011, defendants received an initial check for $175,000.00 from Crest Iron and Steel in partial payment of the amount purportedly owed to Burkeman. Defendants deposited the check into their trust account on 12 July 2011. Although defendants had a policy of holding funds for ten days prior to distribution, the policy was not enforced and distribution of the funds was authorized that same day. Burkeman was to collect $140,000.00 after defendants' contingent fee of $35,000.00 had been deducted from the $175,000.00 check. Defendants attempted to wire $140,000.00 to a bank account in Japan per Burkeman's instructions. However, due to an error in account information, the wire was unsuccessful and defendants could not collect their contingent fee.[1]

On 14 July 2011, defendants received a second check for $175,000.00 from Crest Iron and Steel in partial payment of the amount purportedly owed to Burkeman. On 15 July 2011, defendants deposited the second check and, again not abiding by their policy of holding funds for ten days, immediately wired $140,000.00 to the Japanese bank account. Defendants collected from the second check a $35,000.00 contingent fee which was deposited to defendants' trust account. Also on 15 July 2011, defendants were notified by RBC Bank that the first of the two checks was being returned unpaid. On 18 July 2011, RBC Bank notified defendants that the second check was also being returned unpaid. Both checks were determined to be fraudulent. As a result, defendants suffered a total loss of $175,000.00 from their client trust account.

On 1 November 2011, defendants filed a claim with Lawyers Mutual to recover $175,000.00 in funds lost as a result of the fraud. Lawyers Mutual filed a complaint for declaratory relief on 2 November 2011. On

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1. Defendants charged Burkeman a 20% contingent fee for any amount recovered; as such, defendants' contingent fee for assisting Burkeman with the first purported settlement check of $175,000.00 was $35,000.00. Defendants would likewise assess a contingent fee of $35,000.00 for assisting Burkeman in collecting the second purported settlement check of $175,000.00.

12 December 2011, Lawyers Mutual filed a motion for summary judgment but withdrew that motion on 21 December 2011. Lawyers Mutual then filed a motion for judgment on the pleadings that same day, but the motion was not heard. Defendants filed a motion for summary judgment on 23 December 2011, which was denied by the trial court on 3 April 2012.

On 30 May 2012, Lawyers Mutual filed an amended complaint for declaratory relief. Lawyers Mutual then filed for summary judgment on 15 October 2012. On 18 December 2012, the trial court granted Lawyers Mutual's motion for summary judgment determining in relevant part that: "It is undisputed that the funds at issue in this action were lost at a time when the deposit had not yet 'cleared' Defendants' trust account at the depositary bank. The court concludes that the phrase 'irrevocably credited' in the insurance policy precludes coverage of Defendants' claim of loss." Defendants appeal.

On appeal, defendants argue that the trial court erred in granting Lawyers Mutual's motion for summary judgment. We disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). Thus, this Court must "determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citation omitted). We review the granting of summary judgment *de novo*. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 190-91 (1986).

Defendants contend that the trial court erred in granting summary judgment to Lawyers Mutual because, under Provision I., Section (r) of their insurance policy with Lawyers Mutual, the term "irrevocably credited" is ambiguous. Specifically, defendants argue that they understood "irrevocably credited" to mean that the policy would cover losses involving forged cashier's checks because they assumed that a cashier's check is, like cash, irrevocably credited upon deposit. Defendants' insurance policy provides in part that:

> I. Exclusions . . . [T]his policy does not afford to any **Insured** any coverage or benefits whatsoever,

> including, but not limited to, any right to any defense, with respect to:
>
> . . .
>
> (r) any **claim**, or any theory of liability asserted in a **suit**, based in whole or in any part upon disbursement by any **Insured**, or any employee or agent of any **Insured**, of funds, checks or other similar instruments deposited to a trust, escrow or other similar account unless such deposit is irrevocably credited to such account[.]

Pursuant to N.C. Gen. Stat. § 25-3-104(f), " 'Check' means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check." N.C.G.S. § 25-3-104(f) (2013); *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 707, 567 S.E.2d 184, 187 (2002) ("Negotiable instruments, also called simply "instruments," may include, *e.g.*, a personal check, cashier's check, traveler's check, or CD [pursuant to] N.C.G.S. § 25-3-104."). A settlement agreement to pay a negotiable instrument can be either provisional or final. N.C. Gen. Stat. § 25-4-104(11) (2013). A negotiable instrument may also be referred to as an "item." *Id.* § 25-4-104(9).

> An item is finally paid by a payor bank when the bank has first done any of the following:
>
> (1) Paid the item in cash;
>
> (2) Settled for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement; or
>
> (3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing-house rule, or agreement.

Id. § 25-4-213(a). A payor bank may revoke a provisional settlement prior to making final payment and before its midnight deadline by returning the item. *Id.* § 25-4-301(a).

Defendants argue that "irrevocably credited" is ambiguous because a cashier's check differs from a traditional check. Defendants further argue that it was their understanding that a cashier's check was as good as cash. Defendants' argument is without merit, as pursuant to N.C.G.S. § 25-3-104(f), a cashier's check is treated the same as a traditional check. A traditional check cannot be deemed fully credited until

its provisional settlement period has elapsed without action by the bank to reject the check; the same is true for a cashier's check. Therefore, the provisional settlement period that accompanies traditional checks must also apply to cashier's checks. As such, Lawyers Mutual's policy's use of "irrevocably credited" refers to the statutory provisions which govern a check's acceptance or rejection during its provisional settlement period. Accordingly, Provision I., Section (r) of Lawyers Mutual's insurance policy would not protect defendants unless defendants deposited a check and waited until the provisional settlement period had finally elapsed to ensure that the check had been accepted and fully credited by the payor bank, regardless of whether it was a traditional check or cashier's check. Therefore, the trial court did not err in granting Lawyers Mutual's motion for summary judgment.

Affirmed.

Judges McGEE and STROUD concur

MARK R. PATMORE; MERCIA RESIDENTIAL PROPERTIES, LLC; WILLIAM T. GARTLAND; AND 318 BROOKS LLC, PLAINTIFFS
v.
TOWN OF CHAPEL HILL NORTH CAROLINA, DEFENDANT

No. 13-1049

Filed 1 April 2014

1. Zoning—parking ordinance—cars at rental property—substantive process—not violated

A zoning amendment that limited the number of parked cars at rental properties did not violate substantive due process where the increased effectiveness of this enforcement mechanism was rationally related to the goal of decreasing over-occupancy in the Northside Neighborhood Conservation District.

2. Zoning—parking at rental properties and public areas—fundamentally different

The doctrine of *expressio unius est exclusio alterius* was not applicable to the relationship between N.C.G.S. § 160A-301 (which concerns a city's authority to regulate parking in public areas) and a zoning amendment limiting parking at rental properties. Regulation

of parking in public vehicular areas is fundamentally different from zoning restrictions on the number of cars that may be parked on a private lot by tenants of a house.

3. Zoning—parking—statutes addressing different subjects

A town zoning amendment addressing the number of vehicles that may be parked on a private lot did not address ordinary parking in public vehicular areas which was governed N.C.G.S. § 160A-301. Therefore, N.C.G.S. § 160A-301 is not a more specific statute than N.C.G.S. § 160A-4 (broad construction of municipal powers), but simply addressed a different subject.

4. Zoning—parking regulation—not controlled by Lanvale

The decision of the North Carolina Supreme Court in *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, did not address a local government's authority to enact a *bona fide* zoning ordinance or the requirements of a valid zoning regulation and did not control this case.

Appeal by plaintiffs from order entered 4 June 2013 by Judge W. Osmond Smith, III, in Orange County Superior Court. Heard in the Court of Appeals 4 February 2014.

The Brough Law Firm, by G. Nicholas Herman, for plaintiff-appellants.

Parker Poe Adams & Bernstein, LLP, by Anthony Fox, and Benjamin R. Sullivan, for defendant-appellee.

STEELMAN, Judge.

Where defendant enforced a zoning amendment by citing the owners of rental properties rather than their tenants because it was a more effective method of enforcement, their enforcement against property owners was rationally related to the purpose of the zoning restriction and did not violate plaintiffs' right to substantive due process. N.C. Gen. Stat. § 160A-301 governs a municipality's authority to regulate parking in public vehicular areas, while the zoning amendment was a land use restriction intended to curb over-occupancy of rental properties by limiting the number of cars parked on a rental property. Because the zoning amendment and N.C. Gen. Stat. § 160A-301 do not address the same subject, the principle of *expressio unius est exclusio alterius* does not apply. *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142,

731 S.E.2d 800, *reh'g denied*, 366 N.C. 416, 733 S.E.2d 156 (2012), held that an ordinance was not a zoning ordinance, and did not change the law governing the requirements for a valid zoning ordinance.

I. Factual and Procedural Background

Defendant Town of Chapel Hill enacted a zoning ordinance as part of its Land Use Management Ordinance. One of the zoning districts created is the Northside Neighborhood Conservation District (NNC district), a residential neighborhood located near the campus of UNC-Chapel Hill. Special design standards apply to development in the NNC district and govern such things as maximum building height and the bedroom to bathroom ratio of rental houses. Despite the standards in the zoning ordinance, over-occupancy, or rental to a greater number of tenants than bedrooms, was a "significant problem" in the NNC district for several years, and was associated with a number of problems, including parking and traffic congestion, excess garbage, and "significantly higher complaints of violations" of town regulations than in other town residential neighborhoods.

Defendant's planning department determined that although "it is not a perfect measure, the number of vehicles parked on a residential lot in the [NNC] is a reasonable approximation of how many people are living at the property." After conducting a public hearing to address "the community's concerns about student rental," the Town Council adopted an amendment to the zoning ordinance that limited the number of cars that may be parked on a residential lot in the NNC district to four cars. The amendment was adopted on 9 January 2012 and took effect on 1 September 2012. The amendment is applied to both owner-occupied and rental properties. If a property is rented, the amendment is enforced by citing the owner of the property for violations, rather than the tenants. Plaintiffs are property owners who rent houses in the NNC district and were cited for violation of the amendment. Plaintiffs do not dispute that their properties were in violation of the ordinance.

On 27 November 2012 plaintiffs filed a complaint and an application for declaratory judgment and permanent injunction. Plaintiffs alleged that defendant enforced the zoning amendment "solely against the owner(s) of record of the real properties subject to the Zoning Regulation" "without any determination as to the reason for the parking of those cars" and that plaintiffs were not "in any position to control the number of cars parked" on the properties that they owned and rented. Plaintiffs asserted that the zoning amendment was "unlawful, *ultra vires*, and void" and that "its enforcement and application is unreasonable, arbitrary and capricious, and violates Article I § 19 of

the North Carolina Constitution and substantive due process[.]" On 7 December 2012 plaintiffs filed an amended complaint seeking either "a judgment declaring the Zoning Regulation unlawful, void and unenforceable, and permanently enjoin[ing] the enforcement of the Zoning Regulation" or an injunction "permanently enjoin[ing] the enforcement of the Zoning Regulation against property owners who have no knowledge of and/or have taken no action to create or maintain any violation of the Zoning Regulation[.]" In its answer to the amended complaint, defendant admitted citing plaintiffs for violation of the zoning amendment, but denied plaintiffs' allegations concerning their ability to control the number of cars on their properties, and moved for dismissal of plaintiffs' complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Defendant and plaintiffs filed cross-motions for summary judgment on 22 and 28 May 2013, respectively. The parties' summary judgment motions were heard by the trial court on 3 June 2013, and on 4 June 2013 the trial court entered an order granting summary judgment in favor of defendant.

Plaintiffs appeal.

II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)). "We review a trial court's order granting or denying summary judgment *de novo*. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. N.C. Constitution Art. I § 19

[1] In their first argument, plaintiffs contend that the "enforcement and application" of the zoning amendment "against Plaintiffs violates

substantive due process under Article I, Section 19 of the North Carolina Constitution, the Law of the Land Clause" "because the ordinance is enforced exclusively based on the existence of more than four parked cars on a lot without any determination as to the reason for the parking of those cars." We disagree.

N. C. Constitution Art. I, § 19 provides that:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

"The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976) (citing *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E. 2d 764 (1962)).

"Due process has come to provide two types of protection for individuals against improper governmental action, substantive and procedural due process." *State v. Bryant*, 359 N.C. 554, 563-64, 614 S.E.2d 479, 485 (2005) (citing *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998). " 'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.' " *Johnston v. State*, __ N.C. App. __, __, 735 S.E.2d 859, 875, (2012) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548, 556 (1972)), *aff'd* __ N.C. __, 749 S.E.2d 278 (2013). In this case, plaintiffs do not allege the deprivation of a constitutionally protected interest. Rather, plaintiffs assert a violation of their right to substantive due process.

"Substantive due process is a guaranty against arbitrary legislation, demanding that the law be substantially related to the valid object sought to be obtained." *Lowe v. Tarble*, 313 N.C. 460, 461, 329 S.E.2d 648, 650 (1985) (citing *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975)). "Similar to the rational basis test for equal protection challenges, 'as long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004) (quoting *Lowe*, 313 N.C. at 462, 329 S.E.2d at 650) (alterations in

Rhyne). "If the challenging party cannot prove that the statute bears no rational relationship to any legitimate government interest, the statute is valid." *Liebes v. Guilford Cnty. Dep't of Pub. Health*, 213 N.C. App. 426, 429, 724 S.E.2d 70, 73 (citing *State v. Fowler*, 197 N.C. App. 1, 26, 676 S.E.2d 523, 544 (2009), *disc. review denied*, 364 N.C. 129, 696 S.E.2d 695 (2010)), *disc. review denied*, 365 N.C. 361, 718 S.E.2d 396 (2011). Plaintiffs concede that their complaint "does not challenge the ordinance on any substantive due process ground that the ordinance was enacted without any conceivable rational relationship to a legitimate governmental objective." "Instead, Plaintiffs challenge the ordinance on the ground" that "enforcement of the ordinance solely against non-culpable landowner-lessors is arbitrary and capricious in violation of [Art.] I, [§] 19 of the North Carolina Constitution[.]"

Although plaintiffs characterize themselves as "non-culpable" and assert that they have no ability to control the number of cars on their rental properties, they failed to submit any affidavits or other evidence addressing this issue. Furthermore, plaintiffs proffered leases establishing that they have a number of mechanisms for enforcing the terms of such agreements, including eviction, indemnification, and security deposits. Therefore, we do not consider plaintiffs' allegations regarding their "innocence" or their inability to enforce the terms of the leases executed with their tenants, as these assertions were not supported by affidavits before the trial court. Moreover, plaintiffs have not challenged defendant's determination that the number of cars on a lot generally indicates the number of residents, which we accept as accurate for purposes of this appeal.

Plaintiffs do not allege that enforcement of the zoning amendment implicated a fundamental right, protected class, or denial of their right to equal protection. Instead, plaintiffs assert, without citation to authority, that "the enforcement of the Town's ordinance solely against owners or lessors of property, based solely on the existence of more than four cars on a lot and irrespective of the actual reasons for and person(s) who caused or permitted the violation, is entirely irrational, arbitrary and capricious." However, as discussed above, the zoning amendment was enacted to address the problem of over-occupancy of rental houses, and thereby reduce the problems associated with over-occupancy. Plaintiffs do not dispute that over-occupancy leads to other problems, or that decreasing the over-occupancy of rental properties is a valid goal of a zoning ordinance. In addition, in support of their summary judgment motion, defendant submitted the affidavit of Judy Johnson, defendant's Senior Planner in the town's Planning Department, which averred that:

> When the parking regulation at issue is violated with respect to a [rental] property . . . the Town cites the Property's owner for the violation rather than the tenants. Trying to cite tenants and enforce the parking regulation directly against them would be burdensome, impractical, and ineffective. Based on my years of experience with enforcing zoning regulations, compared to property owners, tenants tend to be more transient and difficult to locate, and many District tenants are students who are not permanent residents of the Town. If the Town issued citations to tenants, it often would be difficult to locate those tenants once they moved out of the District, and it would be administratively difficult to collect fines from such tenants if they no longer lived in Town or even in the State of North Carolina. By comparison, someone who owns property in the District will generally be easier to locate for purposes of issuing citations and enforcing zoning regulations. And, because a property owner will have a lease with his or [her] tenants, the owner can use his authority under the lease to help ensure that tenants comply with the parking regulations. As a result, enforcing the parking regulation against property owners instead of against tenants makes the regulation more effective and reduces the Town's administrative burdens and costs in enforcing the regulation.

(emphasis added). Defendant also submitted the affidavit of Chelsea Laws, defendant's Senior Code Enforcement Officer, who averred that:

> Based on my experience as a Senior Code Enforcement Officer for the Town, enforcing the new parking regulation against property owners is less burdensome and difficult, and more effective, than it would be to enforce the regulation against tenants. Tenants tend to change their places of residence frequently. This is especially true of students, who represent a significant portion of the tenants in the NNC District. In contrast with tenants, owners of District properties . . . are easier to locate. This make it less burdensome and more effective to enforce zoning regulations and penalties against the owners rather than against tenants, as the tenants may be hard to locate and may move away without paying any penalties assessed against them for violating Town regulations.

(emphasis added). These affidavits, which were tendered by defendant's employees with experience in enforcing zoning regulations, state that enforcement of the zoning amendment against property owners was more effective than trying to track down transient student tenants. We hold that the increased effectiveness of this enforcement mechanism is rationally related to the goal of decreasing over-occupancy in the NNC district. "On its face, the practice of more avidly enforcing the Code against owners of property in the City than against their relatively transient tenants appears to be reasonably calculated to efficiently and effectively secure compliance with the Housing Code." *Cunningham v. City of E. Lansing*, 2001 U.S. Dist. LEXIS 15967, *7-8 (W.D. Mich. Sept. 28, 2001).

Plaintiffs do not dispute that it is more effective to enforce the zoning amendment against property owners than their tenants, but simply argue that it is wrong to impose liability on property owners for the number of cars parked on a rental property without proof that the landlord had "knowledge of the violation or any ability to prevent or correct the violation." Plaintiffs' argument is that an alternative enforcement plan might have been fairer to them. However, "[a] duly adopted zoning ordinance is presumed to be valid. The burden is on the complaining party to show it to be invalid. 'When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere.' " *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981) (quoting *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938)). We conclude that the zoning amendment did not violate plaintiffs' rights to substantive due process of law. This argument is without merit.

III. N.C. Gen. Stat. § 160A-301

[2] In their next argument, plaintiffs contend that the zoning amendment "is invalid as being unauthorized under N.C. Gen. Stat. § 160A-301." We disagree.

N.C. Gen. Stat. § 160A-301 is part of Chapter 160A Article 15, "Streets, Traffic and Parking," and provides that a city "may by ordinance regulate, restrict, and prohibit the parking of vehicles on the public streets, alleys, and bridges within the city." The statute addresses a city's authority to "regulate the use of lots, garages, or other facilities owned or leased by the city and designated for use by the public as parking facilities," or to "regulate the stopping, standing, or parking of vehicles in specified

areas of any parking areas or driveways of a hospital, shopping center, apartment house, condominium complex, or commercial office complex, or any other privately owned public vehicular area[.]" Plaintiffs contend that the fact that N.C. Gen. Stat. § 160A-301 only addresses a city's authority to regulate parking in public vehicular areas represents a legislative intent to prohibit municipalities from regulating parking on private property, and that "the doctrine of *expressio unius est exclusion alterius* forecloses" any argument that defendant had the authority to enact the zoning amendment. We do not agree.

"Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) (citations omitted). However, "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S. Ct. 748, 760, 154 L. Ed. 2d 653, 671 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65, 152 L. Ed. 2d 90, 122 S. Ct. 1043 (2002).

"The foremost task in statutory interpretation is 'to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' " *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quoting *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000)) (internal quotation omitted). In this regard, we note that the ordinary meaning of "park" is to "put or leave (a vehicle) for a time in a certain location." *The American Heritage College Dictionary* 993 (3rd. ed. 1997). N.C. Gen. Stat. § 160A-301 clearly deals with regulation of parking in this ordinary sense of the word.

However, the zoning amendment was "drafted to help address the [NNC] neighborhood's over-occupancy problem directly." Defendant's planning department found that "the number of vehicles parked on a residential lot" provided a "reasonable approximation of how many people are living at the property" and determined that "[l]imiting the number of parked cars therefore helps limit over-occupancy" without "trying to count and limit the number of occupants directly." We conclude that, although the parties have referred to the zoning amendment as a "parking" regulation, the context establishes that the amendment was intended to regulate the ratio of bedrooms to tenants in rental

properties in the NNC District by restricting the number of vehicles parked in the yard.[1]

We hold that regulation of parking in public vehicular areas is fundamentally different from zoning restrictions on the number of cars that may be parked on a private lot by tenants of a house, and that there is no basis for assuming that our General Assembly intended legislation allowing a city to regulate parking in public vehicular areas to diminish a town's authority to adopt land use zoning regulations that deal with population density or over-occupancy of rental homes. The fact that defendant chose to restrict the number of cars parked on a lawn as a rough proxy for the number of tenants does not transform this into a "parking" ordinance within the meaning of N.C. Gen. Stat. § 160A-301. We hold that the doctrine of *expressio unius est exclusio alterius* is not applicable to the relationship between N.C. Gen. Stat. § 160A-301 and the zoning amendment.

[3] For similar reasons, we reject plaintiffs' argument that N.C. Gen. Stat. § 160A-301 is a more "specific" statute that renders the provisions of N.C. Gen. Stat. § 160A-4 inapplicable. Defendant cites N.C. Gen. Stat. § 160A-4, "Broad Construction," which provides that:

> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect[.]

Defendant contends that N.C. Gen. Stat. § 160A-4 should be applied to N.C. Gen. Stat. § 160A-383, which provides in relevant part that:

> Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the

1. The zoning amendment was enacted to increase compliance with the zoning ordinance's restrictions on over-occupancy of rental properties, by using the number of cars in a yard as an indication of the number of tenants. Plaintiffs have not challenged the general accuracy of this measure, or asserted that in any specific instance the house where excess cars were parked was not over-occupied. Given this factual scenario, we are not called upon to express an opinion concerning whether it would be a valid defense to a citation that the number of cars on a property did not indicate the number of tenants, but instead were cars belonging to temporary visitors.

> following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. . . .

Defendant asserts that its zoning amendment was "reasonably necessary" to achieve its statutorily approved purpose of regulating population density and traffic congestion. Plaintiffs do not dispute this contention, but argue that because N.C. Gen. Stat. § 160A-301 deals specifically with parking, the general rule stated in N.C. Gen. Stat. § 160A-4 is not applicable, based on the longstanding "principle 'that where there are two opposing acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act.' " *Blair v. Commissioners*, 187 N.C. 488, 489-90, 122 S.E. 298, 299 (1924) (quoting *State v. Johnson*, 170 N.C. 685, 690, 86 S.E. 788, 791 (1915) (other citation omitted). "[T]o the extent of any necessary repugnancy between them, the special statute . . . will prevail over the general statute." *Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997) (internal quotation omitted). However, we have held that the zoning amendment, which addresses the number of vehicles that may be parked on a private lot, does not address the same subject as N.C. Gen. Stat. § 160A-301, which governs ordinary parking on public vehicular areas. Therefore, N.C. Gen. Stat. § 160A-301 is not a more "specific" statute, but simply addresses a different subject.

IV. *Lanvale Properties, LLC v. County of Cabarrus*

[4] In their next argument, plaintiffs contend that the decision of our Supreme Court in *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012), "establishes that the instant parking regulation is not authorized by the general zoning power." We disagree.

Lanvale arose from Cabarrus County's enactment of an "adequate public facilities ordinance ('APFO') that effectively conditions approval of new residential construction projects on developers paying a fee to subsidize new school construction to prevent overcrowding in the County's public schools." *Lanvale*, 366 N.C. at 143, 731 S.E.2d at 803. Defendant appealed from the trial court's entry of summary judgment

in favor of plaintiff-developer and from its ruling that defendant did not have the authority under zoning or subdivision statutes to enact an APFO. This Court affirmed the trial court, and defendant appealed to our Supreme Court, arguing that it was authorized under its general zoning power to adopt the APFO. The Supreme Court first addressed the "distinction between zoning ordinances and subdivision ordinances[,]" and observed that "the primary purpose of county zoning ordinances is to specify the types of land use activities that are permitted, and prohibited, within particular zoning districts." *Lanvale* at 157-58, 731 S.E.2d at 811-12 (citing *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988)). Based upon its review of the characteristics of zoning regulations, the Court held that "the APFO does not define the specific land uses that are permitted, or prohibited, within a particular zoning district" and that "the County's APFO cannot be classified as a zoning ordinance because . . . [it] simply does not 'zone.' " *Id.* at 160, 731 S.E.2d at 813. Because the Supreme Court held in *Lanvale* that the ordinance at issue was not a zoning regulation, the Court did not address a local government's authority to enact a *bona fide* zoning ordinance or the requirements of a valid zoning regulation. We conclude that plaintiffs are not entitled to relief on the basis of the holding in *Lanvale*.

For the reasons discussed above, we conclude that the zoning amendment did not violate plaintiffs' right to substantive due process, and was not barred by N.C. Gen. Stat. § 160A-301 or the holding in *Lanvale*, and that the trial court's summary judgment order should be affirmed.

AFFIRMED.

Judges McGEE and ERVIN concur.

THE ROYAL OAK CONCERNED CITIZENS ASSOCIATION, MARK HARDY, CURTIS MCMILLIAN AND DENNIS MCMILLIAN, PLAINTIFFS
v.
BRUNSWICK COUNTY, DEFENDANT

No. COA13-884

Filed 1 April 2014

THE ROYAL OAK CONCERNED CITIZENS ASSOCIATION, JAMES HARDY, CURTIS MCMILLIAN AND DENNIS MCMILLIAN, PLAINTIFFS
v.
BRUNSWICK COUNTY, DEFENDANT

No. COA13-885

Filed 1 April 2014

Appeal and Error—interlocutory orders and appeals—no substantial right affected—objection to privileged information—deposition

Defendant county's appeal from the trial court's interlocutory orders compelling defendant to produce the county manager for deposition did not affect a substantial right and was dismissed. The orders did not preclude defendant from making good-faith objections to privileged information at the county manager's deposition.

Appeals by defendant from orders entered 5 March and 6 May 2013 by Judge Mary Ann Tally in Brunswick County Superior Court. Heard in the Court of Appeals 9 January 2014.

UNC Center for Civil Rights, by Elizabeth Haddix and Bethan Eynon, Higgins & Owens, PLLC, by Raymond E. Owens, Jr., and Fair Housing Project, Legal Aid of North Carolina, by Jack Holtzman, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, LLP, by Julie B. Bradburn, Jacqueline Terry Hughes, and Kristen Y. Riggs, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Brunswick County ("Defendant") appeals from interlocutory orders compelling former Brunswick County Manager Marty Lawing ("Mr. Lawing") to appear for deposition. Defendant contends that because the orders do not indicate that Mr. Lawing is entitled to assert legislative and/or quasi-judicial immunity, he has been denied a substantial right that warrants our immediate review. For the following reasons, we disagree and dismiss Defendant's appeals.

I. Factual & Procedural History

On 3 June 2011, The Royal Oak Concerned Citizens Association, Curtis McMillian, and Dennis McMillian (collectively, "Plaintiffs") began this action by filing a complaint in Brunswick County Superior Court.[1] Plaintiffs' complaint was amended multiple times. Plaintiffs' third amended complaint, operative here, alleges violations of the North Carolina Fair Housing Act, the Equal Protection Clause under Article I, Section 19 of the North Carolina Constitution, and N.C. Gen. Stat. § 153A-136(c). These causes of action stem from an alleged pattern and practice of racial discrimination by Defendant, culminating in Defendant's decision to rezone property in Plaintiffs' community to accommodate the expansion of an existing landfill. The complaint also seeks a declaration that Defendant's rezoning of the property was unlawful, invalid, and void.

During discovery, Plaintiffs noticed the depositions of Mr. Lawing and former Brunswick County Commissioner William Sue ("Mr. Sue"). Following Defendant's refusal to produce Mr. Lawing and Mr. Sue, Plaintiffs filed a motion to compel their depositions. Defendant responded by filing a motion for a protective order prohibiting the depositions on the grounds that Mr. Lawing and Mr. Sue have legislative and quasi-judicial immunity. Following a hearing on the matter, the trial court filed a written order dated 5 March 2013 allowing Plaintiffs' motion to compel. The order, in part, stated:

> The Court will compel Mr. Sue and Mr. Lawing to appear for depositions at a time that is mutually convenient for the parties and the attorneys but will set the following conditions upon the deposition of former County Commissioner William Sue:

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1. The case number assigned to this action was Brunswick County No. 11 CVS 1301. Plaintiff Mark Hardy originally filed a separate action, Brunswick County No. 12 CVS 1138, which was consolidated by the trial court with 11 CVS 1301. Hereafter, use of the moniker "Plaintiffs" includes Mark Hardy.

a. William Sue is entitled to assert a testimonial privilege.

b. The Plaintiffs are prohibited from inquiring as to Mr. Sue's intentions, motives, or thought processes with respect to any quasi-judicial or legislative matters clearly defined by North Carolina law as such.

The order contained no conditions with respect to Mr. Lawing's deposition. On 4 April 2013, Defendant filed notice of appeal from the order.[2]

Following Defendant's notice of appeal, Plaintiffs again noticed the deposition of Mr. Lawing and filed another motion to compel Mr. Lawing's deposition. By written order dated 6 May 2013, the trial court concluded that:

1. The March 5, 2013 order does not affect a substantial right of Defendant's that would injure Defendant if not corrected before appeal from final judgment, and thus the order is a non-appealable interlocutory order.

2. Therefore, a stay of this Court's March 5, 2013 order is not warranted and the trial court retains jurisdiction of this issue.

3. Defendant is again compelled to produce County Manager Marty Lawing.

On 30 May 2013, Defendant filed notice of appeal from this order as well.[3]

Following Defendant's second notice of appeal, Defendant filed a petition for writ of supersedeas and a motion for a temporary stay with this Court on 31 May 2013. By order entered 3 June 2013, we allowed the motion for a temporary stay. By order entered 18 June 2013, we allowed the petition for writ of supersedeas and stayed the 5 March and 6 May orders of the trial court pending the outcome of Defendant's appeals.

II. Jurisdiction

At the outset, we must determine whether this Court has jurisdiction to hear Defendant's interlocutory appeals. Defendant contends that

2. Defendant's appeal from the 5 March 2013 order is the subject of COA13-885.

3. Defendant's appeal from the 6 May 2013 order is the subject of COA13-884.

"[t]he trial court rejected out of hand that [Mr.] Lawing was entitled to assert any form of immunity, and testimonial privilege, at his deposition[,]" and that such denial is immediately appealable as affecting a substantial right. For the following reasons, we hold that the trial court's 5 March and 6 May 2013 orders do not preclude Defendant from making good-faith objections to privileged information at Mr. Lawing's deposition. Consequently, no substantial right has been affected and we dismiss Defendant's appeals as interlocutory.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Thus, because the trial court's orders compelling Mr. Lawing to testify did not dispose of the case below, Defendant's appeals are interlocutory in nature.

However, an "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted); *accord* N.C. Gen. Stat. §§ 1-277(a), 7A-27(d) (2013). Our Supreme Court has defined a "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (quotation marks and citation omitted) (alteration in original).

"Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. "The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

Here, Defendant contends that because the trial court's orders do not indicate that Mr. Lawing is entitled to assert legislative and/or quasi-judicial immunity, he has been denied a substantial right that warrants our immediate review. Defendant invites this Court to decide, as a general matter, that "any public official, [including a county manager,] is entitled to assert immunity and the accompanying testimonial privilege as to those actions which were taken in the sphere of legitimate legislative or quasi-judicial activity."

As an initial matter, we note that claims of immunity, including claims of legislative and quasi-judicial immunity, affect a substantial right for purposes of appellate review. *Cf. Farrell ex rel. Farrell v. Transylvania Cnty. Bd. of Educ.*, 199 N.C. App. 173, 176, 682 S.E.2d 224, 227 (2009) (stating that "claims of immunity affect a substantial right entitled to immediate appeal"). Moreover, we have held that individuals are "entitled to absolute legislative immunity for all actions taken in the sphere of legitimate legislative activity." *Northfield Dev. Co., Inc. v. City of Burlington*, 136 N.C. App. 272, 281, 523 S.E.2d 743, 749, *aff'd in part, review dismissed in part*, 352 N.C. 671, 535 S.E.2d 32 (2000) (quotation marks and citations omitted). Individuals are also "entitled to absolute quasi-judicial immunity for actions taken in the exercise of their judicial function." *Id.* "These immunities shield the individual from the consequences of the litigation results and provide a testimonial privilege." *Id.* at 282, 523 S.E.2d at 749. Thus, to the extent that Mr. Lawing, as a county manager, performed actions "in the sphere of legitimate legislative activity" or "in the exercise [of a] judicial function," we understand Defendant's desire to keep Mr. Lawing's intentions and motives with respect to such conduct privileged.

However, Defendant's contention that legislative and/or quasi-judicial immunity has been deprived in this case is premised on the assumption that the trial court's orders preclude Defendant from making good-faith objections based on privilege at Mr. Lawing's deposition. Indeed, at oral argument, counsel for Defendant indicated that the trial court's orders summarily deny Defendant the ability to claim legislative and/or quasi-judicial immunity during Mr. Lawing's deposition. We find no such exclusion in the trial court's orders or in the transcript of the motion hearing.

With respect to the trial court's written orders, there are no conclusions denying Mr. Lawing the ability to assert legislative and/or quasi-judicial immunity. While the trial court's 5 March 2013 order does explicitly conclude that Mr. Sue is entitled to legislative and/or

quasi-judicial immunity, such a conclusion does not necessarily deny the right to Mr. Lawing. Furthermore, the transcript of the motion hearing supports this interpretation of the trial court's orders. Specifically, after allowing the motion to compel, the trial court stated:

> If there is an objection at a deposition, it can be noted. And, again, it's my understanding of the rules that if the parties feel that they're at an impasse during the taking of the deposition, that there are provisions for the parties to go to the Court and ask for resolution of the specific issue[.]

Plainly, the trial court contemplated the possibility that Defendant could make good-faith objections based on legislative and/or quasi-judicial immunity during Mr. Lawing's deposition and that any impasse between the parties would then be decided by the trial court in the factual context in which it arises.

Furthermore, when discussing the contents of the written order, the trial court stated:

> I'm not comfortable signing an order that says that Mr. Lawing is entitled to the testimonial privilege, because I'm not sure if that's the law[.]

Thus, the trial court expressed reservation in deciding whether Mr. Lawing is entitled to legislative and/or quasi-judicial immunity. Given this reservation, it would be inconsistent to presume that the trial court was definitively precluding Mr. Lawing's entitlement to immunity in its written orders. Rather, the more consistent interpretation of the trial court's orders is that Defendant may object on behalf of Mr. Lawing if the information sought in Plaintiffs' questioning was generated either "in the sphere of legitimate legislative activity" or "in the exercise [of a] judicial function." *Id.* at 281, 523 S.E.2d at 749.

We therefore hold that the trial court's orders do not preclude Defendant from making objections based on privilege at Mr. Lawing's deposition if Defendant has a good-faith basis to believe that the information is protected by legislative or quasi-judicial immunity. Whether Mr. Lawing, as a county manager, actually performed actions "in the sphere of legitimate legislative activity" or "in the exercise [of a] judicial function" is not properly before us at this time. Once a specific question has been propounded by Plaintiffs to Mr. Lawing at the deposition, the trial court can properly decide whether the information sought is protected by privilege.

Moving forward, we note that if Defendant withholds information at Mr. Lawing's deposition that would otherwise be discoverable by claiming that the information is privileged, Defendant must "(i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." N.C. R. Civ. P. 26(b)(5). Furthermore, if Mr. Lawing fails to answer a question at the deposition based on a claim of privilege, and the parties reach an impasse as to whether the claim of privilege applies, Plaintiffs may move for an order compelling an answer pursuant to N.C. R. Civ. P. 37(a).[4] However, "[i]f the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c)." N.C. R. Civ. P. 37(a)(2); *see also* N.C. R. Civ. P. 26(c) (providing that the protective order can, among other things, order "(i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions[; and] . . . (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters").

Accordingly, because we hold that the trial court's orders do not preclude Defendant from making good-faith objections based on privilege at Mr. Lawing's deposition, Defendant has not been deprived of any right nor suffered injury warranting our immediate review.

III. Conclusion

For the foregoing reasons, we dismiss Defendant's appeals as interlocutory.

DISMISSED.

Judges STROUD and DILLON concur.

4. At the discretion of the trial court, telephoning the judge during the deposition may be an appropriate solution if a matter arises to which to the parties feel an immediate decision is required. North Carolina AIC Civil Procedure Pretrial 2 § 24:14 (1998).

STATE OF NORTH CAROLINA
v.
KENNETH EUGENE ALSTON, DEFENDANT

NO. COA13-429

Filed 1 April 2014

1. Appeal and Error—preservation of issues—failure to object at trial

By not objecting at trial to the trial court joining for trial defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon, defendant failed to preserve the issue for appellate review.

2. Constitutional Law—effective assistance of counsel—objection to joinder of charges at trial—no error—no deficient performance

Defendant did not receive ineffective assistance of counsel in a robbery with a dangerous weapon case where his trial counsel did not to object to the joinder for trial of defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon. Possession of a firearm by a felon is a criminal offense that was properly joined for trial with another criminal offense, robbery with a dangerous weapon. As there was no error in the joinder decision, defense counsel's failure to object to the joinder did not constitute deficient performance.

3. Constitutional Law—effective assistance of counsel—stipulation of felony conviction — not applicable to possession of firearm by felon

Defendant did not receive ineffective assistance of counsel in a robbery with a dangerous weapon and possession of a firearm by a felon case where his trial counsel failed to prevent the jury from hearing that defendant had a prior felony conviction by stipulating to such conviction under N.C.G.S. § 15A-928. N.C.G.S. § 15A-928 does not apply to the offense of possession of a firearm by a felon.

4. Constitutional Law—right to cross-examine witnesses—pending charges in other counties—marginal relevance

The trial court did not violate defendant's Sixth Amendment right to cross-examine witnesses against him by prohibiting him from cross-examining two of the State's witnesses about criminal charges pending against them in counties in different prosecutorial districts

than the district in which defendant was tried. The trial court was reasonable in barring defendant from further cross-examining the witnesses regarding their pending charges in other counties where defendant was allowed to thoroughly cross-examine the witnesses and the relevance of the cross-examination regarding the pending charges in other counties was marginal.

5. Constitutional Law—right to confrontation—not preserved—right to due process—harmless error

By failing to object at trial, defendant did not preserve for appellate review his argument that his right to confrontation under the Sixth Amendment was violated where he was not given the opportunity to question a trial bystander and juror number six about alleged juror misconduct. Furthermore, defendant's argument that statements by the prosecutor in closing argument regarding defendant's attempts to derail justice violated his right to due process under the Fourteenth Amendment was without merit. The record supported the majority of the prosecutor's sentencing argument about defendant's attempts to derail justice. Moreover, even assuming, without deciding, that the sole unsubstantiated statement by the prosecutor at sentencing amounted to a denial of due process, any constitutional error was harmless beyond a reasonable doubt.

Appeal by defendant from judgment entered 17 December 2012 by Judge Allen Baddour in Chatham County Superior Court. Heard in the Court of Appeals 24 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for defendant-appellant.

GEER, Judge.

Defendant Kenneth Eugene Alston appeals from his conviction of robbery with a dangerous weapon. On appeal, defendant primarily contends that he received ineffective assistance of counsel ("IAC") when his trial counsel failed to object to the joinder for trial of defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon. Defendant argues that the statute prohibiting possession of a firearm by a felon is a "civil regulatory measure" and, therefore, a violation of that statute may not be joined for trial with a criminal offense.

While our Supreme Court has held that the ban on felons possessing firearms does not impose additional punishment for prior convictions because the General Assembly adopted the prohibition as a civil regulatory measure, that holding does not in any way mean that a violation of that civil regulatory measure cannot be a crime. As both the Supreme Court and this Court have previously recognized, when a felon possesses a firearm, he commits a crime. Consequently, we hold defendant did not receive IAC when his trial counsel failed to object to the joinder of the charges brought against defendant.

Facts

The State's evidence tended to show the following facts. At some point between 22 July 2010 and 25 July 2010, Chad Taylor called an acquaintance, Calvin Moore, and told Moore that he wanted to sell some marijuana. Moore told defendant about the offer, but did not tell defendant that Taylor, defendant's distant cousin, was the seller. In the evening of 25 July 2010, Taylor and Moore agreed by phone that Taylor would sell Moore three pounds of marijuana.

Late in the night on 25 July or early in the morning on 26 July 2010, defendant drove Moore and three young women, including Tiffany Jarrell, to the house where the drug deal was to take place. Defendant, Moore, and the women all agreed in advance that they would rob the sellers rather than purchase the marijuana. As defendant neared the house, he realized that the house belonged to one of his family members. Defendant nonetheless decided to go forward with the robbery. Defendant parked at the house, and defendant and Moore got out and talked to Taylor and Taylor's friend, Jesus Sifuentes.

Sifuentes left the house in his car and then returned in 10 or 15 minutes with the marijuana. Sifuentes handed Moore the marijuana, and defendant and Moore then pulled out handguns and aimed them at Taylor and Sifuentes. Jarrell and the other women then searched Taylor's and Sifuentes' pockets and took wallets, cell phones, and about $1,500.00 in cash, as well as the marijuana. The robbers then left in defendant's car with defendant driving.

After the robbers left, Taylor got a shotgun and Sifuentes and Taylor chased the robbers in Sifuentes' car. Sifuentes and Taylor caught up with the robbers on the highway, and Sifuentes drove his car into the back of defendant's car, causing both cars to wreck. After the crash, the robbers believed Taylor and Sifuentes had fled, and defendant decided to stay with his car and to tell the police that he was involved in a hit and run. Defendant convinced Jarrell to stay with the car as well. Moore and the

other two women called a friend and got a ride home. Moore took the marijuana and the two guns used in the robbery with him.

Defendant and Jarrell went to the hospital, and a nurse at the hospital discovered the cash proceeds from the robbery in Jarrell's underwear. Jarrell lied about where she got the money. Jarrell then went to the police station, where she also lied to the police about what had occurred.

Defendant was indicted for accessory after the fact to robbery with a dangerous weapon on 10 October 2011 and for possession of a firearm by a felon on 21 May 2012. Defendant was also indicted for robbery with a dangerous weapon.[1] The jury found defendant guilty of robbery with a dangerous weapon and, accordingly, did not render a verdict with respect to the accessory after the fact charge. However, the jury found defendant not guilty of possession of a firearm by a felon. In an amended judgment, the court sentenced defendant to an aggravated-range term of 152 to 192 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first contends that the trial court erroneously joined for trial defendant's charges of robbery with a dangerous weapon and possession of a firearm by a felon. Defendant argues that the latter charge was for violation of a "civil regulatory measure" that could not be properly tried alongside a criminal offense.

Defendant did not make his joinder argument to the trial court, but he argues on appeal that the trial court committed plain error in the joinder. However, our Supreme Court has expressly held that plain error review does not apply to the issue whether joinder of charges was appropriate. *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230-31 (2000). Consequently, due to defendant's failure to preserve this issue for review, it is not properly before this Court.

[2] Defendant alternatively argues that he received IAC due to his counsel's failure to object to the joinder of the charges of robbery with a dangerous weapon and possession of a firearm by a felon. Defendant must satisfy a two-part test in order to prevail on his IAC claim:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel

1. The record on appeal does not contain defendant's indictment for robbery with a dangerous weapon. However, the transcript indicates defendant was indicted for that offense.

> made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

Defendant argues that his counsel's performance was deficient because, in *State v. Whitaker*, 364 N.C. 404, 411, 700 S.E.2d 215, 220 (2010), our Supreme Court held that the statute prohibiting possession of a firearm by a felon is a "civil regulatory measure" rather than a criminal offense, and, according to defendant, it is inherently improper to try a criminal offense together with a civil regulatory matter. Defendant asserts that his trial counsel should have been aware of *Whitaker*, a "well-known" case decided roughly two years before defendant's trial, since "Second Amendment litigation has been the topic of much discussion in the last several years and *Whitaker* was relevant to that discussion."

In *Whitaker*, our Supreme Court rejected the defendant's argument that an amendment broadening the scope of the statute making it unlawful for felons to possess firearms, N.C. Gen. Stat. § 14-415.1 (2013), was an unconstitutional *ex post facto law*. 364 N.C. at 411, 700 S.E.2d at 220. The Court first noted, with respect to *ex post facto* principles, that the defendant had not been retroactively punished for an act that was innocent when committed since the "defendant's conviction [was] for an *offense* that he committed after his actions were deemed *criminal*, namely the possession of any firearm by a felon." *Id.* at 408, 700 S.E.2d at 218 (emphasis added). The Court explained that "[t]he question then becomes whether the 2004 amendment to N.C.G.S. § 14–415.1 is an ex post facto law, *not because it imposes punishment for future acts*, but because it prohibits the possession of firearms by a convicted felon, which defendant asserts operates as a form of enhanced punishment for his prior felonies." *Id.* (emphasis added).

In other words, the issue before the Supreme Court was whether denying a defendant the right to have firearms was additional punishment for a prior conviction. As to that issue, the Court concluded that the General Assembly had a "nonpunitive intent" in enacting the amended statute "to protect the public." *Id.* at 409, 700 S.E.2d at 218.

Ultimately, the Court concluded that "the General Assembly's purpose in enacting" the ban on felons possessing firearms "was to establish a civil regulatory measure, and because the amended statute's effect does not render it punitive in nature, the amended N.C.G.S. § 14–415.1 is not an unconstitutional ex post facto law." *Id.* at 411, 700 S.E.2d at 220.

Although *Whitaker* holds that the statute depriving felons of the right to possess firearms is a civil regulatory measure not intended to further punish people previously convicted, nothing in *Whitaker* suggests that a violation of that statutory prohibition is not a crime. Defendant has cited no authority that a legislature may not make it a crime to violate a statute that was enacted for a "civil regulatory" purpose.

Indeed, the *Whitaker* Court referred to the defendant felon's act of possessing a firearm as an "offense" that was deemed "criminal" by the relevant statutory amendment. *Id.* at 408, 700 S.E.2d at 218. Further, contrary to defendant's argument, N.C. Gen. Stat. § 14-415.1(a) provides that "[e]very person violating the provisions of this section shall be punished *as a Class G felon*." (Emphasis added.) *See also Johnston v. State*, ___ N.C. App. ___, ___, 735 S.E.2d 859, 876 (2012) (explaining that in N.C. Gen. Stat. § 14-415.1, "[o]ur legislature mandated that any felon found in possession of a firearm is subject to *criminal liability*" (emphasis added)), *aff'd per curiam*, ___ N.C. ___, 749 S.E.2d 278 (2013); *State v. Johnson*, 169 N.C. App. 301, 306, 610 S.E.2d 739, 743 (2005) (holding, in rejecting *ex post facto* argument, that "*the crime* for which defendant is being punished is his violation of N.C. Gen. Stat. 14–415.1" (emphasis added)).

In sum, given the statutory language designating possession of a firearm by a felon as a crime, our Supreme Court's reference to a violation of N.C. Gen. Stat. § 14-415.1 as a "criminal" "offense" in *Whitaker*, and this Court's similar language in *Johnson* and *Johnston*, we conclude that possession of a firearm by a felon is a criminal offense that was properly joined for trial with another criminal offense, robbery with a dangerous weapon. Since there was no error in the joinder decision, defense counsel's failure to object to the joinder did not constitute deficient performance, and defendant has failed to show he received IAC.

II

[3] Defendant also contends that he received IAC when his trial counsel failed to prevent the jury from hearing the prejudicial information that defendant had a prior felony conviction by using the procedure set out in N.C. Gen. Stat. § 15A-928 (2013). According to defendant, under N.C. Gen. Stat. § 15A-928, he could have stipulated to the prior conviction and

thereby precluded the State from introducing evidence regarding that conviction. We disagree.

Defendant's argument fails to recognize that N.C. Gen. Stat. § 15A-928(a) limits the statute's applicability as follows: "When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction." When those circumstances apply, then N.C. Gen. Stat. § 15A-928(c)(1) provides that "[i]f the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof."

This Court has previously held that N.C. Gen. Stat. § 15A-928 does not apply to the offense of possession of a firearm by a felon. *State v. Jeffers*, 48 N.C. App. 663, 665-66, 269 S.E.2d 731, 733-34 (1980). The Court in *Jeffers* reasoned:

> Since the trial judge allowed the stipulation as to the previous conviction to be introduced and since he made reference to the stipulation in his charge to the jury, defendant claims that G.S. 15A-928(c)(1) was violated, and that defendant was deprived of his right to a fair trial as a result. G.S. 15A-928, however, is not applicable in this case. The statute applies solely to cases in which the fact that the accused had a prior conviction raises an offense of "lower grade" to one of "higher grade." G.S. 15A-928(a). Thus, the prior conviction serves to increase the punishment available for the offense above what it would ordinarily be. *See State v. Moore*, [27 N.C. App. 245, 218 S.E.2d 496 (1975).] The offense charged in the instant case, however, does not have this characteristic. A previous conviction for one of a group of enumerated felonies is an essential element of the offense of possession of a firearm by a felon, and thus in the absence of a prior conviction, there is no offense at all. G.S. 14-415.1; *State v. Cobb*, 284 N.C. 573, 201 S.E.2d 878 (1974). Also, the statute contains nothing as to certain convictions being more intolerable

> than others, G.S. 14-415.1(a) and (b), and thus no "lower grade"–"higher grade" dichotomy can be ascertained.

Id.

Jeffers controls in this case. We, therefore, conclude that defendant has failed to show IAC for failure to raise N.C. Gen. Stat. § 15A–928 at trial because that statute did not apply to his trial for possession of a firearm by a felon. *See also State v. Jackson*, 306 N.C. 642, 652, 295 S.E.2d 383, 389 (1982) (holding that N.C. Gen. Stat. § 15A–928 did not apply to offense at issue because "[t]he statute applies solely to cases in which the fact that the accused 'has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter' " (quoting N.C. Gen. Stat. § 15A–928(a))).

III

[4] Defendant next argues that the trial court violated his Sixth Amendment right to cross-examination when it did not permit him to cross-examine two of the State's witnesses, Moore and Jarrell, about criminal charges pending against them in counties in different prosecutorial districts than the district in which defendant was tried. We disagree.

During voir dire, Jarrell stated that she had a pending charge in Randolph County for assault with a deadly weapon with intent to kill. Jarrell testified on cross-examination that she did not believe that by cooperating with the State in this case she could "gain anything in any other proceedings" in other counties. Since Jarrell stated she did not believe that testifying in this case would help her with matters in other counties, the trial court did not permit defendant to further cross-examine Jarrell about pending charges in other counties.

Moore testified on voir dire that he had "a few" felony breaking and entering charges and one felony larceny charge pending in Guilford County, three felony breaking and entering charges and one felony larceny charge pending in Moore County, and a probation violation report pending in Randolph County. Moore also testified on voir dire that he did not believe testifying for the State in this case would benefit him with respect to the matters in other counties. Given this voir dire testimony, the court ruled that defendant could only ask Moore on cross-examination whether he believed he would receive any benefit in other counties for his cooperation in this case. The court further ruled, however, that defendant could cross-examine Moore about unrelated pending charges in Chatham County and about the pending probation

violation report in Randolph County since that probation matter was included as part of Moore's original plea agreement with the State.

The Sixth Amendment right to confrontation generally protects the right of a criminal defendant to cross-examine a State's witness about the existence of pending charges in the same prosecutorial district as the trial in order to show bias in favor of the State, since the jury may understand that pending charges may be used by the State as a "weapon to control the witness." *State v. Prevatte*, 346 N.C. 162, 164, 484 S.E.2d 377, 378 (1997). However, " 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' " *State v. McNeil*, 350 N.C. 657, 677, 518 S.E.2d 486, 499 (1999) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 683, 106 S. Ct. 1431, 1435 (1986)).

Given this wide latitude afforded trial courts, we review a trial court's limitation of cross-examination for an abuse of discretion. *Id.* " 'A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Garcell*, 363 N.C. 10, 27, 678 S.E.2d 618, 630 (2009) (quoting *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007)).

In *State v. Murrell*, 362 N.C. 375, 403, 665 S.E.2d 61, 80 (2008), a case out of Forsyth County, the defendant filed a motion for appropriate relief arguing that "the prosecution allowed State's witness . . . to perjure himself concerning his prior convictions, current charges, and discussions with the Durham County District Attorney's office." Regarding the defendant's argument that the witness falsely testified he had no pending charges in Durham County, the Supreme Court held the witness' testimony was in fact true since the record showed that the witness' Durham County charges had been dismissed, although they were subject to reinstatement, at the time of the challenged testimony. *Id.* at 404, 665 S.E.2d at 80.

The Court further held that, even assuming arguendo that the testimony was false and that the defendant was able to prove the prosecution knew it was false, "[the witness'] testimony on this peripheral issue concerning charges dismissed in another district attorney's jurisdiction was simply not material." *Id.* The *Murrell* Court reasoned that unlike *Prevatte*, 346 N.C. at 163–64, 484 S.E.2d at 378, "in which the State's

witness faced pending charges within the *same* jurisdiction in which he testified, any charges pending against [the witness] were being handled in a different jurisdiction, and defendant provides no supporting documentation of any discussion between the two district attorneys' offices to demonstrate that [the witness'] testimony was biased in this respect." 362 N.C. at 404, 665 S.E.2d at 80.

Here, at the outset, we take judicial notice that Guilford, Randolph, and Moore Counties are each located in different prosecutorial districts than Chatham County, where this case was tried. As in *Murrell*, defendant has failed to provide any evidence of discussions between the district attorney's office in Chatham County and district attorneys' offices in the other counties where Jarrell and Moore had pending charges. In addition, Jarrell testified on cross-examination and Moore testified on voir dire that each did not believe testifying in this case could help them in any way with proceedings in other counties. Under these circumstances, we follow the reasoning of *Murrell* and conclude that, in this case, testimony regarding the witnesses' pending charges in other counties was, at best, marginally relevant to defendant's trial.

Moreover, both Jarrell and Moore were thoroughly impeached on a number of other bases separate from their pending charges in other counties. Jarrell acknowledged that she was testifying pursuant to a plea agreement in which her pending charges for robbery with a dangerous weapon and accessory after the fact to robbery with a dangerous weapon in Chatham County would be dismissed and she would plead guilty to obstruction of justice. Pursuant to the agreement, the State agreed to recommend that Jarrell be placed on probation rather than serve active time. At the time of her testimony, Jarrell was currently in prison for misdemeanor assault with a deadly weapon and driving while impaired. Jarrell also testified to her prior convictions for "possessing or manufacturing a fraudulent ID," driving after consuming alcohol, and resisting a public officer.

Jarrell further testified that she made false statements about the events surrounding the robbery to an investigating officer on the night of the robbery in order to avoid being charged with a crime. She admitted lying at the hospital about the source of the money in her underwear that was, in fact, the cash proceeds from the robbery. Jarrell also testified that, on the night of the robbery, she was drunk and she had taken Xanax without a prescription and smoked marijuana. Jarrell, 20 years old at the time of trial, additionally stated that she had regularly smoked marijuana since she was 14 years old and, as a result, sometimes her memory was "off."

At the time he testified, Moore was on probation for convictions on "a number of felonies" in Randolph County and, if he violated his probation, he faced 69 to 84 months imprisonment. Moore testified that he had previously pled guilty, pursuant to a plea agreement, to robbery with a dangerous weapon and possession of a firearm by a felon stemming from the robbery in this case. He was awaiting his sentence on those charges, which could have been up to 201 months imprisonment. Moore stated that, pursuant to that same agreement, he pled guilty to unrelated charges for obtaining property by false pretenses and for two counts of identity theft, all felonies. Pursuant to that agreement, the State would recommend Moore be sentenced at the bottom of the mitigated range, and his sentence on those felonies would run concurrently with a suspended prison sentence from Randolph County for which Moore had been on probation. Also pursuant to that plea agreement, the State dismissed charges against Moore for larceny, financial card fraud, possession of stolen goods, driving while license revoked, resisting a public officer, obtaining property by false pretenses, and two counts of breaking and entering. Moore testified that his written plea agreement with the State was his only agreement with the State.

Moore additionally testified that at the time of trial he understood that if he withdrew his guilty pleas, the State could reinstate all the dismissed charges and could also recommend to the sentencing court that the sentences on the charges to which he had pled guilty run consecutively. Further, Moore recognized that if he withdrew his plea, there was a possibility that he would be sentenced in the aggravated rather than the mitigated range. Moore also testified that he understood he had voided his plea agreement with the State by twice absconding from North Carolina. With respect to the latter issue, Moore had been charged with two counts of felony failure to appear. Also at the time of trial, Moore had two misdemeanor charges pending in Chatham County for resisting a public officer and communicating threats.

In addition, Moore, who was 23 years old at the time of trial, testified that he had three prior convictions of possession of cocaine, three prior convictions of possession with intent to sell and deliver cocaine, two prior convictions of felony larceny, two prior convictions of unauthorized use of a motor vehicle, two prior convictions of breaking and entering, three prior convictions of misdemeanor larceny, and prior convictions of possession of a firearm by a felon, possession of stolen goods, hit and run with property damage, and fleeing to elude arrest.

In sum, the trial court allowed defendant extensive cross-examination of both Jarrell and Moore, revealing their bias to testify favorably

for the State in order to curry favor regarding their pending charges and sentences, respectively, for the robbery in this case and, for Moore, numerous other pending charges. Defendant was also permitted to cross-examine the witnesses on a host of other matters relating to their credibility. Based on this thorough cross-examination and the marginal relevance, if any, of cross-examination regarding Jarrell and Moore's pending charges in other counties, we hold that the trial court was not unreasonable in barring defendant from further cross-examining the witnesses regarding their pending charges in other counties.

IV

[5] Defendant's final argument is that the prosecutor's remarks during the sentencing hearing that defendant was trying to derail the prosecution violated defendant's Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process. The prosecutor's remarks referred, in part, to an incident of alleged juror misconduct during trial.

During trial and outside the presence of the jury, a trial spectator, Michael Stanley, presented himself to the court and stated that the previous evening he had been in the parking lot outside the courthouse attempting to jump start his car and, while doing so, spoke with a woman he recognized as a juror. In the course of the conversation, the juror told Mr. Stanley that she and a friend "felt like [defendant] was guilty." Mr. Stanley was never placed under oath.

The jury then entered the courtroom, and the trial court instructed the jurors to raise their hand if they had spoken to Mr. Stanley about the case. In response, juror number six stated that Mr. Stanley's truck hood was up, and he asked her "something about jumper cables." She told him that she did not have any, but there was a nearby fire department where he might find help. She reported to the court that she "didn't say anything to him about the case." Juror number six was not sworn prior to making these statements. No other juror indicated they had spoken with Mr. Stanley.

During a subsequent break in the trial, the trial court brought up the issue of the juror's alleged comment to Mr. Stanley and stated it was satisfied by juror number six's response. Defense counsel stated that if the juror denied any misconduct, he had nothing else to offer. The court then determined that the matter was settled.

Later the same day, after the jury had been given its final charge and was deliberating, the trial court announced that it had learned

that a deputy had observed Mr. Stanley the previous day and that it was "appropriate to put on the record what the deputy saw." Deputy Raymond Barrios was then sworn and testified that the previous evening, the deputy went outside to the court parking lot at about 5:20 p.m. and saw Mr. Stanley on his cell phone standing by the lot. As Deputy Barrios got near, Mr. Stanley walked away, still on his phone, towards a court "overflow" parking lot across the street.

Deputy Barrios further testified that as Mr. Stanley walked across the street, the deputy noticed a car parked at the farthest end of the parking lot "flashing [its] lights like a signal." The deputy then reentered the courthouse, and when he later left the courthouse to walk to his car, he saw Mr. Stanley "talking to the defendant in the parking lot further up the road" for about five minutes. Defendant declined the opportunity to question Deputy Barrios.

Defendant now challenges the prosecutor's sentencing argument regarding the interaction between Mr. Stanley and the juror. The prosecutor argued the following at sentencing:

> In addition, we had this unusual situation where we had one of [defendant's] old -- apparently -- cell mates who was also convicted of armed robbery come and watch the trial this week and make a statement to the Court implying the jury had already reached a decision -- or at least a jury member had already reached a decision in the case. We feel that that was, again, orchestrated by [defendant] based on the sworn testimony of deputy Barrios [sic] who said that he observed the defendant and this person, Mr. Stanley, interacting outside of the court signaling to -- the defendant signaling to Mr. Stanley after court. And it appears to me that that was a blatant attempt to derail or obstruct justice in this case by creating an atmosphere where we might have to grant a mistrial if his statement was to be believed. Of course the Court addressed that, talked to the jury. It was clear that none of them had had any conversation of that type with Mr. Stanley.
>
> And that's just the continuing kind of thing that we have seen over the last couple of years. [Defendant] never does anything overtly threatening, and we don't have any evidence that money has changed hands, but certainly we have evidence and information through what's been happening in court and out of court that he has persistently tried to work to derail this prosecution.

. . . .

> . . . I have never experienced such a situation as -- as this where we have so many external factors attempting to derail justice in this case. And I think all of those were driven by [defendant].

The State then asked the court to sentence defendant "to the top of the aggravated range for a Class D felony," which amounted to 160 to 201 months imprisonment.

Following the parties' sentencing arguments, the trial court briefly found the existence of two aggravating factors admitted by defendant, found the existence of one mitigating factor, and determined that the aggravating factors outweighed the mitigating factor. The court then, without any discussion of defendant's "derail[ing]" justice, sentenced defendant to an aggravated-range term of 152 to 191 months imprisonment.[2] After sentencing, the trial court stated to defendant: "I do think this is probably an event that could have been avoided at many points along the way; and, [defendant], I think that you bear some responsibility for that. I'm not saying you are the only one who does, but you do."

Defendant now argues that his right to confrontation under the Sixth Amendment was violated because he was not given the opportunity to question Mr. Stanley and juror number six. Defendant did not, however, object to the process during which Mr. Stanley and juror number six gave unsworn statements, did not request that those individuals be sworn, and did not request the opportunity to question them. Consequently, defendant has not preserved his confrontation argument for appeal. *See* N.C.R. App. P. 10(a)(1); *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (holding defendant waived constitutional confrontation argument by failing to object on confrontation grounds below since, generally, "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal").

Defendant further contends that the challenged arguments by the prosecutor regarding defendant's attempts to derail justice in this case by having Mr. Stanley tamper with juror number six were "unsubstantiated" and "speculative" and thereby violated his right to due process under the Fourteenth Amendment. We disagree.

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2. The trial court later entered an amended judgment to correct a clerical error, and in the amended judgment the court sentenced defendant to an aggravated-range term of 152 to 192 months imprisonment.

At trial, Jarrell testified that, prior to trial, defendant told her not to say anything to investigators because defendant had talked to the victims Sifuentes and Taylor and the victims, being drug dealers, were unlikely to testify against defendant and Jarrell. Defendant also told Jarrell that he and Jarrell should try to pay the victims to keep them from testifying. Finally, Jarrell testified that, prior to trial, defendant had attempted to facilitate getting Jarrell's mother out of jail, leading to the inference that defendant was trying to curry favor with Jarrell to keep her from testifying against him.

Moore testified that prior to trial he felt threatened or coerced not to testify, although "not directly from [defendant]." Moore stated that prior to trial he was released from prison and was on house arrest for 120 days. During this time, he took a plea deal with the State requiring him to testify against defendant. Just before Moore was set to be released from house arrest, however, he fled to Florida because he was concerned for his safety after receiving information from people in the community. Moore was subsequently arrested and brought back to North Carolina, where he was released on bond. However, based on a phone call shortly after he was released, Moore again fled, this time to South Carolina. From this evidence, the prosecutor was entitled to argue the inference that defendant was indirectly threatening Moore to keep Moore from testifying.

Sifuentes testified that he saw defendant come to Sifuentes' father's place of business and interact with Sifuentes' father. Later, defendant went to Sifuentes' father's house while Sifuentes was there, and defendant spoke to Sifuentes' father outside the house before leaving. Seeing defendant at his father's house made Sifuentes nervous.

The record additionally contains unsworn statements by Mr. Stanley and juror number six about whether a juror improperly discussed the case with Mr. Stanley and, apart from the truth or falsity of either person's statement, the important, uncontested fact is that the trial court was addressed by a spectator, Mr. Stanley, about a juror improperly discussing the merits of the case. This fact, coupled with Deputy Barrios' sworn testimony that he witnessed Mr. Stanley communicate with someone in a car in the parking lot on the same day that Mr. Stanley reported juror misconduct and, later the same evening, saw defendant talking with Mr. Stanley in the parking lot for about five minutes, raises the inference that defendant was involved in Mr. Stanley's report of juror misconduct to the trial court.

The record, therefore, supports the great majority of the prosecutor's sentencing argument about defendant's attempts to derail justice in this case. We have found no record support, however, for the prosecutor's

assertion that Mr. Stanley was defendant's old cell mate who had also been convicted of armed robbery.

Even assuming, without deciding, that defendant has shown that the sole unsubstantiated statement by the prosecutor at sentencing amounted to a denial of due process, any constitutional error is harmless beyond a reasonable doubt. See N.C. Gen. Stat. § 15A-1443(b) (2013). The vast majority of the prosecutor's sentencing argument that defendant was attempting to derail justice in this case is supported by the record. Moreover, the prosecutor properly argued to the court the two admitted aggravating factors, defendant's three prior robbery with a dangerous weapon and one attempted robbery with a dangerous weapon convictions, defendant's four prior felony drug-related convictions, and defendant's refusal to call off the robbery even when he realized the scene of the robbery was his relative's house. The trial court's comments to defendant after sentencing suggest that the court placed emphasis on defendant's failure to call off the robbery despite having the opportunity to do so.

The trial court gave no indication that, when sentencing defendant, it considered the isolated unsupported statement about Mr. Stanley being defendant's former cell mate with a prior conviction of armed robbery. Rather, the court simply stated that it found the existence of the two aggravating factors admitted by defendant and that those factors outweighed the single mitigating factor. The only other circumstance specifically referred to by the court was defendant's failure to call off the robbery when he had the opportunity to do so.

Under these circumstances, and given the weight of the State's proper sentencing arguments, we hold that any error in the court's consideration of the single unsupported statement was harmless beyond a reasonable doubt. *See State v. Jackson*, 91 N.C. App. 124, 126, 370 S.E.2d 687, 688 (1988) (holding that any error in trial court's consideration of murder victim's two sisters' impact statements describing sisters' thoughts about sentencing, including that defendant acted in cold blood and deserved maximum sentence available, was harmless since "the court certainly knew before then, as every reasonably knowledgeable person knows, that almost invariably relatives and friends of murder victims are shocked and saddened by their killing and are of the opinion that murderers should be severely punished"). Consequently, we conclude defendant received a trial free from prejudicial error.

No error.

Judges STEPHENS and ERVIN concur.

STATE OF NORTH CAROLINA
v.
JOANNA LEIGH BECK

No. COA13-764

Filed 1 April 2014

Motor Vehicles—driving while impaired—jury instruction—pattern—no impermissible mandatory presumption created

The trial court did not err in a driving while impaired case by denying defendant's request for a special jury instruction regarding the jury's ability to determine the weight to be accorded to the results of a chemical analysis. The trial court's use of the pattern jury instruction informed the jury, in substance, that it was not compelled to return a guilty verdict based simply on the chemical analysis results showing a .10 alcohol concentration. Furthermore, the Court of Appeals has already determined that the language in the pattern jury instruction does not create an impermissible mandatory presumption of a person's alcohol concentration.

Appeal by defendant from judgment entered 26 November 2012 by Judge Christopher W. Bragg in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 November 2013.

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State.*

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

DAVIS, Judge.

Joanna Leigh Beck ("Defendant") appeals from a judgment entered upon a jury verdict finding her guilty of driving while impaired. Defendant's sole argument on appeal is that the trial court erred in denying her request for a special jury instruction regarding the jury's ability to determine the weight to be accorded to the results of a chemical analysis. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

Defendant was arrested on 12 December 2009 at a checkpoint and charged with driving while impaired. Defendant was convicted in

Mecklenburg County District Court, and she appealed to the superior court for a trial *de novo*.

At trial, the State's evidence tended to show the following: On 12 December 2009, at approximately 1:00 a.m., Officer Matthew Pressley ("Officer Pressley") of the Charlotte-Mecklenburg Police Department was assisting with an impaired driving checkpoint on Park Road near Archdale Drive. Officer Pressley approached Defendant's vehicle and asked for her license. As he spoke to Defendant, he observed that her eyes were "glossy and bloodshot" and that there was "a strong odor of alcoholic beverage about her breath." Officer Pressley asked Defendant if she had been drinking that evening, and she responded that she had consumed two mixed vodka drinks. Officer Pressley then asked Defendant to step out of her vehicle.

Officer Pressley administered three field sobriety tests: (1) the horizontal gaze nystagmus test; (2) the walk-and-turn test; and (3) the one-leg stand test. Based on Defendant's performance on these three tests, Officer Pressley believed that she was impaired. He arrested Defendant and then administered a "breath test," using the Intoxilyzer EC/IR II machine. The machine registered that Defendant's breath sample had an alcohol concentration of .10.

Defendant presented evidence at trial, including expert testimony from Julian Douglas Scott ("Scott"), who was accepted by the trial court as an expert witness in the detection of impaired driving and in the administration of standardized field sobriety tests. Scott disagreed with several of Officer Pressley's conclusions regarding how many signs of impairment could be gleaned from Defendant's performance on the tests Officer Pressley had administered. Scott also opined that Officer Pressley should have conducted several additional field sobriety tests before concluding that Defendant was impaired.

At the charge conference, Defendant objected to the use of the pattern jury instruction for the offense of driving while impaired and proposed adding one of two alternative special instructions emphasizing to the jury that it was not *compelled* to find that Defendant's blood alcohol concentration was .08 or above based on the results of a chemical analysis indicating that Defendant's blood alcohol concentration was .08 or above. The trial court declined to give either of the requested instructions and instead used Pattern Instruction 270.20A to instruct the jury as to the driving while impaired charge.

The jury found Defendant guilty of driving while impaired, and the trial court entered judgment on the verdict. The trial court sentenced

Defendant to 60 days imprisonment, suspended the sentence, and placed her on 12 months of unsupervised probation. Defendant gave timely notice of appeal.

Analysis

Defendant argues that the trial court erred in denying her request for a special jury instruction because the pattern instruction used by the trial court misled the jury. We disagree.

The trial court — using Pattern Jury Instruction 270.20A — charged the jury in pertinent part as follows:

> The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant was driving . . . . a vehicle.
>
> Second, that the defendant was driving that vehicle upon a street within the state.
>
> And, third, that at the time the defendant was driving that vehicle, the defendant: One, was under the influence of an impairing substance. Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has consumed a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's bodily or mental faculties or both to an extent that there has been appreciable impairment of either or both of these faculties; or, two, had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. A relevant time is anytime after the driving that the driver still has in the body alcohol consumed before or during the driving.
>
> The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a street in this state and that when doing so the defendant was under the influence of an impairing substance or had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol

> concentration of 0.08 or more, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The special instructions requested by Defendant would have informed the jury that (1) the results of the chemical analysis did not create a presumption that Defendant was impaired or that Defendant had an alcohol concentration of .08 or greater; (2) the jury was permitted to find that Defendant had an alcohol concentration of .08 or greater based on the results of the chemical analysis but was not required to do so; and (3) the jury was allowed to consider the credibility and weight to be accorded to the results of the chemical analysis.

When a defendant requests a special jury instruction, "the trial court is not required to give [the] requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). Thus, in order for a defendant to establish error, she "must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Garvick*, 98 N.C. App. 556, 568, 392 S.E.2d 115, 122, *aff'd per curiam*, 327 N.C. 627, 398 S.E.2d 330 (1990). The defendant also bears the burden of showing that the jury was misled or misinformed by the instructions given. *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005).

In *Garvick*, the defendant requested a similar instruction relating to the results of a chemical analysis in connection with a driving while impaired charge. *Garvick*, 98 N.C. App. at 567-68, 392 S.E.2d at 122. The requested instruction stated as follows: "[N]o legal presumption attaches to the results of a breathalyzer test. You, members of the jury, are still at liberty to acquit the defendant if you find that his alcohol concentration was not proven to be [.08] or more . . . beyond a reasonable doubt." *Id.* at 567, 392 S.E.2d at 122. We concluded that the language of the pattern jury instruction contained the defendant's requested instruction in substance because it explained to the jury that it must be convinced beyond a reasonable doubt that the defendant's alcohol concentration was above the legal limit. *Id.* at 568, 392 S.E.2d at 122.

Likewise, in the present case, the trial court's use of the pattern jury instruction informed the jury that in order to return a verdict of guilty, it must be convinced beyond a reasonable doubt that Defendant's alcohol concentration was .08 or more. This instruction informed the jury, in

substance, that it was not compelled to return a guilty verdict based simply on the chemical analysis results showing a .10 alcohol concentration.

Furthermore, as Defendant acknowledges, this Court has already determined that the language in the pattern jury instruction stating that the "results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration" does not create an impermissible mandatory presumption. *State v. Narron*, 193 N.C. App. 76, 85, 666 S.E.2d 860, 866 (2008), *disc. review denied*, 363 N.C. 135, 674 S.E.2d 140, *cert. denied*, 558 U.S. 818, 175 L.Ed.2d 26 (2009). Rather, as we explained in *Narron*, this quoted language — which is used in both the driving while impaired statute (N.C. Gen. Stat. § 20-138.1) and the pattern jury instruction — "simply authorizes the jury to find that the report is what it purports to be — the results of a chemical analysis showing the defendant's alcohol concentration." *Id.* at 84, 666 S.E.2d at 866.

Defendant argues that this language in the trial court's instructions likely misled the jury and caused it to erroneously believe that "it could not consider [the] positive evidence of [Defendant's] non-impairment in deciding whether the results of the chemical analysis were credible and what weight to give it." Accordingly, she argues, the requested instruction was necessary to inform the jury that it had the ability to conclude that the results of the chemical analysis were not credible.

However, Defendant's argument ignores the fact that the trial court expressly instructed the jury that (1) it was the "sole judge[] of the weight to be given [to] any evidence"; (2) it was the jury's "duty to decide from [the] evidence what the facts are"; (3) the jury "should weigh all the evidence in the case"; and (4) the jury "should consider all of the evidence."

These instructions informed the jury that it possessed the authority to determine the weight of any evidence offered to show that Defendant was — or was not — impaired. *See State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148, *cert. denied*, 537 U.S. 845, 154 L.Ed.2d 71 (2002) ("We presume that jurors pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given." (citation and internal quotation marks omitted)); *State v. Holden*, 346 N.C. 404, 438-39, 488 S.E.2d 514, 533 (1997) ("In determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments." (citation, quotation marks, and brackets omitted)), *cert. denied*, 522 U.S. 1126, 140 L.Ed.2d 132 (1998).

We therefore conclude that the trial court did not err in declining to give either of the special instructions requested by Defendant. Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges ELMORE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DEVON ARMOND GAYLES, DEFENDANT

No. COA13-1005

Filed 1 April 2014

1. Evidence—cross-examination of defendant—details of prior convictions—defendant opened door to questions

The trial court did not err in a second-degree murder and possession of a firearm by a felon case by permitting the prosecutor to cross-examine defendant on the details of his prior convictions. By minimizing his criminal record on direct examination and then denying that he had been convicted of carrying a concealed weapon when asked on cross-examination, defendant opened the door to the prosecutor's questions concerning the type of weapon involved with his prior crimes.

2. Evidence—defendant impeached—prior convictions—defendant testified

The trial court did not err in a second-degree murder and possession of a firearm by a felon case by allowing the State to impeach defendant using prior convictions when he had stipulated that he was a convicted felon for purposes of the possession of a firearm by a felon charge. Because defendant testified, he was subject to impeachment on the basis of his prior convictions, even though he had already stipulated to being a convicted felon for purposes of the firearm possession charge.

3. Evidence—testimony—gang culture—gang membership—not known to defendant at time of offense—irrelevant to claim of self-defense

The trial court did not err in a second-degree murder and possession of a firearm by a felon case by excluding evidence about gang culture and the decedent's gang membership that defendant asserts was relevant to his claim of self-defense. What the witnesses knew about gangs and gang culture, and the significance of the victim's tattoos — of which defendant never claimed to be aware at the time of the killing — had no relevance to defendant's reasonable apprehension of great bodily harm.

4. Evidence—cross-examination—statements defendant denied making—egregious disregard for trial court's ruling—curative instruction—no prejudice

The trial court erred in a second-degree murder and possession of a firearm prosecution by allowing the State to cross-examine defendant on the basis of statements he denied making that were contained in a police report. Although the prosecutor showed a marked and egregious disregard for the trial court's ruling that the police report was inadmissible by continuing to ask questions about the contents of that report, the instruction given by the trial court not to consider the prosecutor's questions cured any prejudice to defendant.

Appeal by defendant from Judgments entered on or about 13 March 2013 by Judge Mark E. Powell in Superior Court, Buncombe County. Heard in the Court of Appeals 23 January 2014.

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

Appellate Defender Staples Hughes by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

STROUD, Judge.

Devon Gayles ("defendant") appeals from judgments entered on or about 13 March 2013 after a Buncombe County jury found him guilty of one count of second degree murder and one count of possession of a firearm by a felon. After the jury's verdict defendant also pled guilty to having attained habitual felon status. We conclude that defendant has failed to show prejudicial error at his trial.

I. Background

On or about 9 July 2012, defendant was indicted in Buncombe County for the murder of Anthony Byron Carter, possession of a firearm by a felon, and having obtained habitual felon status. Defendant pled not guilty and proceeded to jury trial.

At trial, the State's evidence tended to show the following facts. In the early morning of 24 December 2011, Anthony Carter and some friends went to an Asheville nightclub called "Hole-N-Da-Wall." Defendant was also at the club that night. Slightly before 2 a.m., Mr. Carter and defendant got into a fight. The two men were "fussing and cussing at each other" in an apparent dispute over whether Mr. Carter had spilled beer on defendant. Mr. Carter shoved defendant and defendant shoved back. Darnelle Logan, a "bouncer" for the nightclub, stepped in to break up the fight. He told defendant to leave the club, but instructed Mr. Carter not to follow until after defendant had left. Despite Mr. Logan's instructions, Mr. Carter followed defendant toward the entrance of the nightclub and began hitting defendant again in the head.

At this point the witnesses' stories diverged slightly. One witness testified that she saw defendant pull a gun out of his vest and shoot Mr. Carter. Stacey Taylor, one of Mr. Carter's friends, testified that defendant dropped the gun when Mr. Carter hit him. Mr. Taylor testified that he tried to step on the gun, but that defendant gained control of it, stood up, and fired one shot at Mr. Carter. A third witness testified that she saw defendant with the gun in his hand and heard the shot, but did not see where the weapon came from. After being shot, Mr. Carter stumbled through the front door of the club and collapsed on the concrete stairs in view of several Alcohol Law Enforcement Special Agents. Mr. Carter died of a single gunshot wound to the chest.

After shooting Mr. Carter, defendant ran out of the club and fled to Cincinnati, Ohio, where he was apprehended nearly two months later. A detective from the Asheville Police Department interviewed defendant while he was jailed in Cincinnati. The detective informed him that he was under arrest for murder. Defendant gave no statement, but asked, "Who did I kill?"

Defendant presented evidence in his defense and testified on his own behalf. Defendant's testimony largely matched that of the other witnesses. He testified that he was in the club with a business associate named "Frog." Defendant was trying to light up his "joint" when someone bumped into him, then punched him three or four times in the mouth before a bouncer intervened. Defendant saw that it was Mr. Carter.

Defendant testified that he knew Mr. Carter as a gang member who "ran the west side," and who kidnapped and robbed people. Defendant then tried to leave the club, but someone "out of nowhere" punched him several more times, causing him to fall forward. Defendant testified that when he opened his eyes he saw a gun on the floor and a foot on the gun, so he grabbed for it. Defendant gained control of the weapon and stood back up. Mr. Carter punched him one more time in the face, so defendant raised the gun and fired one shot at him. Defendant then left the club and threw the gun into a nearby trash can. Defendant testified that after the shooting he received threatening messages, so he decided to flee Asheville and go to Cincinnati.

The jury found defendant guilty of murder in the second degree and possession of a firearm by a felon. The trial court sentenced defendant to 219-275 months imprisonment and a consecutive term of 88-118 months imprisonment. Defendant gave notice of appeal in open court.

II. Cross-examination on Prior Convictions

[1] Defendant first argues that the trial court erred in permitting the prosecutor to cross-examine him on the details of his prior convictions. We disagree.

A. Standard of Review

The State contends that defendant's arguments concerning the prosecutor's cross-examination of defendant on the details of his prior convictions were not properly preserved. Although defendant did not object when the prosecutor asked twice if he had been convicted of carrying a concealed .22 caliber revolver, neither of those questions elicited evidence. The question to which defendant did object was the one which produced the evidence he challenges on appeal. The prosecutor's questions were not evidence and "[o]rdinarily, the asking of the question alone will not result in prejudice to the defendant." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). Because defendant did object to the question which produced the challenged evidence, we hold that defendant's objection to the evidence that he had been convicted of carrying a concealed .22 caliber revolver was properly preserved.

> The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. James, ___ N.C. App. ___, ___, 735 S.E.2d 627, 629 (2012) (citations and quotation marks omitted).

B. Analysis

> It is the rule in North Carolina that for purposes of impeachment, a witness, including the accused, may be cross-examined with respect to prior convictions. . . . [W]here, for purposes of impeachment, the witness has admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon cross-examination. . . . A showing that the witness has been convicted of an offense is a prerequisite to the *right* to cross-examine him relative to the punishment imposed.

State v. Finch, 293 N.C. 132, 141, 235 S.E.2d 819, 824 (1977).

First, defendant contends that the State failed to establish his prior conviction before asking him about that conviction. That is not what the law requires. As stated in *Finch*, the State may only inquire into the time, place, and level of punishment imposed relative to an established conviction. *Id.* But the State is not required to somehow establish the conviction before asking the defendant about the existence of such a conviction. As with any other witness, the State is free to ask the defendant whether he has been convicted of a crime other than a Class 3 misdemeanor consistent with N.C. Gen. Stat. § 8C-1, Rule 609, assuming that there is a good faith basis for such questioning. *See State v. Alkano*, 119 N.C. App. 256, 263, 458 S.E.2d 258, 263 ("Questions asked on cross-examination must be asked in good faith."), *app. dismissed*, 341 N.C. 653, 465 S.E.2d 533 (1995). The State did not inquire further into the details of defendant's prior convictions until after he admitted them.

Generally, "inquiry into prior convictions which exceeds the limitations established in *Finch* is reversible error." *State v. Rathbone*, 78 N.C. App. 58, 64, 336 S.E.2d 702, 705 (1985), *disc. rev. denied*, 316 N.C. 200, 341 S.E.2d 582 (1986). Nevertheless, "when the defendant 'opens the door' by misstating his criminal record or the facts of the crimes or actions, or when he has used his criminal record to create an inference favorable to himself, the prosecutor is free to cross-examine him about details of those prior crimes or actions." *State v. Bishop*, 346 N.C. 365, 389, 488 S.E.2d 769, 782 (1997) (citation and quotation marks omitted).

Here, defendant testified on his own behalf and attempted to minimize his criminal record both on direct and cross-examination. On direct examination, defendant's trial counsel asked him what he had

been convicted of. Defendant responded, "Just maybe eleven years ago what the judge talked about earlier." The prior stipulation that the trial court read to the jury simply stated that "The State and the defendant stipulate or agree that the defendant was a convicted felon on or about December 24, 2011 . . . ."

The State, on cross-examination, then inquired about his prior convictions:

> [PROSECUTOR]: Isn't it true you were convicted on April the 29th of 2002 of felonious carrying a concealed weapon, that being a .22-caliber revolver out of Berrien County, Michigan?
>
> [DEFENDANT]: When?
>
> [PROSECUTOR]: April the 29th, 2002 you were convicted of felonious carrying a concealed weapon, a .22-caliber, out of Berrien County, Michigan?
>
> [DEFENDANT]: No.

The State then showed defendant a court record from Michigan which listed a conviction for carrying a concealed weapon and asked defendant, over defendant's objection, again what type of weapon was listed on the judgment. Defendant responded "A .22 caliber revolver." Defendant admitted that he had been convicted of that charge. The State then asked about a conviction for possession of a firearm by a felon, also in Michigan. Defendant attempted to explain what happened that lead to each conviction, stating that someone else was driving his car with a gun in it, which led to the first conviction, and that the second firearm was found in his home.

In *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L.Ed. 2d 797 (2001), our Supreme Court addressed similar circumstances. In that case, the defendant, on direct examination, described a series of prior convictions, including an assault he described as "getting into some trouble." *Braxton*, 352 N.C. at 193, 531 S.E.2d at 448 (brackets omitted). The Court described the State's cross-examination as follows:

> On cross-examination the prosecutor questioned defendant about the misdemeanors and in an effort to jog defendant's memory, mentioned factual details. The prosecutor also asked if the assault on the officer at Polk Youth Center was what defendant meant by "getting into trouble" and

> whether this was the incident that caused defendant to be transferred from Polk Youth Center to Blanch, a more restrictive facility which defendant had described on direct examination. In response to a question by the prosecutor concerning when he started the cycle of being continuously in and out of prison, defendant volunteered information about stealing a car; and the prosecutor then asked him who the victim was and if he was charged with stealing a car. Defendant responded that he stole a cab and that he was charged with larceny of a motor vehicle and robbery. The prosecutor asked what kind of robbery it was in order to clarify that it was armed robbery and then asked what type of weapon defendant used. The prosecutor also cross-examined defendant about the sequence and timing of the other murders that defendant had committed.

Id. at 193, 531 S.E.2d at 449. The Supreme Court held that "the prosecutor did not exceed the proper scope of examination" because the defendant tried to minimize his criminal history on direct examination, and the prosecutor only asked about "the factual elements of the crimes," not "tangential circumstances of the crimes." *Id.* at 193-94, 531 S.E.2d at 449 (brackets omitted).

Similarly, here, defendant tried to minimize his criminal record on direct examination and then denied that he had been convicted of carrying a concealed weapon when asked on cross-examination. Most of the details concerning tangential circumstances of the crimes were offered by defendant without prompting by the prosecutor. As in *Braxton*, the prosecutor's questions on the type of gun used were part of the prosecutor's effort to jog defendant's memory about a prior conviction he denied and to counter defendant's attempts to minimize his criminal record. *See id.* at 194, 531 S.E.2d at 449. Therefore, we conclude that defendant opened the door to the prosecutor's questions concerning the type of weapon involved with his prior crimes.

III. Impeachment by Prior Conviction

[2] Defendant next asserts that the trial court erred by allowing the State to impeach him using prior convictions when he had stipulated that he was a convicted felon for purposes of the possession of a firearm by a felon charge. We disagree.

Defendant did not object on this basis at trial, but he asks us to review this asserted error for plain error. "[B]efore a ruling can be plain error, it must be error." *State v. Lopez*, ___ N.C. App. ___, ___, 723 S.E.2d

164, 168 (2012) (citation and quotation marks omitted). Even assuming we were to adopt the reasoning of *Old Chief v. United States*, 519 U.S. 172, 136 L.Ed. 2d 574 (1997), which defendant principally relies on, it would not have been error for the trial court to permit the State to impeach defendant with his prior convictions.[1] In *Old Chief*, the U.S. Supreme Court specifically noted that "[w]hile it is true that prior-offense evidence may in a proper case be admissible for impeachment, even if for no other purpose, Fed. Rule Evid. 609, [Old Chief] did not testify at trial." *Old Chief*, 519 U.S. at 176 n.2, 136 L.Ed. 2d at 585 n.2. Even in the North Carolina cases applying *Old Chief*, we have never held that such a rule applies where the defendant elects to testify. *See generally*, *State v. Fortney*, 201 N.C. App. 662, 687 S.E.2d 518 (2010), *State v. Little*, 191 N.C. App. 655, 664 S.E.2d 432, *disc. rev. denied*, 362 N.C. 685, 671 S.E.2d 326 (2008), *and State v. Faison*, 128 N.C. App. 745, 497 S.E.2d 111 (1998); *but see State v. Tice*, 191 N.C. App. 506, 511, 664 S.E.2d 368, 372 (2008) (in a case where the defendant did testify, deciding that defendant failed to show ineffective assistance by failing to raise such an argument under *Old Chief*).

Here, where defendant did testify, he was subject to impeachment on the basis of his prior convictions, even though he had already stipulated to being a convicted felon for purposes of the firearm possession charge. *See United States v. Kemp*, 546 F.3d 759, 763 (6th Cir. 2008) (holding that the protection afforded by Old Chief "can recede when a criminal defendant chooses to testify at trial"). The trial court did not err in permitting the State to impeach defendant on that basis.

IV. Gang Evidence

[3] Defendant next argues that the trial court erred in excluding various evidence about gang culture and evidence from other witnesses about the decedent's gang membership that defendant asserts was relevant to his claim of self-defense. We disagree.

Defendant proffered the testimony of Gregory Hestor, a former officer in the Charlotte-Mecklenburg Police Department's Gangs and Firearms Unit, Asheville Police Department detective Mandy Buchanan, and Sergeant Louis Tomasetti, an Asheville Police Department gang investigator. Mr. Hestor would have testified about gang culture, the meanings of gang tattoos, and their mindset. Detective Buchanan would

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1. *Old Chief* concerned the interpretation of the Federal Rules of Evidence; it does not control our interpretation of the North Carolina Rules of Evidence. *State v. Faiso*n, 128 N.C. App. 745, 747, 497 S.E.2d 111, 112 (1998).

have testified that one of the tattoos on Mr. Carter's chest was a gang symbol. Sergeant Tomasetti would have testified about Mr. Carter's tattoos, what they symbolize, and how one determines whether someone is a gang member. The trial court excluded all three witnesses' testimony as irrelevant. Additionally, the trial court prevented defendant from questioning Mr. Taylor about Mr. Carter's gang membership. The trial court did permit defendant to testify that he had been informed that Mr. Carter was a gang member who had robbed and kidnapped people.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Although "a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. rev. denied and app. dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L.Ed. 2d 241 (1992).

> The law in North Carolina is well-established that, although it may not be necessary to kill to avoid death or great bodily harm, a person may kill if he believes it to be necessary, and he has reasonable grounds for believing it necessary, to save himself from death or great bodily harm. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the defendant at the time of the killing.

State v. Jones, 56 N.C. App. 259, 269, 289 S.E.2d 383, 390 (citations omitted), *disc. rev. denied and app. dismissed*, 305 N.C. 762, 292 S.E.2d 578 (1982).

Defendant asserts that the proffered testimony was relevant to his reasonable apprehension of great bodily harm. However, none of the proffered evidence related to what the defendant knew about Mr. Carter's gang membership or character for violence. The relevant question is what defendant knew or thought about defendant and his history of violence, i.e. "the facts and circumstances as they appeared to defendant at the time of the killing." *Id.*; *see State v. Shoemaker*, 80 N.C. App. 95, 101, 341 S.E.2d 603, 607 ("In self-defense cases, the character of the victim for violence is relevant only as it bears upon the reasonableness of defendant's apprehension and use of force, which are essential elements of the defense of self-defense. Thus, the conduct becomes

relevant only if defendant knew about it at the time of the shooting." (citations omitted)), *disc. rev. denied and app. dismissed*, 317 N.C. 340, 346 S.E.2d 145 (1986); *State v. Brown*, 120 N.C. App. 276, 277-78, 462 S.E.2d 655, 656 (1995) ("In self-defense cases, the victim's violent character is relevant only as it relates to the reasonableness of defendant's apprehension and use of force . . . ."), *disc. rev. denied*, 342 N.C. 896, 467 S.E.2d 906 (1996). What three police officers and other witnesses knew about gangs and gang culture, and the significance of Mr. Carter's tattoos—of which defendant has never claimed to be aware at the time of the killing—has no relevance to defendant's reasonable apprehension of great bodily harm. Therefore, we hold that the trial court did not err in excluding the proffered testimony as irrelevant.

V. Impeachment by Prior Inconsistent Statement

[4] Finally, defendant asserts that the trial court erred in allowing the State to cross-examine him on the basis of statements he denied making that were contained in a police report. We hold that although the prosecutor's questions were inappropriate, especially in light of the trial court's instructions not to ask such questions, defendant has failed to show prejudice.

> The credibility of a witness may be impeached on cross-examination by questioning the witness regarding evidence that appears to be inconsistent with the testimony of the witness. However, contradiction of collateral facts by other evidence is not permitted, as its only effect would be to show that the witness is capable of error on immaterial points, and to allow it would confuse the issues and unduly prolong the trial.

State v. Kimble, 140 N.C. App. 153, 167, 535 S.E.2d 882, 891 (2000) (citations and quotation marks omitted), *cert. denied*, 360 N.C. 178, 626 S.E.2d 833 (2005).

While the denial of a conviction may be contradicted by extrinsic evidence from a public record, the facts surrounding prior convictions will normally be collateral, and extrinsic evidence is inadmissible if used solely to contradict the witness' denial of such collateral matters. *See State v. Dalton*, 96 N.C. App. 65, 70, 384 S.E.2d 573, 576 (1989) (holding that a defendant's denial of a conviction may be contradicted by introducing public records which prove such a conviction); *State v. Monk*, 286 N.C. 509, 517, 212 S.E.2d 125, 132 (1975) (noting that the prosecutor may cross-examine a defendant "concerning *collateral matters* relating to his criminal and degrading conduct." (emphasis added)); *Kimble*, 140

N.C. App. at 167, 535 S.E.2d at 891 (stating that "contradiction of collateral facts by other evidence is not permitted.").

Defendant, on cross-examination, claimed that he was charged with carrying a concealed weapon because he had sold his car to someone else, who had the gun in the trunk, but was charged nonetheless because the car was still registered in his name. The State attempted to impeach defendant by introducing a police report which stated that defendant had admitted placing the gun in the trunk. The trial court excluded the report, but permitted the State to ask defendant whether he had made a prior inconsistent statement to Michigan police, given that defendant had attempted to explain away his prior convictions. The prosecutor then persisted in asking questions while quoting the exhibit that the trial court specifically ruled inadmissible:

> [PROSECUTOR]: Mr. Gayles, I'm going to show you what's been marked for identification purposes as State's Exhibit 42. It reads "Berrien Township Police Department." Isn't that correct, sir?
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Sustained.
>
> [PROSECUTOR]: And on this document it has your name listed, "Devon Armond Gayles;" correct?
>
> [DEFENDANT:] Yeah.
>
> [PROSECUTOR]: Date of birth, 11-7-1975?
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Sustained.
>
> [PROSECUTOR]: Social Security number 384 --
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Sustained.
>
> [PROSECUTOR]: S o your name's on here; true?
>
> [DEFENDANT]: Yeah, I see it.
>
> [PROSECUTOR]: And on the second page of 42 it talks about a .22-caliber revolver?
>
> [DEFENSE COUNSEL]: Objection.

COURT: Sustained.

[PROSECUTOR]: And on this document, the fourth page says "interview with Devon Gayles."

[DEFENSE COUNSEL]: Objection.

COURT: Sustained.

[PROSECUTOR]: Isn't it true the incident you're saying that that gun belonged to somebody else; that's your testimony?

[DEFENDANT]: Correct.

. . . .

[PROSECUTOR]: So you never told him that [the gun was yours]?

[DEFENDANT]: No.

. . . .

[PROSECUTOR]: Did you deny making that statement?

[DEFENDANT]: I didn't make it.

[PROSECUTOR]: So the highlighted portion I'm reading is incorrect?

[DEFENSE COUNSEL]: Objection.

COURT: Sustained.

[PROSECUTOR]: And then after "for protection" –

[DEFENSE COUNSEL]: Move to strike, your Honor.

COURT: Allowed.

[PROSECUTOR]: And after the quotes, because it's got quotes "for protection because a week ago somebody had tried to rob him."

[DEFENSE COUNSEL]: Objection.

COURT: Overruled.

[PROSECUTOR]: Do you admit or deny saying that?

[DEFENDANT]: I didn't.

> [PROSECUTOR]: You did not say that?
>
> [DEFENDANT]: No.
>
> . . . .
>
> [DEFENSE COUNSEL]: I would ask for a limiting instruction that [the prosecutor's] questions are not evidence. They're not to be considered by the jury as they are not evidence in themselves.
>
> COURT: I would think the jury understands that the questions themselves aren't evidence. I want to caution you, also, and I'll talk about convictions at the end of the trial. This document that was shown to [defense counsel] is not in evidence. There's no evidence as to where it came from. Keep that in mind; okay? Mr. [Prosecutor], please go on.

After the trial court issued its limiting instruction, the prosecutor continued asking defendant about his Michigan convictions and the details thereof. Defendant continued to explain what led to the convictions and minimize his culpability.

The prosecutor here showed a marked and egregious disregard for the trial court's ruling that the Michigan police report was inadmissible by continuing to ask questions about the contents of that report. If the prosecutor wanted to make an offer of proof as to the defendant's responses to his questions by asking his questions on the record, he should have done so out of the presence of the jury. Nevertheless, we hold that the prosecutor's misconduct was not prejudicial. The trial court instructed the jury that the prosecutor's questions were not evidence and warned the jury not to consider the document that the prosecutor was reading from as it was not in evidence. "Generally, when a trial court properly instructs jurors to disregard incompetent or objectionable evidence, any error in the admission of the evidence is cured." *State v. Diehl*, 147 N.C. App. 646, 650, 557 S.E.2d 152, 155 (2001), *cert. denied*, 356 N.C. 170, 568 S.E.2d 624 (2002). Further, when a trial court sustains a party's objection to an inappropriate question "no prejudice [ordinarily] exists, for when the trial court sustains an objection to a question the jury is put on notice that it is not to consider that question." *State v. Banks*, 210 N.C. App. 30, 43-44, 706 S.E.2d 807, 817 (2011) (citation and quotation marks omitted). Although the instruction perhaps could have been clearer, we hold that the instruction given by the trial court not to consider the prosecutor's questions cured any prejudice to defendant. "If defendant desired a different, more limiting instruction, he should have

requested it at that time." *State v. Hopper*, 292 N.C. 580, 589, 234 S.E.2d 580, 585 (1977). We do wish to emphasize, however, that such blatant disregard of a trial court's ruling as that shown here by the prosecutor is highly inappropriate.

VI. Conclusion

For the foregoing reasons, we conclude that there was no prejudicial error at defendant's trial.

NO PREJUDICIAL ERROR.

Judges HUNTER, JR., Robert N. and DILLON concur.

STATE OF NORTH CAROLINA
v.
ROMY VERDAE GEISSLERCRAIN

No. COA13-887

Filed 1 April 2014

1. Motor Vehicles—reckless driving—substantial evidence

The trial court did not err by denying defendant's motion to dismiss the charge of reckless driving where there was substantial evidence to support the elements of the offense and more than a mere failure to keep a reasonable lookout, as defendant contended.

2. Sentencing—aggravating factor—found by court—improper

The trial court improperly found an aggravating factor in a prosecution for reckless driving by making the finding itself instead of submitting the aggravating factor to the jury. That aggravating factor increased the penalty for the crime beyond the prescribed maximum.

3. Sentencing—discretion—reckless driving—no aggravating factors

The trial court had no discretion in the sentence given in a reckless driving case where no aggravating factors were properly found. The rationale in *State v. Green*, 209 N.C. App. 669, did not apply.

4. Sentencing—aggravating factors—notice

The State's failure to provide proper notice that it intended to seek aggravating factors in a prosecution for reckless driving, as

required by N.C.G.S. § 20-179(a1)(1), was error, and the State's contention that the error was harmless because defendant received a "presumptive" sentence failed because the sentence given was not appropriate.

5. Appeal and Error—sentence—vacated elsewhere—argument moot

Defendant's argument concerning the enhancement of his sentence was moot where his sentence had already been vacated and remanded.

Appeal by Defendant from judgments entered 10 April 2013 by Judge Marvin P. Pope, Jr., in Yancey County Superior Court. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Charlotte Gail Blake, for Defendant.

DILLON, Judge.

Romy Verdae Geisslercrain ("Defendant") appeals from judgments convicting her of impaired driving and reckless driving to endanger, alleging errors in her sentencing and challenging the trial court's denial of her motion to dismiss for insufficiency of the evidence. We find no error, in part, and we vacate and remand, in part.

I. Background

The evidence of record tends to show the following: On the evening of 16 July 2010, Defendant was involved in a single vehicle accident on Highway 19 near Burnsville. After Defendant had been transported to the hospital, State Trooper Jeremy Carver arrived at the scene where he found Defendant's damaged Ford Ranger truck in the middle of the highway. Trooper Carver believed that Defendant had likely driven off the right side of the road, after which she tried to jerk her truck back onto the road too quickly, resulting in the truck rolling several times and sustaining approximately $7,000.00 in damage. Trooper Carver thought the truck may have been going too fast for a curve in the road.

Trooper Carver went to the hospital to speak with Defendant, who told him she had taken medications either the day of the incident or the day before – including Methadone, Clonazepam, and Adderall. She

also admitted to Trooper Carver that she had been drinking alcohol. Trooper Carver believed that Defendant had consumed a sufficient quantity of impairing substances to appreciably impair her mental and physical faculties.

Defendant was indicted on charges of impaired driving and reckless driving to endanger. After her conviction in District Court, Defendant appealed to Superior Court, where a jury found her guilty of both charges.

During sentencing, the trial court determined, without submitting the question to a jury, that an aggravating factor existed, specifically, that "[t]he negligent driving of [D]efendant led to an accident causing property damage of $1,000.00 or more[.]" The trial court further determined that a mitigating factor existed, specifically, that "[D]efendant has a safe driving record[.]" The trial court determined that the aggravating factor was substantially counterbalanced by the mitigating factor, and, therefore, declared that "a Level Four punishment shall be imposed."

The trial court entered two written judgments, one for each conviction. The written judgment for the impaired driving conviction reflects that the trial court was sentencing Defendant as a Level Four offender, but then actually sentenced her to a minimum and maximum sentence of twelve months incarceration, which is above the range of Level Four punishments. Nonetheless, as reflected on the written judgment, the trial court suspended the active sentence on the condition that she be placed on twelve months supervised probation.

The trial court also entered a written judgment on Defendant's reckless driving to endanger conviction, sentencing her to ten days incarceration, which the trial court suspended on the condition that she be placed on twelve months supervised probation, to be served concurrently with the sentence for her impaired driving conviction. Defendant appeals from both judgments.

II. Analysis

Defendant argues on appeal that the trial court erred in denying her motion to dismiss her impaired driving conviction and also committed errors with regard to her sentence. We address each argument below.

A: Motion to Dismiss

[1] Defendant argues that the trial court erred by denying her motion to dismiss the charge of reckless driving. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

N.C. Gen. Stat. § 20-140(a) and (b) provide two definitions of reckless driving. A person may violate N.C. Gen. Stat. § 20-140 by either of the courses of conduct defined in subsection (a) and (b), or in both respects. *State v. Dupree*, 264 N.C. 463, 142 S.E.2d 5 (1965). Most pertinent to this case, subsection (b) provides the following: "Any 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." *Id.*

On appeal, Defendant specifically argues the trial court erroneously denied her motion to dismiss because the evidence shows that she merely failed to keep a reasonable lookout. "Mere failure to keep a reasonable lookout does not constitute reckless driving[;] [t]o this must be added dangerous speed or perilous operation." *State v. Dupree*, 264 N.C. 463, 466, 142 S.E.2d 5, 7 (1965). We disagree and believe that there was substantial evidence in this case to support the elements of reckless driving, and, when viewed in the light most favorable to the State, that there was more than a mere failure to keep a reasonable lookout. Specifically, the State presented evidence that Defendant was intoxicated; that all four tires of Defendant's vehicle had gone off the road; that distinctive "yaw" marks were left on the road indicating that Defendant had lost control of the vehicle; that Defendant's vehicle overturned twice; and that the vehicle traveled 131 feet from the point it went off the road before it flipped, and another 108 feet after it flipped.

Therefore, the trial court did not err by denying Defendant's motion. *See, e.g.*, *State v. Coffey*, 189 N.C. App. 382, 387, 658 S.E.2d 73, 77 (2008); *see generally Bank v. Lindsey*, 264 N.C. 585, 587, 142 S.E.2d 357, 360 (1965) (stating that "operation of [a vehicle] in a drunken condition constituted a driving of it upon the public highway without due caution and circumspection and in a manner so as to endanger persons or property, and was reckless driving within the intent and meaning of G.S. § 20-140(b)"). Accordingly, Defendant's argument is overruled.

B: Sentencing

Defendant contends that there were reversible errors regarding the sentencing on her impaired driving conviction as a Level Four offender. Specifically, Defendant argues that (1) the trial court erred in determining the existence of an aggravating factor, rather than submitting this issue to the jury; (2) she did not receive proper notice that the State would be seeking aggravating factors; and (3) her sentence was outside (above) the Level Four punishment range. We address each argument below.

i. Trial Court's Finding of Aggravating Factor

[2] Defendant argues the trial court committed reversible error by determining, *itself*, that an aggravating factor existed, rather than submitting the aggravating factor to the jury for determination, citing the United States Supreme Court decision *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) in which that Court applied the rule it stated in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000) — that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to the jury and proved beyond a reasonable doubt" — to aggravating factors. *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412. We agree.

Sentencing defendants convicted of impaired driving is governed by N.C. Gen. Stat. § 20-179 (2011). Under G.S. § 20-179, there are six sentencing ranges. Like the sentencing scheme found in the Structured Sentencing Act, codified at N.C. Gen. Stat. § 15A-1340.16 (2011), a defendant's sentencing range under N.C. Gen. Stat. § 20-179 is determined by the existence and balancing of aggravating and mitigating factors. However, the trial court is afforded much less discretion in sentencing under N.C. Gen. Stat. § 20-179 than under the Structured Sentencing Act. *See State v. Weaver*, 91 N.C. App. 413, 415-16, 371 S.E.2d 759, 760 (1988) (stating that the sentencing scheme found in N.C. Gen. Stat. § 20-179 is "quite systematic and tiered, thus leaving little room to exercise discretion").

The three most severe punishment levels under N.C. Gen. Stat. § 20-179, which are Aggravated Level One, Level One, and Level Two, are imposed only where a "grossly aggravating factor" is found to exist. Where there are no grossly aggravating factors present, a defendant convicted of impaired driving must be sentenced in one of the three remaining ranges, namely, either under Level Three, Level Four, or Level Five. *See id.*

In the present case, no grossly aggravating factors were found to exist, so the trial court was required to determine whether a Level Three, Level Four, or Level Five punishment was appropriate by weighing those factors pursuant to N.C. Gen. Stat. § 20-179(f). Under N.C. Gen. Stat. § 20-179(f)(1), if the trial court determines that "[t]he aggravating factors substantially outweigh any mitigating factors," the trial court *must* impose a Level Three punishment. We also believe that if there are only aggravating factors present — and no mitigating factors present — then the aggravating factors "substantially outweigh" the mitigating factors (as there are none) as a matter of law, and the trial court *must* impose a Level Three punishment. *See id.*

Likewise, if the trial court determines that "[t]he mitigating factors substantially outweigh any aggravating factors," the trial court *must* impose a Level Five punishment. N.C. Gen. Stat. § 20-179(f)(3). And if there are only mitigating factors present — and no aggravating factors present — the trial court *must* impose a Level Five punishment. *See id.*

If there are no aggravating or mitigating factors present or, alternatively, if the aggravating and mitigating factors are "substantially counterbalanced," then the trial court *must* impose a Level Four punishment. N.C. Gen. Stat. § 20-179(f)(2).

In this case, the trial court sentenced Defendant to a Level Four punishment, concluding that the single aggravating factor, which the trial court, and not the jury, found, was substantially counterbalanced by the single mitigating factor. If the aggravating factor had not been considered by the trial court, then there would have been only the single mitigating factor present; and the trial court would have been *required* to sentence Defendant to a Level Five punishment. *See* N.C. Gen. Stat. § 20-179(f)(3). Accordingly, the aggravating factor in this case, which was improperly found by the judge, "increase[d] the penalty for [the] crime beyond the prescribed maximum," *Blakely*, *supra*, and Defendant's Level Four punishment must be vacated.

The State, however, argues that no *Blakely* error occurred because a Level Four punishment is similar to a defendant being sentenced

within the presumptive range under the Structured Sentencing Act. Our Supreme Court has held that, in the context of a defendant sentenced under the Structured Sentencing Act, *Blakely* is not implicated when a trial court improperly finds aggravating factors, rather than submitting those factors to the jury, so long as the defendant is sentenced within the presumptive range, reasoning that a trial judge "does not exceed his proper authority until he inflicts [enhanced] punishment . . . the jury's verdict alone does not allow." *State v. Norris*, 360 N.C. 507, 514, 517, 630 S.E.2d 915, 919, 921, *cert. denied*, 549 U.S. 1064, 166 L. Ed. 2d 535 (2006) (holding that "[t]he trial court did not violate defendant's Sixth Amendment right to a jury trial when it found a statutory aggravating factor but sentenced defendant within the presumptive range")(citation and quotation marks omitted).

Norris is not applicable to the present case. Under the Structured Sentencing Act the trial court has the discretion to sentence a defendant within the presumptive range even where only mitigating factors are properly found. However, in the context of the sentencing scheme in N.C. Gen. Stat. § 20-179, the trial court does not have the discretion to sentence a defendant to a Level Four punishment where only mitigating factors are properly found, but rather, it is required to sentence the defendant to a Level Five punishment. In other words, where a defendant is sentenced under the Structured Sentencing Act within the presumptive range where mitigating factors are present, *Blakely* is not implicated if the trial court *itself* — and not the jury — finds aggravating factors to exist as well. This is because the trial court had the authority to sentence the defendant within the presumptive range even without finding aggravating factors to counterbalance the mitigating factors. However, under G.S. § 20-179, the trial court has no discretion to sentence a defendant to a Level Four punishment where only mitigating factors are properly found to exist. Therefore, in this case, *Blakely* has been implicated because, without the presence of an aggravating factor, the trial court was required to sentence Defendant to a Level Five punishment, a sentence which could not have been enhanced to a Level Four punishment without the jury finding the aggravating factor — which had been improperly found by the trial court — beyond a reasonable doubt.

[3] The State also argues that we are bound by our decision in *State v. Green*, 209 N.C. App. 669, 707 S.E.2d 715 (2011). *Green* involved a prosecution for impaired driving where two aggravating factors and two mitigating factors were found to exist, and the defendant was sentenced to a Level Four punishment. *Id.* at 681, 707 S.E.2d at 723-24. On appeal, the defendant argued that the trial court had inappropriately found one

of the two aggravating factors instead of submitting that factor to the jury. *Id.* The defendant made no argument that the trial court inappropriately found the other aggravating factor, which involved the defendant's driving record[1]. *Id.* Accordingly, the defendant was effectively arguing that there was only one valid aggravating factor, instead of two, which, by itself, did not substantially counterbalance the two mitigating factors. *Id.* at 681-82, 707 S.E.2d at 723-24. This Court, specifically relying on the rationale in *Norris*, expressly held that the "level four punishment imposed by the trial court [under G.S. § 20-179] was tantamount to a sentence within the presumptive range [in a structured sentencing case], so that the trial court did not enhance defendant's sentence even after finding aggravating factors [and, therefore,] *Blakely* is not implicated." *Id.* at 681-82, 707 S.E.2d at 724.

We hold *Green* is distinguishable from the present case. In *Green*, even with the error, there remained one valid aggravating factor to counterbalance the two mitigating factors. *See id.* Even where only one aggravating factor, rather than two, is found along with two mitigating factors, the trial court still has the discretion to sentence the defendant to a Level Four punishment since it could have determined, within its discretion, that the one aggravating factor "substantially counterbalanced" the two mitigating factors. However, in the present case, without any aggravating factors properly found, the trial court had no discretion but to sentence Defendant to a Level Five punishment. Accordingly, we believe that this Court's rationale in *Green* does not apply.

ii. Notice

[4] Defendant contends the State failed to provide notice that it intended to seek aggravating factors as required by N.C. Gen. Stat. § 20-179(a1)(1). We agree that the State's failure to provide the required notice was error.

N.C. Gen. Stat. § 20-179(a1)(1) provides the following with regard to notice of aggravating factors:

> If the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall

1. We note that *Blakely* is not implicated where the fact found by the trial court, and not the jury, which is used to enhance a defendant's punishment is the existence of a prior conviction.

> contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

On appeal, the State does not dispute that it failed to provide proper notice; but rather, since Defendant was sentenced to a Level Four punishment, which the State argues is a "presumptive" sentence, the State's failure to provide notice was harmless error. However, because we have concluded that a Level Four punishment in this case was inappropriate, the State's argument must fail.

Generally, when the State has failed to provide proper notice pursuant to N.C. Gen. Stat. § 20-179(a1)(1), this Court has vacated Defendant's sentence and remanded for resentencing. *State v. Reeves*, __ N.C. __, 721 S.E.2d 317 (2012). In *Reeves*, this Court stated, "[i]t is evident that the State failed to provide Defendant with the statutorily required notice of its intention to use an aggravating factor under N.C.G.S. § 20-179(d). We must therefore vacate Defendant's sentence as to the DWI charge and remand to the trial court for resentencing." *Id.* at __, 721 S.E.2d at 322.

Following our rationale in *Reeves* and other decisions of this Court, we believe the proper resolution in the present case is to remand the matter to the trial court, directing it to resentence Defendant to a Level Five punishment.

iii. Sentence Outside the Level Four Punishment Range

[5] Defendant argues that the trial court improperly sentenced her to a punishment outside the Level Four range. However, having concluded that Defendant's punishment must be vacated and this matter remanded for resentencing in the Level Five range, we conclude that Defendant's argument is moot and, therefore, do not address its merits.

III. Conclusion

Based on the foregoing, the trial court erred by sentencing Defendant to a Level Four punishment on her conviction of impaired driving. Accordingly, we vacate and remand the judgment on this charge only, directing the trial court to resentence Defendant to a Level Five punishment. Otherwise, we find no error.

NO ERROR, in part; VACATED and REMANDED, in part.

Judge STROUD and Judge HUNTER, JR. concur.

STATE v. MARION

[233 N.C. App. 195 (2014)]

STATE OF NORTH CAROLINA
v.
TIFFANY LEIGH MARION

No. COA13-200

Filed 1 April 2014

1. Evidence—written notes of conversation with defendant—not confession—statement by party-opponent—acknowledgement or adoption not required

The trial court did not commit plain error in a first-degree murder trial by admitting into evidence notes prepared by a detective memorializing a conversation with defendant and allowing the State to impeach defendant's testimony with those notes. A defendant's statement that is not purported to be a written confession is admissible under the exception to the hearsay rule for statements by a party-opponent and does not require the defendant's acknowledgement or adoption. In this case, defendant's statements to the detective were never characterized as defendant's confession.

2. Sentencing—failure to arrest judgment—felony murder—underlying felonies

The trial court erred in a first-degree murder case by failing to arrest judgment on one of defendant's felony convictions because defendant's first-degree murder convictions were exclusively premised on a felony murder theory. As multiple felonies supported a felony murder conviction, the merger rule only required the trial court to arrest judgment on at least one of the underlying felony convictions. The matter was remanded with instructions that the trial court arrest judgment with respect to at least one of defendant's felony convictions in such a manner that would not subject defendant to a greater punishment.

3. Sentencing—attempted first-degree felony murder—crime non-existent

The trial court erred in a first-degree murder case by entering judgment on the jury's guilty verdict of attempted murder. The trial court's instruction concerning the attempted murder offense was based solely upon a theory of attempted felony murder and the offense of attempted first-degree felony murder does not exist under our law.

4. Homicide—first-degree murder—felony murder—acting in concert—aiding and abetting—sufficient evidence

Defendant's argument that all of her convictions must be vacated because the State failed to present substantial evidence concerning her involvement in the crimes charged under either the theory of (1) acting in concert or (2) aiding and abetting was without merit. The evidence offered at trial, taken in the light most favorable to the State, was sufficient to support defendant's convictions under both theories of criminal liability.

5. Constitutional Law—effective assistance of counsel—failure to move to dismiss charges—no prejudice

Defendant did not receive ineffective assistance of counsel in a first-degree murder case where her trial counsel did not move to dismiss the charges. As the State presented sufficient evidence to withstand a motion to dismiss the charges against defendant under acting in concert and aiding and abetting theories of criminal liability, defendant was not prejudiced by her counsel's failure to make a proper motion to dismiss the charges.

Appeal by defendant from judgments entered 19 March 2012 by Judge Marvin Pope in Swain County Superior Court. Heard in the Court of Appeals 26 September 2013.

Roy Cooper, Attorney General, by Mary Carla Hollis, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Daniel R. Pollitt and Paul M. Green, Assistant Appellate Defenders, for defendant-appellant.

DAVIS, Judge.

Tiffany Leigh Marion ("Defendant") appeals from her convictions for two counts of first-degree murder, one count of attempted murder, two counts of robbery with a dangerous weapon, and one count of first-degree burglary. Defendant's primary argument on appeal is that there was insufficient evidence presented at trial to support her convictions under either an acting in concert theory or an aiding and abetting theory. After careful review, we vacate in part and remand in part as set out below.

Factual Background

The State's evidence tended to establish the following facts: On 5 August 2008, Defendant traveled from Atlanta, Georgia to Cherokee,

North Carolina to visit Harrah's casino. Defendant was accompanied by Jada McCutcheon ("McCutcheon") — a friend from the massage therapy school Defendant attended — and three men, Jeffrey Miles ("Miles"), Jason Johnson ("Johnson"), and a man known as "Freak." The group used ecstasy and smoked marijuana during the car trip and during their entire stay in North Carolina. Some of the ecstasy they used during their trip was mixed with other controlled substances, including heroin and cocaine. Once they arrived, part of the group gambled for several hours at the casino. Afterwards, Miles checked into a hotel room and listed Defendant as his guest. The group congregated in Miles' room over the next several days to "chill" and use drugs.

On 7 August 2008, Miles, Johnson, and "Freak" went to the local Wal-Mart, where they met two local residents, Mark Goolsby ("Goolsby") and Dean Mangold ("Mangold"). Miles asked Goolsby and Mangold if they wanted to take ecstasy and go to the casino with them, and the two replied affirmatively. Miles eventually brought them back to his hotel room and showed them an AR-15 firearm that he was interested in selling. Mangold suggested trying to sell the gun to a man named Scott Wiggins ("Wiggins") and offered to take them up to see Wiggins. Mangold also told Miles that Wiggins "had drugs." During this conversation, Defendant was lying on the bed and seemed "messed up."

Goolsby, Mangold, Miles, Johnson, McCutcheon, and Defendant got into their van and drove to Wiggins' home. During the drive, Mangold told Miles that Wiggins owed him money and that Wiggins had "all this stuff" and "a lot of money." Miles was driving the van and parked it on a gravel logging road where it could not be seen from Wiggins' house. Everyone exited the vehicle, and Miles told everyone that they were "fixin' to hit a lick," meaning that they were about to rob someone. Defendant stayed by the van and told McCutcheon that she "didn't want to go up there."

Johnson kicked in the door of the residence and proceeded to hold Wiggins and another person present in Wiggins' home, Michael Heath Compton ("Compton"), at gunpoint while the others began gathering valuables. While the group was searching for valuables, another person, Timothy Dale Waldroup ("Waldroup"), drove up to the house and was escorted into the residence at gunpoint. Miles shot Wiggins, Compton, and Waldroup during the course of the burglary, and only Waldroup survived. Goolsby and Mangold heard the gunshots, "got scared," and left the scene. Defendant then left the area by the van where she had been waiting, walked towards the house, found Johnson, and informed him that Goolsby and Mangold had left. She then returned to the van.

Johnson, Miles and McCutcheon proceeded to load the stolen items into Wiggins' pickup truck. Defendant attempted to drive the van but was unable to release the parking brake so McCutcheon drove the vehicle. Defendant and the others traveled back to Georgia and moved the stolen items into Miles' apartment.

On 18 August 2008, the Swain County grand jury returned bills of indictment charging Defendant with two counts of first-degree murder, one count of attempted murder, one count of first-degree burglary, two counts of robbery with a dangerous weapon, and three counts of first-degree kidnapping. The matter came on for a jury trial during the February and March 2012 Criminal Sessions of Swain County Superior Court.

Defendant offered evidence at trial and testified in her defense. She testified that she was using drugs during the entire trip and did not learn what had happened at Wiggins' house until she returned to Georgia on 11 August 2008. She further stated that she never heard or was a part of any conversations regarding a plan to rob Wiggins and explained that she "had no idea what was going on" when the group went to Wiggins' house, "had nothing to do with it," and "would never, ever be a part of anything like this."

The jury found Defendant guilty of two counts of first-degree murder, one count of attempted murder, one count of first-degree burglary, and two counts of robbery with a dangerous weapon. Defendant was found not guilty of the three kidnapping charges. The trial court entered judgments based on the jury's verdicts, sentencing Defendant to two consecutive terms of life imprisonment without parole for the first-degree murder charges, a presumptive-range term of 125 to 159 months for the attempted murder conviction, and presumptive-range terms of 51 to 71 months imprisonment for each of the remaining charges. Defendant gave timely written notice of appeal.

Analysis

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

I. Defendant's Statement to Detective Posey

[1] Defendant first argues that the trial court erred by allowing the State to impeach her trial testimony through the use of a "written instrument[] the prosecutor improperly characterized, described, and referred to in court as 'defendant's written statement.' " Defendant acknowledges that she did not object to the use of this evidence at trial and therefore seeks review under the plain error doctrine. Under plain error review,

Defendant bears the burden of showing that the alleged error was such that it "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

Relying on *State v. Walker*, 269 N.C. 135, 152 S.E.2d 133 (1967), Defendant contends that the trial court committed plain error by admitting into evidence notes prepared by Detective Carolyn Posey ("Detective Posey") memorializing a conversation with Defendant and allowing the State to impeach Defendant's testimony with those notes.

In *Walker*, our Supreme Court held as follows:

> If a statement purporting to be a confession is given by [the] accused, and is reduced to writing by another person, before the written instrument will be deemed admissible as the written confession of [the] accused, he must in some manner have indicated his acquiescence in the correctness of the writing itself. If the transcribed statement is not read by or to [the] accused, and is not signed by [the] accused, or in some other manner approved, or its correctness acknowledged, the instrument is not legally, or *per se*, the confession of [the] accused; and it is not admissible in evidence as the written confession of [the] accused.

Id. at 139, 152 S.E.2d at 137 (citation and quotation marks omitted).

Our Supreme Court has explained, however, that the authentication requirements outlined in *Walker*, and later reiterated in *State v. Wagner*, 343 N.C. 250, 470 S.E.2d 33 (1996), do not apply to statements made by a defendant that are not confessions. *See State v. Moody*, 345 N.C. 563, 579, 481 S.E.2d 629, 637 (holding that "the requirements outlined in *Wagner* do not apply" because "[a]t no time was [the law enforcement officer's] record of his interview with defendant characterized as defendant's written confession"), *cert. denied*, 522 U.S. 871, 139 L.Ed.2d 125 (1997).

Here, Detective Posey testified that she took notes while she and Deputy Scott Cody transported Defendant from Georgia to North Carolina on 20 August 2008. Detective Posey explained that the notes were taken in shorthand, and they were "not exactly word for word." She replied affirmatively when asked if what she wrote was "as best [as] you can recall . . . what [Defendant] said while she was in the car."

After reviewing the transcript and record, we have found no indication that Defendant's statements to Detective Posey were ever characterized as Defendant's confession. A confession is "an acknowledgment

in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it." *State v. Jones*, 294 N.C. 642, 659, 243 S.E.2d 118, 128 (1978) (citation and quotation marks omitted). Defendant's statements to Detective Posey, conversely, did not admit her guilt or participation in the crimes. Rather, the notes memorializing the conversation reflected Defendant's assertions that she did not know "anything about robbing anybody"; "did not even know anyone had passed"; that "nobody said anything to [her] about guns"; and that she only knew what had happened afterwards because McCutcheon told her.

A defendant's statement that is not purported to be a written confession is admissible under the exception to the hearsay rule for statements by a party-opponent and does not require the defendant's acknowledgement or adoption. *Moody*, 345 N.C. at 579, 481 S.E.2d at 637; *see State v. Randolph*, ___ N.C. App. ___, ___, 735 S.E.2d 845, 852 (2012) ("[S]o long as oral statements are not obtained in violation of the constitutional protections against self-incrimination or due process, a defendant's own statement is admissible when offered against him at trial as an exception to the hearsay rule." (citation and quotation marks omitted)), *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 392 (2013). Accordingly, we hold that the trial court did not commit error, much less plain error, by allowing the State to impeach Defendant with her prior statements to Detective Posey.

II. Failure to Arrest Judgment on a Felony Conviction

[2] Defendant's second argument on appeal is that the trial court erred by failing to arrest judgment with respect to any of her felony convictions. Defendant asserts that because she was convicted of two counts of first-degree felony murder, the trial court was required to arrest judgment on at least two of her felony convictions pursuant to the felony murder merger doctrine. The State concedes that failing to arrest judgment on any of Defendant's felony offenses was error but argues that judgment need be arrested on only *one* of the felonies.

"The felony murder merger doctrine provides that when a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction." *State v. Rush*, 196 N.C. App. 307, 313-14, 674 S.E.2d 764, 770 (citation, quotation marks, and brackets omitted), *disc. review denied*, 363 N.C. 587, 683 S.E.2d 706 (2009). Thus, if the defendant's conviction for first-degree murder is based solely upon the theory of felony murder, he or

she "cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder." *Id.* at 314, 674 S.E.2d at 770 (citation and quotation marks omitted). In this case, because Defendant's first-degree murder convictions were exclusively premised on a felony murder theory, the trial court erred in entering judgment on all of Defendant's felonies.

However, we are not persuaded by Defendant's contention that judgment must be arrested with respect to *all* of her felony convictions. Defendant asserts that because the trial court's instructions were disjunctive and permitted the jury to find Defendant guilty of felony murder if it found that she committed "the felony of robbery with a firearm, burglary, and/or kidnapping," the trial court should have arrested judgment on all of the felony convictions on the theory that they all could have served as the basis for the felony murder convictions.

Our Court rejected this same argument in *State v. Coleman*, 161 N.C. App. 224, 587 S.E.2d 889 (2003). We explained that the disjunctive instruction was not error — and did not require the trial court to arrest judgment with respect to all of the defendant's felony convictions — because the defendant's right to a unanimous verdict was not violated and the instruction merely allowed the jury to convict the defendant of a single wrong by alternative acts. *Id.* at 234-35, 587 S.E.2d at 896.

Indeed, this Court has explicitly held that if multiple felonies support a felony murder conviction, the merger rule only "requires the trial court to arrest judgment on at least one of the underlying felony convictions . . . ." *State v. Dudley*, 151 N.C. App. 711, 716, 566 S.E.2d 843, 847 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 684, 578 S.E.2d 314 (2003). In cases where the jury does not specifically determine which conviction serves as the underlying felony, we have held that the trial court may, in its discretion, select the felony judgment to arrest. *See Coleman*, 161 N.C. App. at 236, 587 S.E.2d at 897 ("[W]here no specific underlying felony was noted in the jury instructions on felony murder, and where there are multiple felony convictions which could serve as the underlying felony for purposes of the felony murder conviction, it is in the discretion of the trial court as to which felony will serve as the underlying felony for purposes of sentencing."). We therefore remand with instructions that the trial court arrest judgment with respect to at least one of Defendant's felony convictions "in such a manner that would not subject [D]efendant to a greater punishment." *Dudley*, 151 N.C. App. at 716, 566 S.E.2d at 847.

III. Attempted Murder

[3] Defendant also argues that the trial court erred by entering judgment on the jury's guilty verdict of attempted murder. The State concedes error on this issue as well.

The trial court's instruction concerning the attempted murder offense was based solely upon a theory of attempted felony murder. This Court has held that "the offense of 'attempted first degree felony murder' does not exist under our law." *State v. Lea*, 126 N.C. App. 440, 449, 485 S.E.2d 874, 879 (1997) (cited with approval by *State v. Coble*, 351 N.C. 448, 452, 527 S.E.2d 45, 48 (2000)). In so holding, we reasoned that the offense of felony murder "does not require that the defendant intend the killing, only that he or she intend to commit the underlying felony. *Lea*, 126 N.C. App. at 449, 485 S.E.2d at 880. Attempt, on the other hand, requires the State to establish that the defendant specifically intended to commit the crime charged. *Id.* Thus, "a charge of 'attempted felony murder' is a logical impossibility in that it would require the defendant to intend what is by definition an unintentional result." *Id.* at 450, 485 S.E.2d at 880.

Because attempted first-degree felony murder does not exist under the laws of North Carolina, we vacate Defendant's conviction with respect to this charge.

IV. Sufficiency of the Evidence of Acting in Concert or Aiding and Abetting

[4] Defendant next asserts that all of her convictions must be vacated because the State failed to present substantial evidence concerning her involvement in the crimes under either the theory of (1) acting in concert; or (2) aiding and abetting. Defendant's counsel did not make a motion to dismiss the charges at the close of all of the evidence, thereby failing to preserve this issue for appellate review. *See* N.C.R. App. P.10(a)(3) ("[I]f a defendant fails to move to dismiss the action . . . at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged."). However, because Defendant also brings forward an ineffective assistance of counsel claim based on her counsel's failure to make the motion to dismiss, we elect to review Defendant's sufficiency of the evidence argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. *See State v. Gayton-Barbosa*, 197 N.C. App. 129, 140, 676 S.E.2d 586, 593 (2009) ("[P]ursuant to N.C.R. App. P.2, we will hear the merits of defendant's claim despite the rule violation because defendant also argues ineffective assistance

of counsel based on counsel's failure to make the proper motion to dismiss.").

Here, the State relied on two theories to establish Defendant's criminal responsibility for the murder, burglary, and robbery with a dangerous weapon offenses: (1) acting in concert, and (2) aiding and abetting. Under a theory of acting in concert, a defendant may be found guilty of an offense if she "is present at the scene of the crime and . . . [s]he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Barnes*, 91 N.C. App. 484, 487, 372 S.E.2d 352, 353 (1988) (citation and quotation marks omitted), *aff'd as modified*, 324 N.C. 539, 380 S.E.2d 118 (1989).

Under a theory of aiding and abetting, the State must present evidence "(1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person." *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *cert. denied*, 521 U.S. 1124, 138 L.Ed.2d 1022 (1997).

> A person may be guilty as an aider and abettor if that person . . . accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense.

State v. Pryor, 59 N.C. App. 1, 7, 295 S.E.2d 610, 615 (1982) (citation and quotation marks omitted).

When determining whether there is substantial evidence to sustain a conviction,

> all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]

State v. Spencer, 192 N.C. App. 143, 147, 664 S.E.2d 601, 604 (2008) (internal citation and quotation marks omitted), *disc. review denied*, 363 N.C. 380, 680 S.E.2d 208 (2009).

Evidence offered by the defendant is disregarded when considering a motion to dismiss unless the evidence is "favorable to the State or does not conflict with the State's evidence." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002). Finally, our Supreme Court has made clear that "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000).

We conclude that the evidence offered at trial, taken in the light most favorable to the State, was sufficient to support Defendant's convictions under both theories of criminal liability. Although Defendant argues that she never said anything to the other participants to indicate that she had a common plan or an intent to aid them in their crimes, neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct. *See State v. Hill*, 182 N.C. App. 88, 93, 641 S.E.2d 380, 385 (2007) ("The theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes." (citation and quotation marks omitted)); *State v. Allen*, 127 N.C. App. 182, 185, 488 S.E.2d 294, 296 (1997) ("Communication of intent [to aid or abet] to the perpetrator may be inferred from the defendant's actions and from his relation to the perpetrator. . . . [A defendant's] presence alone may be sufficient when the [defendant] is a friend of the perpetrator and the perpetrator knows the friend's presence will be regarded as encouragement and protection.").

The State offered evidence, through the testimony of several of the other participants,[1] that Defendant (1) was present for the discussions and aware of the group's plan to rob Wiggins; (2) noticed Mangold's gun because it was similar to the one "she had got shot with prior in her life;" (3) was sitting next to Miles in the van when he loaded his shotgun; (4) told the group that she did not want to go up to the house but remained outside the van; (5) walked toward the house to inform the others that Mangold and Goolsby had fled; (6) told McCutcheon and Johnson "y'all

1. McCutcheon died before Defendant's trial, but her interview with law enforcement officers on 17 September 2008 was introduced at trial under Rule 804 of the North Carolina Rules of Evidence.

need to come on;" (7) attempted to start the van when McCutcheon returned but could not release the parking brake; and (8) assisted in unloading the goods stolen from Wiggins' house into Miles' apartment once they returned to Georgia.

This evidence — and the reasonable inferences that may be drawn from it — is relevant evidence that a reasonable juror could conclude was adequate to support the conclusion that Defendant remained in the vicinity of the crime scene, was willing to render assistance, and did, in fact, aid in the perpetration of the offenses by informing the others that Goolsby and Mangold "ran off" and encouraging everyone to hurry up and leave. Defendant's testimony that she was not aware of what was happening and did not act pursuant to a common plan or intend to offer assistance is not considered when ruling on the sufficiency of the evidence and did not warrant a dismissal of the charges. *See State v. Agustin*, ___ N.C. App. ___, ___, 747 S.E.2d 316, 318 (2013) ("Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." (citation and quotation marks omitted)). Thus, the determination of whether Defendant was criminally responsible for these offenses under either an aiding and abetting theory or an acting in concert theory was a question for the jury.

V. Ineffective Assistance of Counsel

[5] Finally, Defendant contends that her trial counsel's failure to make a motion to dismiss at the close of all of the evidence deprived her of her constitutional right to effective assistance of counsel. We disagree.

In order to establish ineffective assistance of counsel, "[a] defendant must first show that [her] defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced [her] defense." *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004), *cert. denied*, 546 U.S. 830, 163 L.Ed.2d 80 (2005).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

However, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

As discussed above, the State presented sufficient evidence to withstand a motion to dismiss the charges against Defendant under the acting in concert and aiding and abetting theories of criminal liability. As such, we cannot conclude that Defendant was prejudiced by her counsel's failure to make a proper motion to dismiss the charges. Therefore, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we vacate Defendant's conviction for attempted murder and remand to the trial court so that it may arrest judgment with respect to at least one of Defendant's felony convictions pursuant to the merger doctrine.

NO ERROR IN PART; VACATED IN PART; REMANDED IN PART.

Judges HUNTER, JR. and ERVIN concur.

STATE v. YOUNG

[233 N.C. App. 207 (2014)]

STATE OF NORTH CAROLINA
v.
JASON LYNN YOUNG

No. COA13-586

Filed 1 April 2014

1. Evidence—first-degree murder—civil pleadings and judgment—proof of fact alleged—danger of unfair prejudice—outweighed probative value

The trial court violated N.C.G.S. § 1-149, abused its discretion, and committed plain error in a first-degree murder trial by admitting into evidence a default judgment in a wrongful death suit, the complaint in that suit, and a complaint in a child custody suit which stated that defendant killed the victim. The evidence was incompetent under N.C.G.S. § 1-149 because it was used against defendant as proof of a fact alleged in it; specifically, that defendant killed the victim. It was the duty of the trial court to exclude the evidence, regardless of whether defendant objected to it on that basis at trial. Furthermore, admitting the evidence was an abuse of discretion because defendant's presumption of innocence was irreparably diminished by the evidence from the civil actions, especially when the presiding judge in the murder trial was the presiding judge in the wrongful death suit, and the danger of unfair prejudice vastly outweighed the probative value in this case. Additionally, the trial court abused its discretion by admitting the evidence under a misapprehension of the law where the trial court failed to conduct an inquiry concerning N.C.G.S. § 1-149.1.

2. Evidence—hearsay statements—child—six days after event—excited utterance

The trial court did not err in a first-degree murder trial by allowing into evidence statements made by a two-and-a-half-year old child to daycare workers that were admitted via the workers' testimony. The statements were relevant to show that the child may have witnessed the murder of her mother. Furthermore, even though the statements were made six days after the incident, the statements merited the application of the excited utterance exception to the hearsay rule.

3. Constitutional Law—right to remain silent—pre-arrest silence—does not extend to failure to speak with non-officers

The trial court did not commit plain error in a first-degree murder case by instructing the jury that it could consider defendant's failure to speak with friends and family about his wife's murder as substantive evidence of his guilt. A defendant's silence to non-officers may provide substantive evidence of guilt because statements or silence to questioning from non-police officers are not granted the same protections under the Fifth Amendment and are probative of a defendant's mental processes. Furthermore, defendant's pre-arrest silence coupled with evidence that whoever killed the victim did so with premeditation and deliberation and the limited referral to defendant's silence about the murder to friends and family did not rise to the level of plain error having a probable impact on the verdict.

Appeal by Defendant from judgment entered 5 March 2012 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery, Assistant Attorney General Amy Kunstling Irene, and Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Jason Lynn Young ("Defendant") appeals a jury verdict finding him guilty of first-degree murder of his wife, Michelle Fisher Young ("Michelle"). Defendant argues that the trial court erred by admitting evidence of the entry of a default judgment in a wrongful death action and a child custody complaint against Defendant in his subsequent criminal trial. We agree, vacate the judgment, and remand for a new trial.

I. Facts & Procedural History

The Wake County Grand Jury indicted Defendant for first-degree murder on 14 December 2009. Defendant's case was tried in Wake County Superior Court on 31 May 2011 with Judge Donald W. Stephens

presiding. On 27 June 2011, a mistrial was declared when the jury deadlocked eight to four to acquit Defendant.

Defendant's retrial began at the 17 January 2012 session of Wake County Superior Court, with Judge Stephens again presiding. On 5 March 2012, the jury found Defendant guilty of first-degree murder and sentenced Defendant to life imprisonment without parole. Notice of appeal was given in open court. The testimony presented at trial tended to show the following facts.

A. State's Evidence

Michelle Young was found at her home by her sister, Meredith Fisher ("Meredith"), around 1:00 p.m. on 3 November 2006. Meredith found Michelle after Defendant called Meredith, asking her to retrieve some printouts of eBay searches for Coach purses. Defendant was out of town on a business trip and left a voicemail for Meredith stating his plan to purchase these purses as a belated anniversary present. Defendant did not want Michelle to find out beforehand.

Meredith complied with Defendant's requests and entered the Youngs' home through the garage door, which was broken, and then through the unlocked kitchen door to the home's mudroom. Meredith noticed her sister's car was in the garage and that her keys and purse were visible near the kitchen counter. After entering, Meredith called out Michelle's name and heard no response. Meredith heard the Youngs' dog, "Mr. G.," whimpering, but she did not see him. The house was cold.

As Meredith ascended the home's stairs, she saw what she thought was dark red hair dye at the top of the staircase in the bathroom of the Youngs' two-and-a-half-year-old daughter, Emily.[1] Meredith first thought that Emily had smeared hair dye around the home and that Michelle would be angry about the mess. When Meredith reached the top of the stairs and looked to the left, she saw Michelle lying on the floor, surrounded by a large amount of blood.

Meredith called 911, and as she did, Meredith said "[Emily] lifted up the covers and just kind of stared at me and I just kind of stared back at her and then she just kind of got on me and clung to me as I called 911." During the call, Emily continually asked for band-aids and said that her mother "has boo-boos everywhere." The 911 operator asked Meredith if Michelle had any personal problems, to which Meredith replied

1. The pseudonym "Emily" is used to protect the identity of the child involved in this case.

"[u]m not really. You know her and her husband fight a little bit, but nothing too ridiculous." Meredith also told the 911 operator that her "niece is very smart for her age" and that she thought Emily was saying "there was somebody in the house." Paramedics and the Wake County Sheriff's Office responded to Meredith's call.

Emily was not injured and appeared "clean" when Meredith arrived, except for some dried blood on Emily's toenails and on the bottom of her pajama pants. Meredith said she did not clean Emily. Emily was wearing fleece pajamas, was not wearing underpants or footwear, and did not urinate or defecate on herself or the bed. Emily clung to Meredith's hip until they both were taken away by emergency personnel. Later, Meredith called her mother Linda Fisher ("Linda") in New York to tell her of Michelle's passing and later told Defendant's mother Pat Young ("Pat") of Michelle's death.

Sheriff's officers found Michelle with a large amount of coagulated, dried blood around her body and with blood splattering against the walls of her bedroom. Michelle's body was discolored, cold, and stiff. She was not wearing shoes and was dressed in sweatpants and a zip-up sweatshirt. Blood was observed on the opposite side of the bed from where Meredith found Emily. Defendant's DNA and fingerprints were present in the bedroom, although none of his fingerprints contained blood.

Michelle was lying face-down just outside of a closet labeled "his closet." A child's doll was near Michelle's head. Blood was also found on the exterior of this closet, and inside of the closet door. The only blood found outside of the second floor of the Youngs' home was found on the doorknob leading from the kitchen to the garage, and its DNA markers were consistent with Michelle's DNA. No blood was found in or on Defendant's vehicle, his clothes, or in the hotel room where he stayed on 2 November 2006.

The medical examiner who conducted the autopsy, Dr. Thomas Clark ("Dr. Clark"), opined that Michelle experienced blunt force trauma to her head and body. The trauma included a broken jaw, skull fracturing, brain hemorrhaging, lacerations, abrasions, and dislodged teeth. Dr. Clark stated that there were likely at least thirty blows delivered to Michelle, and the medical examiner testified that he thought the blows were inflicted by "a heavy blunt object" with a rounded surface that produced crescent-shaped skull fractures. Dr. Clark said the autopsy did not produce evidence of a sexual assault against Michelle. Michelle was approximately twenty weeks pregnant when she passed away.

Small footprints in blood, consistent with a child's footprints, were found around the bedroom and at the top of the stairwell landing. Investigators testified that blood was smeared on the walls at a child's level in Emily's bathroom. Investigators said the blood smearing could indicate that Emily was in her bathroom with the door closed. Investigators did not find blood in the sink or bathtub of either the master bathroom or Emily's bathroom.

Several other pieces of evidence were presented by federal, state, and county investigators. Michael Smith of the Federal Bureau of Investigation, Andy Parker of the Wake/Raleigh City and County Bureau of Investigation ("CCBI"), and Karen Morrow of the State Bureau of Investigation testified at trial. Smith, Parker, and Morrow testified that footwear impressions in blood were made by two distinct shoe types on pillows found near Michelle. These included impressions that corresponded with size 12 Hush Puppy Orbital, Sealy, and Belleville shoes which all had the same outsole design. Smith, Morrow, and Parker also testified that there were additional impressions made by a different shoe type, consistent with a size 10 Air Fit or Franklin athletic shoe. Karen Morrow and Greg Tart of the State Bureau of Investigation testified that Defendant at one time owned size 12 Hush Puppy Orbitals, which were purchased on 4 July 2005. The State never produced shoes matching either of the impressions. The State also never produced a murder weapon.

A jewelry box in the master bedroom had two drawers removed, and DNA testing showed four markers that did not include Defendant or Michelle's DNA. Meredith testified that Michelle "didn't really have a lot of fancy jewelry" except her wedding and engagement rings, and that she "always wore" her wedding and engagement rings. Michelle's wedding and engagement rings were both missing from her body when she was found and the rings were not recovered. Additional unidentified fingerprints were found in the house. Investigators found no signs of forced entry.

Printouts from eBay concerning purses were found on an office printer with three fingerprints; one matched Defendant and two others remain unidentified. Forensic analyst Beth Whitney of the CCBI ("Ms. Whitney") also said Internet searches for purses were made between 7:05 p.m. and 7:23 p.m. on 2 November 2006. Ms. Whitney testified that MapQuest inquiries for directions between Raleigh and Clintwood, Virginia, were also made that evening, as well as e-mail logins to Defendant's personal email account. Ms. Whitney also found that, at an undetermined time, Internet searches were made on the Youngs' home

computer for "anatomy of a knockout," "head trauma blackout," "head blow knockout," and "head trauma."

i. Evening of 2 November 2006

Michelle's sorority sister and close friend, Ms. Shelly Schaad ("Ms. Schaad"), arrived at the Youngs' home around 6:30 p.m. on 2 November 2006. Ms. Schaad arrived to have dinner and to watch Grey's Anatomy on television with Michelle. Ms. Schaad said she was surprised Defendant was still home. Ms. Schaad picked up dinner on the way to the Youngs' house and invited Defendant to eat. Defendant said he planned to stop at the Cracker Barrel in Greensboro to have dinner, drive three hours to Galax to spend the evening, and then drive two hours the next morning to a 10:30 meeting. As Defendant left for the evening, Ms. Schaad asked Defendant if he would return for the N.C. State football game on 4 November 2006. Defendant said it depended on whether his father-in-law, Alan Fisher, would come for the weekend. Defendant expected his father-in-law to visit, and Defendant had spent the afternoon cleaning the yard in anticipation of his arrival. Defendant's father-in-law called and cancelled his visit that evening. After he left, Defendant called the Young residence seven times that evening.

Michelle and Ms. Schaad had dinner, bathed Emily, diapered her, and dressed her in pajamas. Michelle and Ms. Schaad talked about an argument between the Youngs over Defendant's mother-in-law, Linda, staying at their home for the majority of the time between Thanksgiving and Christmas. Defendant was upset with the length of her potential stay.

Ms. Schaad testified that she had an "eerie feeling" that evening. Ms. Schaad asked Michelle if she was scared to be alone. Ms. Schaad testified that Michelle

> proceeded to say, you know, Jason's heard a lot of noises lately around the house, you know, but her thoughts were, you know, if -- and her exact words to me, if someone's going to break in and their intention is to kill you, then that's what they're going to do, and it was very unsettling.

Ms. Schaad said she felt like the two were being watched and asked Michelle to walk her to her vehicle before she left that evening.

ii. Defendant's Location on 2 and 3 November 2006

Defendant purchased gasoline in Raleigh at approximately 7:30 p.m. on 2 November 2006 and then went to a Cracker Barrel restaurant in Greensboro. Defendant called his mother Pat, who lived in Brevard,

while at the Raleigh gas station. Defendant paid for his meal at the Cracker Barrel at 9:25 p.m. and checked into a room at the Hampton Inn in Hillsville, Virginia at 10:54 p.m. Data from the keycards used to gain access to the hotel rooms showed that Defendant entered his room at 10:56 p.m. and did not use his keycard to re-enter his hotel room for the remainder of his stay.

Security camera footage tended to show that Defendant wore a light shirt, jeans, and brown slip-on shoes at the Cracker Barrel and upon entering the Hampton Inn. Two pairs of brown slip-on shoes were found in Defendant's vehicle when police later seized it on 3 November 2006.

Defendant was also captured on video at the hotel just before midnight at the front desk and walking down a hallway that lead to stairs and an exit door, wearing what appeared to be a darker colored shirt with a light-colored horizontal stripe across the chest. Defendant was not shown on surveillance footage for the remainder of the evening.

The night-clerk at the Hampton Inn distributed check-out receipts and hung copies of the USA Today on door handles between 3:00 a.m. and 5:00 a.m. or later. Both the receipt for Defendant's stay as well as a weekend edition of the USA Today were found in Defendant's Ford Explorer on 3 November 2006, when police seized it.

Early in the morning on 3 November 2006, Hampton Inn Clerk Mr. Keith Hicks ("Mr. Hicks") noticed that the emergency door on the first floor at the western end of the hotel was propped open with a small red rock. Mr. Hicks removed the rock and shut the door. Immediately next to the door was a glass door that could only be accessed via keycard between 11:00 p.m. and 6:00 a.m. A sign next to the door listed the hours the door was locked; at all other times the glass door was unlocked.

When Mr. Hicks returned to the front desk and reviewed the hotel's surveillance cameras, he noticed that the camera was malfunctioning in the same stairwell where the door was left ajar. Mr. Hicks later determined that the camera was unplugged, and Mr. Hicks asked a maintenance worker, Elmer Goad ("Mr. Goad"), to plug the camera in again. Mr. Goad testified that if someone were six feet tall, they would be able to easily reach the camera's plug. The last image from the camera was at 11:19:59 p.m. on 2 November 2006, and no images were recorded until 5:50 a.m. on 3 November 2006, when Mr. Goad got a stepladder and plugged the camera in again.

The camera worked properly from 5:50 a.m. until 6:34 a.m., but at 6:35 a.m., the camera was pointed at the ceiling. Mr. Goad put the

camera back in position and focused it on the bottom of the stairs at 6:38 a.m. The hotel said the camera was never unplugged previously and that the only other time that camera was tampered with was several years prior, when some guests snuck in and out of the exit door. CCBI investigator Andy Parker performed a fingerprint analysis on the camera and testified that the State did not find Defendant's fingerprints on the security camera. Investigator Eddie McCormick ("Investigator McCormick") also testified that tests conducted by the State did not show that any fibers were transferred from the Hampton Inn where Defendant stayed on 2 November 2006 to the Youngs' home at 5108 Birchleaf Drive.

The hotel had no record of when Defendant left on 3 November 2006. The State's first evidence showing his location was from a call he made to his mother Pat around thirty miles from the hotel near Wythville, Virginia at 7:40 a.m. Defendant made several calls to his mother and others while driving to Clintwood, with several lasting ten seconds or less. Investigator McCormick testified it was possible the large number of short calls could be from dropped phone calls, but he also said that "knowing what I know about telephonic investigations," the call frequency reflected a person who was panicked.

Defendant was thirty minutes late to his 10:00 a.m. sales call in Clintwood, Virginia. Defendant purchased gas in Duffield at 12:06 p.m. and then left a voicemail for Meredith.

Detective Richard Spivey of the Wake County Sheriff's Office ("Detective Spivey") testified that his deputy drove between Raleigh and Hillsville, Virginia in two hours and twenty-five minutes without traffic. Three gas receipts were found in Defendant's vehicle, one from Raleigh on 2 November 2006, Duffield on 3 November 2006, and Burlington at 8:32 p.m. on 3 November 2006. Officers also canvassed gas stations between Hillsville and Raleigh. Ms. Gracie Calhoun ("Ms. Calhoun"), who worked at the Four Brothers BP in King, North Carolina, said she saw a man drive to a pump and attempt to pump gas in the early morning hours of 3 November 2006. The State's investigators said that the Four Brothers BP was along the most direct route between Raleigh and Hillsville and was the only gas station open at that particular exit.

Ms. Calhoun was shown a photograph of Defendant's white Ford Explorer on 5 November 2006 and asked if she saw the car on 3 November 2006. When Ms. Calhoun was shown Defendant's photograph, she identified him as the vehicle's driver. Ms. Calhoun was not asked to provide a physical description prior to seeing Defendant's photo, and stated that the Defendant was "just a little bit taller than me," although Ms. Calhoun

is five feet tall and Defendant is six-foot-one. Ms. Calhoun stated that she had not seen any news reports about the case when she was asked about the vehicle. Ms. Calhoun said she remembered Defendant specifically because he cursed at her, and that it left an impression because only one other person had ever cursed at her during her tenure at the Four Brothers BP. It is around a forty to forty-five minute drive from the Hillsville Hampton Inn to the Four Brothers BP.

Ms. Calhoun testified that Defendant came into the store and cursed at her because the pumps were not on, threw $20 at her, pumped $15 of gas and drove off without returning for change. Store records showed several gas and in-store purchases between 5:00 a.m. and 5:40 a.m., including a $15 gas purchase at 5:27 a.m. and a $20 gas purchase at 5:36 a.m.

After the first trial concluded, Defendant's counsel learned that Ms. Calhoun had received disability benefits since she was a child. Ms. Calhoun stated that when she was six-years-old, she was hit by a truck. This accident caused her brain to be dislodged from her skull and to fall onto the street. Doctors reinserted her brain and Ms. Calhoun stated that she has had memory problems her entire life as a result of the accident.

The State presented evidence that a newspaper delivery person passed by the Youngs' home between 3:30 a.m. and 4 a.m. and noticed that the interior, exterior, and driveway lights were on, which she considered unusual at that hour. The delivery person testified that she saw a light colored SUV in front of the home and that a minivan was across the street.

After Defendant arrived and learned from his mother of Michelle's passing, he spoke with Meredith over the phone. Meredith told Defendant to come to her home because the Youngs' home was a crime scene. When speaking to Meredith, he asked about Emily, what had happened, and seemed upset over the phone.

Officers began to question Meredith and friends of the Youngs about possible marital problems. After the questioning, Defendant's friends Josh Dalton and Ryan Schaad suggested he not speak to police until he retained counsel. On counsel's advice, Defendant never answered any questions from law enforcement or spoke about Michelle's death with friends or family.

Defendant arrived at Meredith's home along with his mother, sister, and brother-in-law around 9 or 10 p.m. on 3 November 2006. Defendant hugged Meredith and went to see Emily. Meredith said Defendant was wearing "dress pants, dress shoes, a thermal cut crew neck shirt, a

couple buttons here, and a dress shirt over that open." Police arrived at the home and Defendant refused to speak with them. Later in the evening, Defendant and Linda were alone in the home, watching Emily, and Linda said Defendant told her that his lawyer said he could not talk to anyone and that he was "going to take a hit on the house."

iii. Marital Difficulties

The State produced several witnesses who testified that the Youngs experienced difficulties in their marriage, including Meredith, Ms. Schaad, and Defendant's friend Josh Dalton. Ms. Schaad described the Youngs' relationship as "volatile."

Meredith also noted marital problems between Michelle and Defendant and suggested divorce to Defendant and Michelle. Meredith said the Youngs "would get in screaming matches. They'd fight in public." Meredith testified that on 1 November 2006, Michelle told Meredith that she had fought with Defendant and that he threw a remote at her. Meredith averred that before her death, Michelle became "withdrawn," "depressed" and "miserable."

On 12 September 2006, Defendant sent an e-mail to the work address of his former fiancée, Genevieve Cargol ("Ms. Cargol") professing his love for her. Defendant and Ms. Cargol did not have contact for several years before this e-mail, which Ms. Cargol did not receive at the time. Ms. Cargol testified that Defendant was violent at several points during their relationship, once punching and breaking Ms. Cargol's car windshield, punching a hole in a wall, and forcibly removing the engagement ring from her finger.

Defendant had extra-marital affairs with two other women while married to Michelle. Defendant communicated with one of these women, Michelle Money ("Ms. Money") regularly and engaged in sexual intercourse in Orlando, Florida on 7 October 2006. Defendant's friend Josh Dalton stated that Defendant said "he felt like he was in love with" Ms. Money. Defendant and Ms. Money discussed meeting on 3 through 5 November 2006, although Ms. Money said Defendant did not want to meet that weekend as he had a business meeting as well as friends and family staying at his home. Defendant and Ms. Money also contacted each other several times by phone on 2–3 November 2006. Ms. Money said Defendant sounded normal during the calls and that he also mentioned having left printouts in his office for a Coach purse he planned to buy for Michelle. Defendant also had a sexual relationship with a different woman in the Youngs' home while Michelle was out of town on another occasion.

On 27 October 2006, Michelle saw a counselor by herself, Ms. Kimberly Sargent. Ms. Sargent testified that Michelle "cried the entire session." Ms. Sargent said her "assessment of the situation was that [Michelle] was being verbally abused."

iv. Emily's Statements at Daycare

Emily returned to daycare the Monday after Michelle's death. The State introduced testimony of Emily's daycare teacher, Brooke Bass ("Ms. Bass"). Defendant objected to admitting this testimony and was overruled.

Ms. Bass testified that Emily kept to herself more than usual that week. Ms. Bass said Emily asked for a "mommy" doll and was given a bucket of dolls to play with. Ms. Bass saw Emily select a female doll with long brown hair that Emily called the "mommy doll," and a second female doll with short hair. Ms. Bass stated that Emily began hitting the two dolls together. Another daycare teacher, Ashley Palmatier ("Ms. Palmatier") asked Emily what she was doing and said Emily hit the dolls together and said "mommy's getting a spanking for biting." Emily then laid the doll face-down on a dollhouse bed, saying "mommy had booboos all over, mommy has red stuff all over." Emily's teachers told police what she said at daycare. Ms. Bass testified that Emily did not return to the daycare after these statements were made. These statements were not introduced at Defendant's first trial.

v. Introduction of Civil Suits

Evidence of two separate civil suits was introduced at Defendant's second trial over Defendant's objection. The State introduced evidence showing Linda, on behalf of the estate, filed a wrongful death action and a request for a slayer declaration against Defendant on 29 October 2008. Defendant did not respond to the suit, and on 5 December 2008, Judge Stephens heard Plaintiff Linda's motion for entry of a default judgment. Judge Stephens reviewed the affidavits and entered a judgment that Defendant "unlawfully killed" Michelle. Defendant was the beneficiary of Michelle's $4 million life insurance policy, but did not make a claim on the policy. Defendant's assets were seized as a result of the $15 million judgment for Linda.

After Michelle's death, Defendant took Emily to Brevard, and the Fisher family was allowed to see Emily at several visits. Defendant later did not want the Fishers to have contact with Emily. Defendant refused to agree to a visitation schedule, and the Fishers filed suit.

The Fishers filed a child custody complaint against Defendant on 17 December 2008. The complaint said Defendant "brutally murdered Michelle Marie Fisher Young . . . at their residence. Michelle was pregnant with [Defendant's] son at the time of her murder. Upon information and belief [Emily] was in the residence at the time [Defendant] murdered her mother." The lawsuit requested a psychological evaluation of Defendant, and would have required discovery and depositions. Defendant agreed to a consent order and transferred primary physical custody of Emily to Meredith. The consent order required that no discovery or depositions be taken.

vi. Defendant's Mistrial Testimony

Defendant testified at his first trial, and the State introduced his testimony at the retrial. Defendant denied killing his wife, denied being present when she was killed, and denied having any knowledge of who killed Michelle. Defendant said that he loved Michelle, that he did not plan to divorce Michelle, and that he did not plan to leave Michelle for any of the other women he had sexual relationships with. Defendant testified that after Emily was born, Michelle had a miscarriage. Defendant said he and Michelle began trying to conceive another child as soon as Michelle received medical clearance to bear another child. Defendant said he was "ecstatic" that he would soon have a son.

Defendant testified that he thought he and Michelle didn't fight much more than other couples, but that the couple "fought more openly than other couples." Defendant said he encouraged his sister-in-law Meredith to mediate disputes between Michelle and Defendant. Defendant testified that his disputes with Michelle never turned physical. Defendant also testified that he had "a lot of guilt" for spending his anniversary weekend with Ms. Money, rather than his wife Michelle, and so he planned to purchase a Coach handbag to "make up for a lot in a big way." Defendant called Meredith several times to retrieve the papers from the family printer because he "really wanted it to be a surprise." Defendant thought that the gift had special significance because it was a leather purse for his and Michelle's third anniversary, which is commonly known as the "leather anniversary."

Defendant said he had just begun a new job with an electronic health records company, and a schedule was set for him to make a sales call in Clintwood, Virginia. Defendant's sales call was at 10:00 a.m. on 3 November 2006, so Defendant said he planned to "break the trip up" by staying at a hotel about half-way between Clintwood and Raleigh. Defendant said he did not make a hotel reservation prior to staying at

the Hampton Inn in Hillsville. After checking into the hotel, Defendant said he called Michelle and Ms. Money.

Defendant said he was nervous about the sales call, as it was his first solo sales call. Defendant said he wanted to review the software on his computer and forgot his charging cable for his computer in his car. Defendant said he left the hotel room door slightly ajar so he could re-enter without disturbing his neighbors. As he left to go to his vehicle, Defendant said he went out the exit door, noticed it was a type of door which would not allow re-entry, broke off a piece of shrubbery to prop the door, retrieved his charger and re-entered the room.

Defendant said he finished on his computer around 11:53 p.m. and said he wanted to smoke a cigar and catch up on some sports news. Defendant said he then picked up a newspaper from the front desk, walked down the hallway, inserted a stick in the door, went outside and smoked. Defendant said he later re-entered and went to sleep. Defendant also said he arrived thirty minutes late for his appointment the next morning because he had gotten lost. Defendant said he tried to call his appointment to let them know he would be late, but that the cell phone service was "nil to one bar."

After his sales meeting, Defendant drove south toward Brevard, arrived at his mother's house, and his stepfather told him that Michelle was dead. Defendant said he "just broke" and cried. Defendant said some friends called and told him he needed "to get a lawyer before" talking to anyone. Defendant's sister left a message for an attorney she previously employed, and Defendant eventually met with a lawyer, who advised him to not speak with police.

Defendant also said he purchased a pair of brown Hush Puppy Orbital shoes, and that they were donated to Goodwill by Michelle prior to 2 November 2006. Defendant also introduced a photograph of himself in 2007 at Emily's third birthday party, showing Defendant wearing a dark pullover with a stripe on it. Defendant also said he could not afford a lawyer for a custody fight between Defendant and Michelle's family. Defendant also made internet searches on his home computer for head trauma and anatomy of a knockout, which he said he made after being the "first responder" to a car accident where a person was knocked out.

The State offered several pieces of evidence to rebut Defendant's testimony. The State noted that prior to trial, Defendant received copies of all the State's investigative files, which included field and interview notes. The State's analysis of Defendant's computer activities did not show Defendant completed work-related activities on his computer that

evening. The State produced testimony from Meredith and other friends of the Youngs that Defendant did not like smoking and that he disliked the smell of smoke. The State also introduced evidence showing that on 2 November 2006 at 11:40 p.m. it was cold and windy where Defendant said he smoked the cigar. Detective Spivey testified that no "substantial outerwear" besides a suit jacket was found in Defendant's luggage.

The State rested its case on 24 February 2012. Defendant moved to dismiss the case at that time. The trial court denied Defendant's motion, and Defendant began presenting his case on 27 February 2012.

B. Defendant's Evidence

Defendant's mother Pat said Defendant called her the evening of 2 November 2006 and discussed bringing home a wash stand and an antique dresser when Defendant's family visited at Thanksgiving. Defendant said he would call Michelle to see if he could spend the evening at their home and pick the furniture up, as he was nearby in southern Virginia. Pat said Defendant noted that he would have to leave early on Saturday to get home for his guests who were attending the N.C. State football game.

Defendant was thirty minutes late to his meeting at Dickinson Hospital with Jennifer Sproles; he said he was lost and was not able to call because of poor cell phone service. Defendant called Pat in the morning on 3 November 2006 to tell her he would pick up a wash stand at her home in Brevard. Defendant introduced testimony from an AT&T analyst who said the large number of short phone calls were consistent with dropped phone calls. Defendant later called Pat asking her to call Meredith about the eBay printouts, which Pat did.

Before Defendant arrived at her home on 3 November 2006, Pat received a call from Linda stating that Michelle was deceased. Pat decided not to tell Defendant over the phone. When Defendant arrived at her home, Defendant's stepfather told Defendant of Michelle's death, and Defendant fell to the ground and began crying.

Defendant's sister Heather McCracken ("Heather") and his brother-in-law, Joe McCracken ("Joe"), came to the home to see Defendant, who was pale, crying, and laying with a blanket draped over himself in a recliner. Joe drove Defendant, Pat, and Heather in his Ford Explorer to Meredith's home in Fuquay-Varina. During the ride, Defendant said he would lose his home and that there was no way he could afford the home. Defendant's luggage remained in his vehicle and Pat said nothing was

removed between his arrival in Brevard and their arrival at Meredith's home in Fuquay-Varina.

Pat and Defendant's family later packed up the Youngs' home two months after Michelle's death and found a cigar humidor that said "Quick Set" on the exterior. Defendant previously sold Quick Set locks. A credit card purchase was made on a credit card in Michelle's name at a Tampa, Florida store called "Cigars by Antonio."

Defendant introduced testimony of a newspaper deliveryman who drove by the Youngs' home at 5108 Birchleaf Drive around 3:50 a.m., noticed that nothing seemed unusual, and did not see a vehicle.

A neighbor, Cynthia Beaver ("Ms. Beaver"), testified that she passed by the Youngs' home between 5:20 and 5:30 a.m. and saw that the home's lights and driveway lights were on, and that there was a light-colored "soccer-mom car" with its lights on and placed at the edge of the driveway. Ms. Beaver said a white male was in the driver's seat and another person was in the passenger's seat, who may have been a female. Another neighbor, Fay Hinsley, said she saw an empty S.U.V. at the edge of the driveway between 6 and 6:30 a.m.

Unlike the first trial, Defendant did not testify at his second trial. Defendant rested his case on 29 February 2012. The jury returned a unanimous verdict finding Defendant guilty of first-degree murder of Michelle. The trial court then entered a life without parole sentence as required by law.

II. Jurisdiction

Defendant's appeal from the superior court's final judgment lies of right to this Court pursuant to N.C. Gen. Stat. §§ 7A–27(b), 15A–1444(a) (2013).

III. Analysis

a. Introduction of Civil Judgment and Pleadings

[1] Defendant argues that introduction of a default judgment and complaint in a wrongful death suit, which stated that Defendant killed Michelle, is reversible error. We agree. Defendant also argues that introducing the child custody complaint into evidence against Defendant was reversible error. We agree.[2]

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2. Because we grant Defendant a new trial based on the trial court's improper admission of evidence under N.C. Gen. Stat. § 1-149, we do not address Defendant's motion for appropriate relief because it is moot.

Introduction of the complaints and default judgment concern whether the trial court erred by violating N.C. Gen. Stat. § 1-149 (2013). Introduction of this evidence is reviewed *de novo*. *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) (holding that a violation of a statutory mandates is reviewable de novo without objection).

The State argues that *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985) precludes *de novo* review of these issues because Defendant cited only Rule 403 of the Rules of Civil Procedure when objecting to introduction of the default judgment and complaint. We disagree. *Ashe* recognizes that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *Id.* at 39, 331 S.E.2d at 659. Further, "'where evidence is rendered incompetent by statute, it is the *duty of the trial judge to exclude it*, and his failure to do so is reversible error, whether objection is interposed and exception noted or not.'" *Christensen v. Christensen*, 101 N.C. App. 47, 54–55, 398 S.E.2d 634, 638 (1990) (quoting *State v. McCall*, 289 N.C. 570, 577, 223 S.E.2d 334, 338 (1976)) (emphasis added), *superseded by statute as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000).

Under *de novo* review, we examine the case with new eyes. "[*D*]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

The first issue concerning admitting evidence of the default judgment may also be reviewed as an evidentiary matter *de novo*, for an abuse of discretion, and under plain error. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986); *State v. Martinez*, 212 N.C. App. 661, 664, 711 S.E.2d 787, 789 (2011); *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011).

"When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006).

Plain error is explained in *State v. Lawrence*, 365 N.C 506, 723 S.E.2d 326 (2012):

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

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

N.C. Gen. Stat. § 1-149 provides that "[n]o pleading can be used in a criminal prosecution against the party as *proof of a fact admitted or alleged in it*." *Id.* (emphasis added).[3] Further:

> [A] judgment in a civil action is not admissible in a subsequent criminal prosecution although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail.

State v. Dula, 204 N.C. 535, 536, 168 S.E. 836, 836–37 (1933) (quotation marks and citation omitted).

Dula is a criminal embezzlement case where a civil complaint showing a contract for the sale of thirteen pianos was admitted by the defendant's answer. The defendant alleged in his answer that he had paid the full price of the pianos described in the complaint and had settled the contract with plaintiff's agent. *Dula*, 204 N.C. at 535, 168 S.E. at 836. At the defendant's criminal trial, evidence from the civil pleadings was introduced to show that the pianos involved in the civil dispute were the identical pianos at issue in the criminal dispute, thus seeking to prove a fact from the pleadings in a criminal case. *Id.* at 536, 168 S.E. at 836. The trial court was reversed for allowing this evidence at the defendant's criminal trial. *Id.* at 537, 168 S.E. at 837. Thus, *Dula* provides an example of N.C. Gen. Stat. § 1-149 as applied and illustrates the second portion

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3. We note that N.C. Gen. Stat. § 1-149 was not brought to the trial court's attention by the State or Defendant's counsel. In our review, we did not uncover mention of N.C. Gen. Stat. § 1-149 in common references, such as the Trial Judges' Bench Book.

of the statute, namely that civil judgments and/or pleadings may not be used to prove a fact contained therein at a subsequent criminal trial.

In *State v. Wilson*, 217 N.C. 123, 7 S.E.2d 11 (1940), our Supreme Court recognized that reading "certain allegations of fact contained in the complaint in a civil action against [the defendant]" and asking the defendant "if he had not failed to deny them by any answer" would infringe upon the statutory guarantee against using pleadings in "'a criminal prosecution against the party as proof of a fact admitted or alleged.'" *Id.* at 126–27, 7 S.E.2d at 13 (quoting *State v. Ray*, 206 N.C. 736, 737, 175 S.E. 109, 110 (1934)).

Wilson was also a criminal embezzlement case where a civil court's order finding the defendant had "made loans to himself of his wards' funds [and] mismanaged the funds belonging to the estate of his wards." *Id.* at 126, 7 S.E.2d at 13. The court didn't question "[t]he propriety of the action of Judge Sink in making the orders referred to," but did find it was "prejudicial to the defendant on this trial, charged with a felony, to have the weighty effect of those statements, opinions and court orders, relative to the matter then being inquired into, laid before the impaneled jury." *Id.* at 126, 7 S.E.2d at 12. The Supreme Court said it would be proper to cross-examine the defendant at length about his transactions as administrator of the estate for impeachment purposes, "but it would not have been competent for the State to offer affirmative evidence of these collateral matters" unless they were so connected with the indicted charge as to illuminate the question of "fraudulent intent or to rebut special defenses." *Id.* at 127, 7 S.E.2d at 13.

The State cites several cases where civil pleadings and judgments were admitted in a subsequent criminal trial. *State v. Rowell*, 244 N.C. 280, 93 S.E.2d 201 (1956); *State v. Phillips*, 227 N.C. 277, 41 S.E.2d 766 (1947); *State v. McNair*, 226 N.C. 462, 38 S.E.2d 514 (1946); *State v. Fred D. Wilson*, 57 N.C. App. 444, 291 S.E.2d 830, *disc. rev. denied*, 306 N.C. 563, 294 S.E.2d 375 (1982). None of these cases involve default judgments against a defendant, wrongful death judgments against a defendant, or non-testifying defendants. Additionally, these cases involve admitting pleadings and/or judgments in a civil case at a subsequent criminal trial for a different purpose than as proof of a fact alleged in the criminal trial.

In *Rowell*, the defendant was charged criminally for involuntary manslaughter, as he caused his passenger's death after colliding with a large truck operated by Mr. Wiley Goins. 244 N.C. at 280, 93 S.E.2d at 201. The decedent's estate filed a wrongful death action against Mr. Goins,

which was pending at the time of the defendant's trial. *Id.* Mr. Goins testified on behalf of the State, and on cross-examination, the defendant's counsel asked Mr. Goins whether he was facing a wrongful death suit from the decedent's estate. *Id.* The trial court refused to allow Mr. Goins to be cross-examined on the pending lawsuit. *Id.* The Supreme Court reversed the defendant's conviction, holding that cross-examination of the pending civil action would show the bias of the witness and that the witness had an interest in the outcome of the criminal prosecution of defendant. *Id.*

In *Phillips*, the defendant's relationship with his wife deteriorated when his first wife discovered that he had entered into a bigamous marriage with another woman from Raleigh ("second wife"). 227 N.C. at 278–79, 41 S.E.2d at 767. The defendant was charged with murdering his first wife. *Id.* The second wife testified and the Court held that her testimony "was a proper link in the chain of circumstances tending to show motive." *Id.* at 279, 41 S.E.2d at 766. A complaint filed by the second wife to annul the bigamous marriage was also introduced, but the Court held that the complaint was only used to corroborate the testimony of the second wife and that the error was harmless. *Id.* Thus, the complaint showing a bigamous contract of marriage was not used to show "proof of a fact alleged" by the second wife, but was only used for corroborative purposes. *Id.*

In *McNair*, the defendant was prosecuted for larceny of an automobile. 226 N.C. at 462, 38 S.E.2d at 515. The defendant had filed a civil complaint concerning the ownership of a vehicle and then testified at his criminal trial in a contrary manner from his complaint. *Id.* at 463–64, 38 S.E.2d at 516. The State *explicitly* announced that they were introducing the complaint to impeach the defendant's contrary testimony at trial. *Id.* Thus, the court said "no impingement upon the statute was intended or resulted from the cross-examination." *Id.* at 464, 28 S.E.2d at 516.

In *Fred D. Wilson*, the defendant was prosecuted for obtaining property via false pretenses in a real-estate scheme, and the State presented several outstanding civil judgments against the defendant. 57 N.C. App. at 449–50, 291 S.E.2d at 833. This Court distinguished the case from *Dula*, saying that in *Dula* "pleadings and a civil judgment entered against defendant were erroneously admitted to prove the same facts necessary to obtain a criminal conviction against the defendant." *Id.* at 450, 291 S.E.2d at 834. This Court held that rather than attempting to prove the truth of the facts underlying the civil judgment, the State was attempting to show the defendant's financial motive for committing his crimes in

Fred D. Wilson, as he had defaulted on several judgments due to insufficient funds. *Id.*

This Court addresses a different set of facts than *Fred D. Wilson*, *McNair*, *Phillips*, and *Rowell*. Before the re-trial, Defendant's counsel learned that the State planned to introduce evidence about the civil actions against Defendant. Defendant's counsel did not research whether this evidence was admissible, nor did counsel move prior to trial to exclude the evidence on any ground. Rather, Defendant's counsel requested discovery of the civil attorney's files. The State replied that it planned to produce all public records in the civil case, have a witness explain the documents, and cross-examine Defendant if he testified. The trial court held that the evidence could be inquired into at trial, if relevant.

During the trial, Wake County Clerk Lorrin Freeman ("Ms. Freeman") testified that on 29 October 2008, Linda filed a wrongful death lawsuit against Defendant on behalf of the estate. Ms. Freeman introduced Linda's request for Defendant's disqualification under the slayer statute. Ms. Freeman explained that a wrongful death action is a monetary claim for relief filed against a party who is alleged to have directly caused a decedent's death. The prosecutor requested Ms. Freeman to read the sixth paragraph of the complaint aloud in court in front of the empaneled jury, which said "[i]n the early morning hours of November 3rd, 2006 Jason Young brutally murdered Michelle Young."

Ms. Freeman testified that the file showed no attorney on Defendant's behalf, and she also stated that Defendant did not respond to the suit. Ms. Freeman explained that by failing to answer, Defendant's action had "the legal implication or the legal result of the defendant having admitted the allegations as set forth in the complaint." Ms. Freeman entered a default on 2 December 2008 and thereafter, Linda moved for a default judgment and slayer declaration.

Judge Stephens heard the motion on 5 December 2008. Ms. Freeman testified, over Defendant's objection, that Judge Stephens reviewed the evidence and attachments to the motion and entered a judgment declaring that Defendant killed Michelle. Ms. Freeman also testified that Defendant could have presented evidence in the civil action, and Defendant levied a Rule 403 objection.

In sum, Ms. Freeman read aloud a civil judgment that declared Defendant had killed his wife. Ms. Freeman read aloud that Judge Stephens, the presiding judge in Defendant's criminal trial, entered

judgment against Defendant after reviewing the evidence. Ms. Freeman read aloud that Defendant did not respond to the complaint and informed the jury that his action was legally operative as an admission under a civil standard. Additionally, the trial court admitted a "Child Custody Complaint Motion for Psychological Evaluation" into evidence without any restrictions which also included statements that Defendant had killed his wife Michelle.

The State did not offer an explicit purpose at trial for offering evidence of the default judgment nor did the State offer a purpose for admitting the child custody complaint. The State now articulates an impeachment purpose on appeal, asserting that the civil pleadings and judgment were used to show Defendant's unusual reaction to civil suits and to show Defendant's silence in not responding to the lawsuits cast doubt on his subsequent testimony at his first trial. The State also argues the purpose of introducing the evidence contained in the civil filings was to "show that [Defendant] had great incentives to answer the civil matters and explain the evidence." This stated purpose demonstrates the State's intention of introducing these civil pleadings and judgments: to show proof of Defendant's guilt, in violation of N.C. Gen. Stat. § 1-149.

Further, the State's argument that the civil suits were used to cast doubt on Defendant's 22 June 2011 testimony concerns testimony that the State actually introduced at the second trial. This purpose was not stated at trial, and the impeachment value of introducing these civil suits remains unclear, as Defendant did not file a custody complaint, nor did he testify at the second trial. Essentially, the State is requesting to impeach evidence it offered.

Secondly, the State cannot articulate a corroborative purpose for this evidence. These civil complaints would only be useful in corroborating the opinions of guilt made by Michelle's mother, Linda Fisher. Linda's opinions are themselves inadmissible, leaving no proper corroborative purpose. *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). No *res judicata* effect was applicable. *Dula*, 204 N.C. at 536, 168 S.E. at 837.

The jury instructions did not explicitly prohibit the jury from using the default judgment or the child custody complaint filed against Defendant as proof of Defendant's guilt in the criminal case. The trial court ruled that the civil matters "might be relevant to any number of matters that the jury has already heard and will hear." However, the transcript shows the trial court did not articulate a clear basis for admitting either item or the limited purposes for which the jury could use these judgments:

If a civil complaint is filed by plaintiff and the parties in a civil action are designated plaintiff, the person bringing the complaint, and the defendant, the person or entity being sued, if a civil complaint is filed by a plaintiff with the clerk of Superior Court, Lorrin Freeman and her office, and if a civil summons is issued by an officer of the court commanding the defendant named in the complaint to respond and otherwise answer to the allegations of the complaint within the time required by law and if the defendant named in the complaint is properly served with this complaint and this summons and if the defendant is an adult and is not otherwise incapacitated or in the military and if the defendant fails to file an answer to that civil complaint or otherwise respond to the allegations within the time required by law and if the plaintiff filing the complaint moves that the court to enter judgment in the plaintiff's favor by reason of that failure to respond or answer, then under the rules of civil law in civil cases and under the rules of the court a judgment can be entered in favor of the plaintiff bringing the lawsuit. Both failure for the defendant named to respond or otherwise answer the allegations, for purposes of the civil case that's been filed the allegations of the complaint under those circumstances, whether actually true or not, which have not been denied by the named defendant are deemed in the civil law to have been admitted for the purpose of allowing the plaintiff to have judgment entered in the plaintiff's favor. The entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense.

. . . .

I further instruct you there is evidence that tends to show that a civil complaint was filed in the Civil Superior Court of Wake County against the defendant by Linda Fisher on behalf of the Estate of Michelle Young and that a civil summons was issued by the clerk of the court commanding the defendant to answer or otherwise respond to the allegations of that civil complaint within the time required by law. There is further evidence that tends to show that the defendant was timely served with these documents and that he did not file an answer or otherwise respond to the

> complaint and that a default judgment was entered against him by reason of that failure.
>
> As I previously instructed you, when a defendant in a civil action has been properly served with the civil summons and the civil complaint and fails to timely respond, upon motion of the plaintiff the Court is authorized to enter a civil judgment against the defaulting defendant. For purpose of the civil law, the allegations of the complaint which have not been denied, whether actually true or not, are deemed to be admitted for the purpose of allowing the plaintiff to have a civil judgment entered against the defendant. The burden of proof in a civil case requires only that the plaintiff satisfy the Court or the jury by the greater weight of the evidence that the plaintiff's claims are valid. This means that the plaintiff must prove that the facts are more likely than not to exist in the plaintiff's favor. When there is a default, that burden of proof is deemed in law to be met.
>
> The entry of a civil default judgment is not a determination of guilt by the Court that the named defendant has committed any criminal offense.

Still further, the State does not point to an instance where a trial court has attempted to gain admission of a default judgment and a slayer determination in a homicide prosecution. Defendant points our attention to *In re J.S.B.*, 183 N.C. App. 192, 202, 644 S.E.2d 580, 586, *writ denied*, *review denied*, 361 N.C. 693, 652 S.E.2d 645 (2007), as an example where this Court held that a voluntary manslaughter finding from a termination of parental rights proceeding could not be used if the State commenced a subsequent criminal prosecution against that defendant.

Admitting the wrongful death judgment, the complaint in that case, and the complaint in the child custody case were also abuses of discretion. "When the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under [Rule 403] as a matter of law." *State v. Scott*, 331 N.C. 39, 43, 413 S.E.2d 787, 789 (1992). Defendant's presumption of innocence was irreparably diminished by the admission of these civil actions. This is similar to the prejudice that a jury has when it learns a defendant is previously convicted of a charged offense. *State v. Lewis*, 365 N.C. 488, 498, 724 S.E.2d 492, 499 (2012). Criminal judgments are clearly admissible in slayer actions.

Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 57, 213 S.E.2d 563, 569 (1975). However, as Defendant states, the converse is typically not true because admitting such evidence creates great prejudice against the Defendant's innocence and increases the chance that an unreliable guilty verdict may be rendered. Even greater still is the prejudice to Defendant when a juror is told that the presiding judge in the case reviewed the evidence before the jury and entered a default judgment against a defendant. The danger of unfair prejudice vastly outweighed the probative value in this case and admission of the evidence was abuse of discretion in Defendant's trial. It is also an abuse of discretion to make a ruling under a misapprehension of the law as occurred here, where the trial court conducted no inquiry concerning N.C. Gen. Stat. § 1-149.

Because the trial court disregarded a statute, we hold the trial court erred in admitting evidence of both the entry of default judgment against Defendant and the child custody complaint against Defendant, and because entry of both items was prejudicial to Defendant, we hold that Defendant must receive a new trial. Because we hold that the trial court violated § 1-149 in admitting these civil matters, we do not address Defendant's arguments concerning judicial opinions or Defendant's argument that insufficient evidence existed to deny a motion to dismiss. We continue to address the admissibility of Emily's statements and evidence of Defendant's silence. We address these issues because they are likely to recur at Defendant's re-trial.

b. Admission of Emily's Statements at Daycare

[2] Defendant argues that statements made by Emily to daycare workers that were admitted via the workers' testimony were hearsay outside the scope of any exception and/or overwhelmingly prejudicial. Defendant objected to this evidence at trial. This issue is an evidentiary issue that is reviewed *de novo*. "When the admissibility of evidence by the trial court is preserved for review by an objection, we review the trial court's decision *de novo*." *Martinez*, 212 N.C. App. at 664, 711 S.E.2d at 789. "When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *Johnson*, 209 N.C. App. at 692, 706 S.E.2d at 797.

The State argues that Defendant did not preserve this issue for appellate review. We disagree. After the prosecution advised the court outside the jury's presence that it would put forth two witnesses that would relate Emily's statements at daycare, the following dialogue occurred between Defendant's counsel and the trial court:

> THE COURT: Okay. I know you've objected to the testimony of the witness. We heard Ms. Palmatier Friday afternoon. I take it you object to this line of testimony and evidence in its entirety.
>
> [DEFENSE COUNSEL]: We would, your Honor, on grounds previously stated.
>
> THE COURT: As I understand, your position is that the statement of the child is hearsay and not otherwise admissible, as well as it's not a foundation to show that the capacity of the child to fully understand and appreciate and relate her observations due to her age and that her conduct is also ambiguous.
>
> [DEFENSE COUNSEL]: That is correct, your Honor, as well as confrontation/cross-examination grounds and due process and 403.
>
> THE COURT: And as I understand it, you object to any testimony with regard to the child herself because you contend the testimony with regard to the child is not relevant to any issue in these proceedings.
>
> [DEFENSE COUNSEL]: That is correct.
>
> THE COURT: I mean, the learning and her schooling and observations about the folks at school and things like that.
>
> [DEFENSE COUNSEL]: That is correct, your Honor.
>
> THE COURT: All right. Well, I do believe it is relevant and I have overruled your previous objections and your objections are preserved for the record and the objection goes to the testimony of every witness on this subject as I understand it.

This portion of the trial transcript demonstrates the trial court's granting of a line or continuing objection pursuant to N.C. Gen. Stat. § 15A-1446(d)(10) (2013); *State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996). While Defendant's counsel objected to a question on redirect asking the first daycare worker to compare the size of the dolls to Defendant and Michelle, this was a properly lodged objection as it exceeded the scope of the granted line objection, although the objection was sustained. Defendant's second objection when the second daycare worker took the stand and began to relate hearsay statements was a

simple reaffirmation of the originally granted line objection. Therefore *de novo* review of this issue is appropriate.

The State presented the testimony of Emily's daycare worker, Ms. Palmatier. Ms. Palmatier testified during *voir dire* that on 9 November 2006 she told a Wake County detective that Emily hit two female dolls together with a dollhouse chair and said, "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over." Ms. Palmatier then testified that, after a nap, Emily said "[Mommy] fell on the floor. Now she's on the bed with animals, animals were in the barn, they were asleep. There was a cow. Daddy bought me new fruit snacks." The State argued that this was evidence Emily saw the murder, and that it was probative of Defendant's identity as she was later found unharmed.

Defendant's counsel objected to this evidence, citing hearsay, due process, lack of competency, relevance, and undue prejudice. The trial court ruled that (1) the statements met the present sense impression, excited utterance, and residual hearsay exceptions; (2) the evidence was relevant to determine the killer's identity; and (3) the evidence was more probative than prejudicial.

The court *sua sponte* excluded Emily's post-nap statements and granted the defense a continuing objection to Emily's testimony. The trial court instructed the jury that evidence was being introduced of Emily's observations, made when she "may have had some memory" of Michelle's death. The trial court instructed the jury that it could use Emily's statements to determine whether Emily witnessed a portion of the assault on Michelle.

Emily's daycare teacher then testified that on 9 November 2006, Emily asked her for "the mommy doll." The teacher gave Emily a bucket of dolls. Emily picked two dolls, one female with long hair and one with short hair, and hit them together. Ms. Palmatier testified that she saw Emily strike a "mommy doll" against another doll and a dollhouse chair while saying, "[M]ommy has boo-boos all over" and "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over, mommy has red stuff all over."

Defendant first argues that the evidence was not relevant. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011). We agree with

the State that the evidence clearly related to the identity of Michelle's assailant. The evidence was probative that Emily observed her mother's assault, and that the assailant cared for Emily in some way, as he or she left Emily unharmed after the assault.

Secondly, Defendant argues that the statements made at daycare were inadmissible hearsay and do not fit within any hearsay exception. We hold the statements are hearsay, but that they fit within the excited utterance exception pursuant to this Court's decisions in *State v. Rogers*, 109 N.C. App. 491, 501, 428 S.E.2d 220, 226, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), cert. denied, 511 U.S. 1008 (1994), and *State v. Thomas*, 119 N.C. App. 708, 712–14, 460 S.E.2d 349, 352–53, *disc. review denied*, 342 N.C. 196, 463 S.E.2d 248 (1995).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). A "statement" is an oral or written assertion or "nonverbal conduct of a person . . . intended by him as an assertion." N.C. Gen. Stat. § 8C-1, Rule 801(a).

Emily's statements consisted of striking the "mommy" doll while saying, "[M]ommy's getting a spanking for biting" and "[M]ommy has boo-boos all over, mommy has red stuff all over." The trial court found that these were statements made by Emily, and that they were offered for the truth of the matter asserted. We agree, and note that the trial court also found that these phrases spoken by Emily were to describe past events via the words and actions of a two and a half year old child. The age of Emily at the time of the statements likely meant she could express herself in a limited way as to her observations. Fact-finders may find that an alternate meaning exists when considering the words of young children who lack the verbal clarity often present in adults. *See, e.g.*, *State v. Smith*, 315 N.C. 76, 80, 337 S.E.2d 833, 837 (1985) (considering statements of a young child that used figurative language to describe a sex act).

However, if a statement is hearsay, it may still be admitted if it falls within one of the exceptions to the hearsay rule. The primary exception at issue in this case is the excited utterance exception. N.C. Gen. Stat. § 8C-1, Rule 803(2). For the excited utterance exception to apply, "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *Smith*, 315 N.C. at 86, 337 S.E.2d at 841. "The rationale underlying the admissibility of an excited utterance is its inherent trustworthiness." *State v. Guice*, 141 N.C. App. 177, 200, 541 S.E.2d 474,

489 (2000), *opinion adhered to as modified on reconsideration*, 151 N.C. App. 293, 564 S.E.2d 925 (2002).

Excited utterances are often made and admitted into evidence because they fall within a timeframe that is close in proximity to the startling event. *See*, *e.g.*, *id.* at 201, 541 S.E.2d at 489 (finding a statement made to an officer within "several minutes" of the defendant dragging the victim from the home and while struggling to breathe fell within the requisite time frame). However, this Court has held that "the stress and spontaneity upon which the exception is based [are] often present for longer periods of time in young children than in adults." *Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226 (quotation marks and citation omitted); *see also Smith*, 315 N.C. at 87–88, 337 S.E.2d at 841 ("This ascertainment of prolonged stress is born of three observations. First, a child is apt to repress the incident. Second, it is often unlikely that a child will report this kind of incident to anyone but the mother. Third, the characteristics of young children work to produce declarations 'free of conscious fabrication' for a longer period after the incident than with adults." (citation and quotation marks omitted)).

Our State's appellate courts have thus extended the length of time that the excited utterance exception may apply. *See Smith*, 315 N.C. at 79, 86–90, 337 S.E.2d at 836, 841–43 (four and five-year-olds' statements made two to three days after being sexually abused were admissible); *Thomas*, 119 N.C. App. at 712–14, 460 S.E.2d at 352–53 (five-year-old's statements made four to five days after sexual abuse were admissible); *Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226 (five-year-old's statements made three days after sexual abuse admissible).

Thus, the outer time limit at present is four to five days from the event a child has made statements about. Emily was also younger than the other children discussed above in prior cases this Court has considered. Emily's statements were made six days after her mother was killed and were made while she played with dolls, without prompting or questioning from adults. We hold that the attendant circumstances in this case merit application of the excited utterance exception and that the trial court did not err in admitting Emily's statements. Because we hold Emily's statements were admitted properly under the excited utterance exception to the hearsay rule, we do not address whether the present sense impression or residual exception apply to this case.

c. Defendant's Silence as Substantive Evidence

[3] The trial court offered the following jury instructions as they relate to Defendant's refusal to speak with police and his family members:

> Ladies and gentlemen, the Fifth Amendment to the United States Constitution protects a citizen's right to refuse to answer questions of the police during a criminal investigation. The exercise of that Constitutional right may not be used as evidence against that citizen later at trial to create an inference of guilt. Therefore, the defendant's decision not to answer questions by law enforcement officers during the criminal investigation may not be considered against him as evidence of guilt to the pending charge. However, that same Fifth Amendment does permit the jury to consider the defendant's refusal to answer police questions to the extent that the evidence surrounding that refusal bears upon the defendant's truthfulness if the defendant elects to testify or made a statement at a later time. The evidence presented in this case tends to show that the defendant elected to testify at a prior trial.
>
> Therefore, I instruct you that you may consider evidence of the defendant's refusal to answer police questions during this investigation for one purpose only. If, in considering the nature of that evidence, you believe that such evidence bears upon the defendant's truthfulness as a witness at his prior trial, then you may consider it for that purpose only. Except as it relates to the defendant's truthfulness, you may not consider the defendant's refusal to answer police questions as evidence of guilt in this case.
>
> I also instruct you that this Fifth Amendment protection applies only to police questioning. It does not apply to questions asked by civilians, including friends and family of the defendant and friends and family of the victim.

Defendant argues that the trial court committed plain error by instructing the jury that it could consider Defendant's failure to speak with friends and family as substantive evidence of guilt. We disagree and find that the instruction was proper.

The Fifth Amendment's protection against self-incrimination does not extend to questions asked by civilians. *Oregon v. Elstad*, 470 U.S. 298, 304-05 (1985) ("The Fifth Amendment, of course, is not concerned with nontestimonial evidence. *Nor is it concerned with moral and psychological pressures to confess emanating from sources other than official coercion.*" (citations and quotation marks omitted) (emphasis added)).

Defendant argues that Defendant's silence in response to questions from non-officers should be offered for impeachment purposes only. Defendant cites *State v. Mack*, 282 N.C. 334, 339–40, 193 S.E.2d 71, 75–76 (1972), and *State v. Hunt*, 72 N.C. App. 59, 61, 323 S.E.2d 490, 492 (1984), *aff'd without precedential value*, 313 N.C. 593, 330 S.E.2d 205 (1985), for the proposition that pre-arrest silence may only be used to impeach a defendant's pre-trial statement or trial testimony. *Mack* held that "[p]rior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature." 282 N.C. at 339, 193 S.E.2d at 75; *see also State v. Black*, ___ N.C. App. ___, ___, 735 S.E.2d 195, 202 (2012) (citing *Mack*, 282 N.C. at 339–40, 193 S.E.2d at 75)), *appeal dismissed*, *review denied*, ___ N.C. ___, 738 S.E.2d 391 (2013). However, *Mack* concerned the substantive use of silence within the context of a testifying non-party witness making statements to a police officer. 282 N.C. at 339, 193 S.E.2d at 75. *Hunt* was affirmed without precedential value by the North Carolina Supreme Court, 313 N.C. at 593, 330 S.E.2d at 205, but also involved silence with respect to police questioning. 72 N.C. App. at 61–62, 323 S.E.2d at 492.

Defendant's friends and family asked him about Michelle's murder on several occasions and Defendant did not offer statements to his friends and family about the evening's events. The State contends that Defendant's later version of events offered at his first trial were inconsistent with his earlier silence and that the discrepancy "tend[s] to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself]." *State v. Redfern*, 246 N.C. 293, 298, 98 S.E.2d 322, 326 (1957) (holding that conflicting statements amount to "substantive evidence of substantial probative force, tending to show consciousness of guilt"). Defendant's silence to non-officers may provide substantive evidence of guilt because statements or silence to questioning from non-police officers are not granted the same protections under the Fifth Amendment and are probative of Defendant's mental processes. Thus, the evidence was proper for substantive consideration by the jury.

Defendant also argues that the trial court committed plain error in offering its jury instruction. Defendant argues that the trial court should have instructed the jury that the evidence did not create a presumption of guilt, was insufficient alone to establish guilt, and that the evidence could not be considered as to premeditation and deliberation. *State v. Myers*, 309 N.C. 78, 88, 305 S.E.2d 506, 512 (1983). Defendant argues that a new trial was required because the case was "entirely circumstantial." *Id.*

In *Myers*, the defendant objected to the instruction, the witnesses relied upon by the State had severe credibility issues, and the trial court placed an "emphasis upon the negative aspect of defendant's statements." *Id.* Here, there was minimal mention by the State that Defendant was silent to his friends and family. We hold that Defendant's pre-arrest silence coupled with evidence that whoever killed Michelle did so with premeditation and deliberation and the limited referral to Defendant's silence about the murder to friends and family did not rise to the level of plain error having a probable impact on the verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

IV. Conclusion

The introduction into evidence of the civil complaints and judgment was in error and violated N.C. Gen. Stat. § 1-149, as the evidence was used to prove a fact — namely, that Defendant had killed Michelle — Defendant is deemed to have admitted in the wrongful death civil action and which had been alleged in the child custody proceeding. This evidence also severely impacted Defendant's ability to receive a fair trial. As such, we order a

NEW TRIAL.

Judges STROUD and DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 APRIL 2014)

ALLSBROOK v. ILL. TOOL WORKS/ WILSONART No. 13-651	N.C. Industrial Commission (W13767)	Affirmed
ARMSTRONG v. VELASQUEZ No. 13-652	Wayne (10CVD1815)	Reversed and Remanded
CURRIE v. POTEAT No. 13-814	Caswell (04CVS336)	Affirmed
DALE v. ALCURT CARRBORO, LLC No. 13-1095	Orange (12CVS1883)	Dismissed
EXUM v. EXUM No. 13-704	Wake (11CVS3353)	Dismissed in Part; Affirmed in Part
IN RE A.A.P. No. 13-1051	Onslow (10JB109)	Affirmed
IN RE G.A.A. No. 13-1113	New Hanover (12JT171)	Reversed
IN RE JOHNSON No. 13-962	Wake (13SPC1148)	Reversed and Remanded
IN RE J.T.M. No. 13-961	Mecklenburg (10JB694)	Dismissed
IN RE T.W.C. No. 13-1097	Chatham (12JA40-42)	Affirmed in part; Reversed and remanded in part.
LAWSON v. LAWSON No. 13-1119	Forsyth (12CVS8369)	Dismissed
MARSHALL v. MARSHALL No. 13-689	Mecklenburg (10CVD24330)	Affirmed in part; Vacated in part
MARSHALL v. MARSHALL No. 13-692	Mecklenburg (10CVD24330)	Affirmed in part; vacated in part
METTS v. PARKINSON No. 13-1243	Durham (10CVS5717)	Affirmed
N.C. DEPT. OF CORR. v. PARKER No. 13-1008	Wake (12CVS2136)	Affirmed

RUTHERFORD PLANTATION, LLC v. CHALLENGE GOLF GRP. No. 12-1305	Rutherford (11CVS594)	Vacated and Remanded
RUTHERFORD PLANTATION, LLC v. CHALLENGE GOLF GRP. No. 12-1308	Rutherford (11CVS594)	Vacated and Remanded
SAWYER v. RUIZ No. 13-1060	Perquimans (07CVS25)	Affirmed
SIMMONS v. CITY OF GREENSBORO No. 13-1065	Guilford (12CVS10339)	Affirmed
STATE v. ANDREWS No. 13-1013	Mecklenburg (09CRS86046)	No Error
STATE v. BURNETTE No. 13-976	Forsyth (12CRS58053-54) (12CRS58353-56)	No Error
STATE v. GRIFFIN No. 13-1093	Cabarrus (10CRS4678) (10CRS51075)	No error in part; no prejudicial error in part; dismissed in part
STATE v. HARLING No. 13-575	Mecklenburg (11CRS243001)	No Error
STATE v. JONES No. 13-1244	Columbus (11CRS52691) (11CRS52692) (11CRS52694) (11CRS52695)	No Error
STATE v. LOFTIS No. 13-1002	Haywood (11CRS54179-80) (11CRS54236) (11CRS54238)	No Error In Part, Vacated and Remanded for New Trial In Part
STATE v. PARKER No. 13-1054	Pitt (09CRS12865) (09CRS61279)	Affirmed in Part, Reversed in Part and Remanded
STATE v. SPARKS No. 13-659	Rockingham (10CRS50917-18) (12CRS1601)	No Error

STATE v. STOUGH No. 13-762	Jackson (11CRS1787) (11CRS1789-95)	NO ERROR in part, REVERSED AND REMANDED in part.
STATE v. TABRON No. 13-634	Edgecombe (11CRS53248)	No prejudicial error
STATE v. WILLIAMS No. 13-871	Wake (11CRS206744)	Affirmed ; no error
STATE v. YORK No. 13-1147	Alamance (12CRS52478)	Vacated
STEIN v. BRASINGTON No. 13-460	Wake (09CVD7126)	Affirmed in part; Vacated in part; Remanded in part.
TATUM v. CUMBERLAND CNTY. SCH. No. 13-1090	N.C. Industrial Commission (W48687)	Affirmed
VANEK v. GLOBAL SUPPLY & LOGISTICS, INC. No. 13-1135	Mecklenburg (12CVS557)	Affirmed
WELLS FARGO BANK, N.A. v. HUNDLEY No. 13-1038	Rockingham (12CVS1522)	Reversed

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